IN SEARCH OF JUVENILE JUSTICE

Gault and Its Implementation

NORMAN LEFSTEIN
Legal Aid Agency for the District of Columbia

VAUGHAN STAPLETON
Yale Law School

LEE TEITELBAUM
University of North Dakota School of Law

I. INTRODUCTION

ON MAY 15, 1967 the United States Supreme Court rendered, in *In re Gault*,[1] its first decision in the area of juvenile delinquency procedure. Commentators have repeatedly construed the rulings in *Gault* as requiring juvenile courts to adopt new and more liberal practices. The privilege against self-incrimination, and the rights to notice of charges, counsel, confrontation, and cross-examination were heretofore primarily regarded as the cornerstones of an adversary system of justice. The

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1. 387 U.S. 1 (1967). *(Continued next page)*

extension of these rights to juvenile courts would have seemed to require an overnight transformation of the court procedures.[2]

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2. Prior to Gault, courts had divided sharply on the existence and operation of these rights at the adjudicative hearing. While it was held that the juvenile could not be denied the assistance of counsel already retained, *see In re* Poulin, 100 N.H. 458, 129 A.2d 672 (1957), the rights announced in Gideon v. Wainwright, 372 U.S. 335 (1963) were not generally made available in juvenile courts. Some state statutes provided that whether counsel should be appointed was a matter for the court's discretion. *E.g.*, ALA. CODE ANN. tit. 13, §359 (1959); CAL. WELF. & INST. CODE §§633, 634, 679, 700 (1961) (mandatory where felony charge involved); COLO. REV. STAT. §22-8-6 (1964); ARK. STAT. ANN. 45-227 (1964); MICH. COMP. LAWS ANN. §712A.17 (Supp. 1968); NEV. REV. STAT. §62.085 (1961); N.D. CENTURY CODE §27-16-25 (1960); W. VA. CODE §49.04 [13] (1961); WIS. STAT. ANN. §48-25-6 (1957). Others mentioned only a right to retained counsel. *E.g.*, ME. REV. STAT. ANN. tit. 15, §2609 (1964); MISS. CODE ANN. §7185.08 (1942); MO. STAT. ANN. §211.211 (1959); OHIO REV. CODE ANN. §2151.35 (1964); R. I. GEN. LAWS §§14-1-30, 14-1-58 (1961). A few states required appointment of counsel for the indigent, at least upon request. IDAHO CODE §16-1631 (Supp. 1968); ILL. REV. STAT. ch. 37, §701-20 (1967); IOWA CODE ANN. ch. 232, §232.28 (Supp. 1965); KAN. GEN. STAT. §38.821 (1963) (guardian ad litem); MINN. STAT. ANN. §260.155(2) (Supp. 1967); ORE. REV. STAT. §419.498 (Supp. 1967). In the jurisdictions where the right to counsel in delinquency proceedings was not treated by statute, predictably, the decisions were split. *Compare* Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955) *with In re*

This article examines the response of three urban juvenile courts—referred to as Metro, Gotham and Zenith[3]—to the *Gault* decision. The data presented here—drawn from numerous observations of court hearings—provide some indication of the extent of the changes in juvenile proceedings. Particular attention is paid to what the Supreme Court seems to have required in *Gault,* to what juvenile courts should now be expected to do under that decision, and to what was actually done in the observed courts. This study also provides insight into the problems encountered in the implementation of *Gault,* as well as a commentary on the structure of the juvenile hearing process.

Section II of this article describes the courts and samples studied. Section III is devoted to the methodology employed in the data collection and analysis. Sections IV, V, and VI consider the three most significant legal rights extended to delinquency proceedings by *Gault*—the rights to counsel, silence, and confrontation—and present empirical evidence on compliance with each. Section VII explores the justifications which might be offered in cases where the juvenile courts failed to

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Poff, 135 F. Supp. 224 (D.D.C. 1955); Shioutakon v. District of Columbia, 246 F.2d 666 (D.D.C. 1956).

The privilege against self-incrimination was by and large unrecognized in delinquency cases prior to Gault. *See* P. Driscoll, *The Privilege Against Self-Incrimination in Juvenile Proceedings,* 15 JUV. CT. JUDGES J. 17 (1964); N. Lefstein, In re Gault, *Juvenile Courts and Lawyers,* 53 A.B.A.J. 811 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 37 (1967). Some courts indicated that the privilege did not apply to juvenile courts since they were civil rather than criminal in nature. *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973; *In re* Lewis, 51 Wn. 2d 193, 316 P.2d 907 (1957). The Arizona Supreme Court in Application of Gault, *supra,* without expressly holding that the privilege applied in Arizona delinquency hearings, took the position adopted by the UNITED STATES CHILDREN'S BUREAU in its STANDARDS FOR JUVENILE AND FAMILY COURTS (1966) that while the right to silence may exist in some sense, the child and his parents need not be informed of it.

Juvenile courts had frequently taken the position that strict application of ordinary rules of criminal procedure would substantially interfere with the relationship between child and the court. Thus admission of hearsay evidence was held not to invalidate an adjudication of delinquency in *In re* Holmes, *supra,* State *ex rel.* Christiansen v. Christiansen, 119 Utah 361, 227 P.2d 760 (1951), and *In re* Bentley, 246 Wis. 69, 16 N.W. 2d 390 (1944). On much the same theory, the rule preventing the use of unsworn testimony in ascertaining essential facts was not extended to delinquency proceedings in some courts. State *ex rel.* Christiansen v. Christiansen, *supra;* State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918). Other jurisdictions, however, concluded that the use of hearsay and unsworn testimony was improper. *In re* Sippy, 97 A. 2d 455 (D.C. Mun. Ct. App. 1953); *In re* Mantell, 157 Neb. 900, 62 N.W. 2d 308 (1954).

3. The decision to use fictional names for the three project cities was encouraged by the project's Advisory Board.

comply with the recently announced constitutional requirements. Section VIII undertakes an evaluation of the Court's apparent conclusion that these rights, which it has extended to juveniles, can be competently relinquished by the minor respondent.

It is likely that trial and appellate tribunals will increasingly be called upon to define how *Gault*'s constitutional protections must be administered by juvenile courts. To do so without information would be necessarily speculative; it is hoped that this analysis will assist in pointing the direction for other such projects, and in furthering clarification, change and improvement in the system of juvenile justice.

II. CHARACTERISTICS OF COURTS AND SAMPLE STUDIED

The juvenile court in each of the three cities serves a heavily populated area. The population of the county served by the court in Zenith is by far the largest, slightly in excess of five million; Metro's is between one and two million; Gotham's county population is just under a million.

A considerable number of delinquency petitions are processed in each of the three courts; statistics for 1966 indicate that both Gotham and Metro handled in excess of 7,000 complaints, and that Zenith's delinquency petitions numbered more than 11,000.[4] All three of the courts have several full-time juvenile court judges. Zenith's juvenile court has the largest number, seven at the time the data for this study were gathered. The court in Gotham has four judges who divide their time evenly between the court's juvenile and domestic relations branches, with a rotation in personnel occurring every six months. References to Gotham's judges in this article refer to the two judges who were hearing

4. For all three cities, delinquency petitions encompass those criminal code and municipal ordinance violations which, if committed by an adult, would constitute an offense. In Metro and Gotham, delinquency petitions are also appropriate where the respondent is charged with an act that would not be illegal if done by an older person, such as violation of curfew, truancy, runaway, and incorrigibility. Such offenses are included in the more than 7,000 complaints listed for these courts. In Zenith, pursuant to the state's juvenile court act, these special youthful offenses are charged in a separately labeled "Minor in Need of Supervision" petition. For the year 1966, more than 5,000 of these petitions were filed in Zenith's court. Youths adjudicated delinquent for any offense, including those applicable only to minors, are subject to institutionalization by the Metro and Gotham juvenile courts. In Zenith, commitment is not authorized for one found to be a "Minor in Need of Supervision." If, however, a juvenile is adjudicated in need of supervision and subsequently commits the same offense, which offense also constitutes a violation of a lawful court order imposed as a result of the previous court appearance, he then can be adjudicated delinquent and institutionalized on the latter basis.

juvenile cases during the time of this study. In Metro's juvenile court, a total of six persons—four judges and two referees—decide delinquency cases.[5]

Of the three courts, Gotham's and Metro's are the most typical of traditional juvenile courts, frequently exhibiting strong tendencies to "treat" the whole child, reminiscent of the late Judge Julian Mack's often-cited quotation: "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."[6] This, of course, does not mean that Zenith's court is unconcerned with the child's interest; indeed, its judges demonstrate considerable concern with the child's welfare at the dispositional hearing, but, unlike Gotham's and Metro's courts, the adjudication and dispositional hearing processes are clearly delineated, and a finding of delinquency, if there is one, is carefully noted. Tests for the admissibility of evidence, moreover, are usually applied with more care in Zenith's court.

Several factors seem to account for the more "legalistic approach" of Zenith's juvenile court. First, and perhaps most important, is the fact that none of Zenith's judges have been on the juvenile court bench very long, and consequently the less stringent procedural rules of traditional juvenile courts are not deeply ingrained in these judges. In fact, six of the seven judges at the time of this study had served less than a year, and the seventh judge was in his third year. In contrast, of the four judges in Metro, two had served six and eight years respectively on the bench and had Master's degrees in social work; the third was in his ninth year as a judge and had devoted more than 30 years service to the juvenile court in various capacities; and the fourth judge had been on the bench for 15 years. The court's two referees were appointed in 1960, and one had been active in the court as a "lawyer-caseworker" for 16 years preceding his appointment. In Gotham, one of the juvenile court judges was in his twenty-third year of service at the time of the study, and the other was beginning his fifth year on the bench.

Second, at the outset of each case in Zenith, unlike Metro and Gotham, a precise plea to the petition was obtained during an arraign-

5. The judges observed in Zenith included a "visiting judge," not normally assigned to the juvenile court. A distribution of youths by judges in Zenith as well as in Metro and Gotham is contained in Table 3, *infra*.

6. J. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909) (emphasis added).

ment hearing. This tended to give the proceedings a formal structure, and to clarify the rights that attached to the parties and the time of their attachment.

Third, the state statute governing Zenith's juvenile court was enacted rather recently, having gone into effect less than a year and a half before the Supreme Court's decision in *Gault*. According to the statute's provisions, juvenile courts were required (even before *Gault*) to advise the juvenile and his parent that, upon request, they could have counsel appointed by the court if they were financially unable to employ an attorney. The statute also permitted a minor to refuse to testify during a delinquency adjudication hearing, although it does not appear that the juvenile court judge was required to apprise the parties of this privilege. In Gotham and Metro, the codes governing juvenile procedures prior to *Gault* were older and more consistent with traditional juvenile court philosophy. Metro's statute simply provided that the juvenile court shall permit a child to be represented by an attorney during any hearing. The provisions of Gotham's statute went only slightly further, providing that a juvenile is entitled to be "represented by counsel at every stage of the proceedings," and that the court could, at its discretion, assign counsel where it was deemed necessary for a fair hearing and where the juvenile was unable to secure his own. Only in cases involving a charge of homicide was the juvenile specifically guaranteed representation by a lawyer. The privilege against self-incrimination was not referred to in the statutes of either state, and it was not extended in practice in the juvenile courts of either Metro or Gotham.

Finally, in Zenith's court a prosecutor is present at all delinquency hearings (a practice adopted even before the *Gault* decision), whereas in Metro and Gotham a prosecutor still rarely attends. His presence in Zenith's juvenile court appears to free the judge from the dual role of judge and prosecutor. This, in turn, contributes to more formal and legalistic hearings.

All observations of cases reported here were made after the *Gault* decision, i.e., after May 15, 1967. Court hearings in Zenith were attended in late May, June, July, and August; in Gotham, observers attended hearings in June, July, and August. In Metro, observations were made during June and December, as well as in January 1968.[7]

7. As indicated in table 1 *infra*, 71 different juveniles were observed in our final sample of analyzed hearings in Metro. The observations of 39 of these juveniles were made in June, and the balance—32—in December and January. It also would have

In the three juvenile courts, observers were present and took notes on 188 different court hearings, involving a total of 268 youths. Nevertheless, for purposes of analyzing compliance with the *Gault* decision, the final sample of court hearings and juveniles detailed in this article is substantially smaller. Using the Supreme Court's opinion in *Gault* as a guide, we determined that the sample should only include individuals, charged with delinquency, who were subject to commitment to an institution,[8] and not represented by an attorney.[9] Thus, we excluded cases where the petition's sole charge was a violation of probation, even if probation revocation could have resulted in institutionalization.[10] Similarly, if the data related solely to a dispositional hearing, or if the observed hearing was a continuance from a previous court date, at which time the judge might have informed the parties fully of their rights under *Gault*, the case was excluded in our final sample.[11] By

been desirable to have gone back to Gotham's juvenile court in late 1967. However, new rules governing juvenile procedures in Gotham's court went into effect in September 1967, and their rather unusual provisions made further study of compliance with Gault virtually impossible. The rules created two court calendars, one labeled "formal" and the other "informal." Cases on the formal calendar are determined in advance by the court to be subject to the possibility of commitment, and a lawyer is appointed, if one is not already present, in all such cases. The cases on the informal calendar are declared not subject to commitment, and Gault's requirements are not implemented. The significance of the possibility of commitment, from the standpoint of implementing the rights guaranteed in Gault, is noted in footnote 8, *infra*.

8. We conclude that the 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.

In re Gault, *supra* note 1, at 41 (emphasis added). Under the statute that governs Metro's juvenile procedures, referees have the power to make findings and recommendations that must be submitted to a juvenile court judge for approval. Despite the absence of the power of referees to commit juveniles directly to an institution, cases of nine youths heard before Metro's two referees are included in our final sample. *See* Table 3, *infra*. It was found that the action of the referees, in actual practice, is rarely reversed by one of the juvenile court judges, and thus the referee's decision may very well "result in commitment to an institution."

9. For this analysis we have accepted the hypothesis that the presence of counsel insures implementation of the other rights in Gault—or at the very least, that these rights were relinquished upon legal advice. Nevertheless, this is an empirical question that remains to be investigated. Data bearing on this problem are currently being analyzed.

10. It is arguable, however, in light of the Supreme Court's decision in Mempa v. Rhay, 389 U.S. 128 (1967), that the right to counsel must now be extended by juvenile courts to probation revocation hearings.

11. Two cases in our final sample—one in Metro and the other in Zenith—are exceptions to the general rule that we excluded cases where there had been a prior

far the greatest number of exclusions consisted of hearings where *all* juveniles before the court were represented by counsel. In cases where *some* youths had an attorney and others did not, and the criteria for inclusion in our final sample were otherwise met, the individuals without counsel were retained in the sample.

The application of these principles for excluding juveniles from our final sample led to the following results: In Zenith, 48 youths, 45 of whom were represented by counsel, were excluded; in Metro, 44 juveniles, 21 of whom had an attorney, were eliminated; and in Gotham, a total of 28 youths, all but 3 of whom had an attorney, were omitted from the final sample.[12]

The number of court hearings and individual juveniles reported on in this article are summarized in Table 1.[13]

TABLE 1

NUMBER OF YOUTHS AND COURT HEARINGS ANALYZED

	Gotham	*Metro*	*Zenith*	*Total*
Number of youths reported on in this article	59	71	18	148
Total number of different court hearings	39	40	12	91
Court hearings involving a single youth	24	26	6	56
Court hearings involving more than one youth	15	14	6	35

continuance. In one instance, the court had continued the case for the parties to obtain counsel, and in the other the parties were deemed to have waived their right to a lawyer at their first court appearance. Nevertheless, in both cases the court discussed with the parties their right to an attorney and for this reason the cases were included in our sample. In both cases, incidentally, the judge proceeded to hear the case without an attorney.

12. No effort was made in this study to determine whether the actual number of juveniles represented by lawyers in the three juvenile courts was greater after the Gault decision, although it is our definite impression that this is true. Indeed, in Zenith, our sample of cases is relatively small due to the elimination of cases where lawyers were present.

13. Metro's court has jurisdiction of "juvenile traffic offenders" as well as "delinquents." Although juveniles in these groups are labeled differently, both are subject to commitment to an institution following an adjudication. The sample of youths in Metro includes one boy who was charged with multiple traffic offenses. In Zenith, the sample includes one boy, charged with running away from home, who was previously adjudicated in need of supervision, and who was subject to the possibility of commitment in his appearance before the court. *See* discussion in note 4, *supra*.

Analysis of compliance with *Gault*'s requirements is based on how individuals, rather than entire cases, were treated. This approach was necessary because we found that in some cases with more than one respondent, not all youths and their parents received precisely the same information regarding their constitutional rights. The table below lists the number of youths in each city for whom the right to counsel, the privilege against self-incrimination, and the right of confrontation were deemed relevant for purposes of analysis. As the table indicates, the right to counsel was considered significant for every youth in our final sample, whereas some juveniles in each city were omitted from the analyses of the privilege against self-incrimination and the right of confrontation.[14]

TABLE 2

CONSTITUTIONAL RIGHTS CONSIDERED RELEVANT FOR YOUTHS IN SAMPLE

	Gotham	*Metro*	*Zenith*	*Total*
Youths reported on in this article	59	71	18	148
Youths for whom right to counsel considered relevant	59	71	18	148
Youths for whom privilege against self-incrimination considered relevant	53[a]	62[b]	6[c]	121
Youths for whom right of confrontation considered relevant	53[a]	62[b]	7[d]	122

a. Excluded from the sample of 59 youths are six cases which the court continued for a lawyer.

b. Nine cases are excluded from the total sample in Metro. In six there were continuances for a lawyer and in three the continuance was for a witness; in none of the cases did the juvenile court hear evidence.

c. The twelve youths excluded from Zenith's sample are composed of one case where the petition was dismissed, and eleven instances where the case was continued for a lawyer.

d. Only the eleven cases continued for a lawyer are excluded; the case where the petition was dismissed is included because the dismissal was attributable to the state's inability at the time of the hearing to confront the juvenile with his accusers.

The offenses committed by the youths in our sample are varied, and include crimes against both property and persons, as well as offenses peculiar to juveniles, such as truancy, incorrigibility, and running away from home. The overwhelming majority of the sample for Gotham and

14. The criteria used to determine whether these rights were significant for youths in the sample are set forth later. See footnotes appended to Table 2.

Zenith (more than 90%) are Negro, but in Metro whites comprised approximately 42% of the sample. For the three cities combined, males account for 92% of the sample. The ages of the juveniles range from 9 to 17, but most are 15 and 16 years old.[15]

III. METHODOLOGY

Although the data were gathered after the *Gault* decision, field-workers had been active in the Gotham, Metro, and Zenith courts since early 1966. At this time, their main objectives were to observe and take notes on delinquency cases, in an effort to collect qualitative data on the impact of counsel.[16] With the *Gault* decision in May 1967, a unique opportunity was presented, within the context of the major research program, to study the day-to-day response of juvenile courts to the Supreme Court's landmark decision. As a result, special emphasis was placed on observing the degree of compliance with *Gault*'s requirements in the courts.

In keeping with general social science methodology, several problems had been anticipated as potential sources of error in data collection and analysis. Of particular concern were inaccurate reporting, bias in the collection and analysis of field notes, the representativeness of the sample, and the potential interference effect of a note-taking observer.

Inaccurate Reporting

A complete record of the juvenile court hearings would have required motion picture cameras and recording equipment. Failing this, transcripts of court proceedings would have been adequate substitutes. Unfortunately, in two of the courts neither reporters nor tape recorders were used, and in the third (Zenith) where there were court reporters, the cost of transcripts was prohibitive. Self-reporting by judges and other court personnel was rejected as too dependent upon self-serving

15. Youths above the age of 18 who commit an offense are beyond the jurisdiction of the juvenile courts in Gotham and Metro. In Zenith, the state's juvenile court act fixes the upper age limit for delinquency at 17 for boys and 18 for girls. Minor in need of supervision petitions may be brought against boys and girls for violations committed before the 18th birthday.

16. *See* N. Lefstein & V. Stapleton, Counsel in Juvenile Courts: An Experimental Study, 1967 (unpublished ms., National Council of Juvenile Court Judges).

statements,[17] and because it would not have provided sufficiently specific data on the *content* of communications between judge and juvenile. Instead, a form of "participant observation" [18] was chosen for its convenience, ease of implementation, and financial feasibility.

In the notes on court hearings, the proceedings were described only generally in areas of little research concern, but more precisely in areas of greatest theoretical interest, with emphasis on the form and content of the language used by judges, lawyers, and other parties connected with the case. As an aid in recalling what to look for and as a check against the accuracy of their note taking, a lengthy checklist was taken into the courtroom. Statements by courtroom participants were written down verbatim whenever possible. In reporting communications in this manuscript, all statements enclosed in quotation marks are direct, verbatim statements. Remarks attributed to persons but not so enclosed are reconstructed quotations. To reduce error, all notes taken during a day's work at court were dictated into a tape recorder later that same day.

Bias in Data Collection and Analysis

Another major source of error is the more subtle risk that "The instrument [the human observer] may selectively expose himself to the data, or relatively perceive them, and, worse yet, shift over time the calibration of his observation measures." [19] Financial considerations and

17. We believe this study to be measurably strengthened because it is based on observed courtroom behavior rather than on answers to self-administered questionnaires. Such studies, although useful in many ways, are subject to a variety of well-known errors, principally self-selection (only a portion of the sample may reply) and self-reporting (which may be biased in favor of the respondent's position). It is, therefore, desirable to treat questionnaire surveys on the implementation of Gault with appropriate caution. For an example of such a survey see W. W. Reckless & W. C. Reckless, *The Initial Impact of the* Gault *Decision on Juvenile Court Procedure in Ohio*, 18 JUV. CT. JUDGES J. 121 (1968).

18. Participant observation is a term of art rather than of science. *See* R. Gold, *Roles in Sociological Field Observation*, 36 SOCIAL FORCES 217-23 (1958) for a discussion of types of data gathering techniques commonly described by the term. In this study the observer was not a participant, except in the sense that he was present in the courtroom during the hearings engaged in taking notes. All observers had permission from the courts' presiding judges and from the judge at the hearing. All judges were informed that the observer was in court to take notes on courtroom interaction, especially between child and judge, as part of a large-scale study of juvenile courts.

Anonymity of all parties appearing before the court was promised and has been preserved.

19. E. WEBB, D. CAMPBELL, R. SCHWARTZ & L. SECHREST, UNOBTRUSIVE MEASURES: NONREACTIVE RESEARCH IN THE SOCIAL SCIENCES 114 (1966).

a desire to gather data on as many hearings as possible precluded the use of several fieldworkers for the same cases. However, an attempt was made to guard against selective reporting. Based upon observations prior to May 1967, we predicted that the three courts would not systematically apply the provisions of *Gault,* and that when they did attempt to comply with the new rules, they would do so in a manner that would prejudice the rights of the parties. After *Gault* the fieldworkers were instructed to record instances that would both verify *and* discredit this hypothesis. In the course of field observation, as well as during coding and analysis of data, every effort was made to find incidents where the central hypothesis was negated by court practices. Thus if error appears in the data, it is more likely to be in statements of full compliance with *Gault's* requirements where there was none, rather than in reporting nonexistent violations of *Gault.*

In analyzing the field notes,[20] all data relevant to this analysis were placed on keysort cards which were then coded into appropriate categories.[21] Coding of these cards was done by the authors, and no item was categorized without the full agreement of all the authors. In ambiguous cases, the benefit of doubt was given to the court.

Representativeness of the Sample

A truly representative sample would have necessitated random selection of cases for observation, but this was not technically possible. However, every attempt was made to distribute observations among the judges so that no one judge would be observed more than the others. Table 3 below shows that the distribution of cases among judges and cities was relatively even. As a result, we believe that the data reported in this article can be generalized with considerable accuracy to the courts as institutions, rather than applying only to particular judges.

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20. In the use of field data we have attempted to follow Becker and Geer, especially in their model of proof: "We attempted to make explicit those elements in our data which led us to arrive at conclusions in which we had confidence and to explore the reasoning by which we decided that those conclusions were credible." H. BECKER & B. GEER, *Participant Observation: The Analysis of Qualitative Field Data,* in HUMAN ORGANIZATION RESEARCH 271 (R. Adams & J. Preiss eds. 1966).

21. Keysort cards represent a precomputer method of information retrieval particularly useful in analyzing qualitative data. For a recent application of Keysort cards involving the legal profession, see O. Lewis & P. Ulrich, *Information Retrieval Without Computers,* 55 A.B.A.J. 676 (1968).

TABLE 3

DISTRIBUTION OF CASES BY CITY AND JUDGE

Metro		*Gotham*		*Zenith*	
Judge	*Number of Cases*	*Judge*	*Number of Cases*	*Judge*	*Number of Cases*
A	13	G	26	I	2
B	29*	H	33	J	4
C	13			K	2
D	7			L	3
				M	2
				N	1
				O	1
				P	3
Referee	*Number of Cases*				
E	6				
F	3				
TOTALS	71		59		18

* The overrepresentation before Judge B was due to several hearings which involved a number of different youths charged with the same offense.

It may be argued that the sample size and the short time of observation severely limit the scope of our findings. Insofar as the three counties reported on in this article represent large, Northern, urban populations, it is true that the data provide no information on the degree of implementation of *Gault* in nonmetropolitan areas, nor can we comment on juvenile court practices in other geographic regions. Nonetheless, to the extent that the problems of the administration of juvenile justice are the problems of a large portion of America's urban population, external validity for this study can be claimed.

The relatively short duration of our observations presents a more difficult problem, and it may properly be claimed that no conclusions about the long-term impact of *Gault* on the operations of juvenile courts can be made. In only one city, Metro, were we able to repeat meaningfully the observations of summer, 1967,[22] and in this instance the pattern of implementation was found to be identical with earlier observations.

22. *See* note 7 *supra.*

In Zenith, the dearth of cases falling within our sample (youths without lawyers) testifies to that city's unique position vis-a-vis traditional juvenile court practices, while in Gotham the changes in court rules created a noncomparable sample after their implementation. Ultimately, however, in order to determine the long-term impact of *Gault*, this study will have to be validated through replication over time.

Observer Interference

Finally, it may be argued that an observer's presence causes judges to alter their behavior and interferes with the normal court procedure so that the report does not accurately reflect court proceedings that are unobserved. We concede that there may be some truth to this, and there is at least one instance where interference was documented.[23] In general, however, all three courts by the time of the *Gault* decision were reasonably accustomed to the presence of note-taking observers because, as mentioned earlier, fieldworkers had been assigned to the courts since early 1966. But more importantly, to the extent that our observers did interfere, we claim the error is irrelevant for purposes of this study, in light of the fact that our data reveal widespread violations of *Gault*'s requirements. We submit that if judges know their words and actions are being recorded, they will attempt to speak and act in the manner most favorable to a positive image, and therefore the data contained in this study reflect juvenile courts at their best. There is no reason to suppose that judges consciously go out of their way to violate *Gault*'s requirements in the presence of note-taking observers.[24]

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23. In Metro, following a case that had been continued for the appointment of an attorney, the probation officer assigned to the case approached the observer and stated:

> "You're a real doll. You just messed up my case." He said that because I [the observer] was in there. "He [the judge] really bawled me out." I [observer] said, "You think so?" and he [probation officer] said, "Yea. He would have heard it." And I said, "Well, why didn't he have them waive it then?" And he said, "Well, he could have done that. . . . But he gave me a hard time and it's all because of you. Thanks a lot, doll." [Observer speaking] This probation officer carries on that way. It's obvious that my presence is an interference with the on-going way of handling things.

24. Jerome Skolnick faced the same problem in his study of police behavior, and concluded the following:

> Finally, if an observer's presence does alter police behavior, it can be assumed that it does so only in one direction. I can see no reason why police would, for example, behave *more* harshly to a prisoner in the presence of an observer than in his absence. Nor can I imagine why police would attempt to deceive a prisoner in an interrogation to a greater degree than customary. Thus, a conservative in-

IV. RIGHT TO COUNSEL

In General

In discussing the right to counsel, the Supreme Court in *Gault* commented:

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. *The child "requires the guiding hand of counsel at every step in the proceedings against him."* [25]

The court then directed its attention toward ensuring that this right, established in principle, would be meaningful in operation. Rejecting the view of some courts that even if a youth does have the right to counsel there is no requirement that he be so informed,[26] the majority opinion expressly required that the juvenile and his parent be told of the child's right, and further that they be instructed that if they could not afford an attorney, one would be appointed for them.[27] The opinion also imported to the juvenile courts the concept of waiver; henceforth, counsel could be withheld from the parties only if they validly waived their rights to a lawyer.[28]

In the delinquency cases reported in this study, compliance with the right to counsel was determined from the initial court hearings where juveniles and their parents appeared without counsel. However, two of the courts sent to the accused's parents, in advance of the first

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terpretation of the materials that follow would hold that these are based upon observations of a top police department behaving at its best.

J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 36 (1966). The problem of the reactivity of subjects of social science investigation is a chronic one. One recent book on social science methodology stresses the use of "non-reactive" measures in social research. WEBB, CAMPBELL, SCHWARTZ & SECHREST, *supra* note 19.

25. 387 U.S. 1, 36 (emphasis added).

26. *See* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 797 (1966).

27. 387 U.S. 1, 41.

28. The introduction of the waiver doctrine to delinquency proceedings is discussed in section VIII *infra*.

hearing, a notice which included reference to the right to counsel. In Metro, a form entitled *Notice: Legal Rights and Privileges* was delivered by a probation officer to the minor's parents, and the parents were asked to sign a return indicating their receipt of the notice. The part of the form relevant to the right to counsel reads as follows:

> You and/or your child have the right to be represented by a lawyer who will advise you as to the law and present your case in Court. If you wish to have a lawyer but are financially unable to employ one, we suggest that you contact the Legal Aid Defender's Office [giving address and phone number] or consult the yellow pages of the telephone book under "attorneys" for a listing of the Legal Aid Society Office nearest your home.

The Gotham juvenile court at the time of this study sent a summons by regular mail to the respondent and his parents containing the following information: "PARENTS, GUARDIAN or CUSTODIAN, of the juvenile and the juvenile ....., have the right to retain and be represented by counsel at every stage of the proceedings."

Neither notice complies satisfactorily with the right to counsel requirement imposed by *Gault*.[29] The first carefully avoids mentioning the court's duty to appoint a lawyer for the minor, if for financial reasons one cannot be retained; the latter simply makes no mention at all of that duty. But even if the notices were complete, it is doubtful that the court's responsibility to inform the parents and juvenile of the

29. Nor did the notices in these two cities or in Zenith satisfy Gault's requirement that the parent and the child be served written, timely, and specific notice of the charges. 387 U.S. at 32-33. In Metro, a written notice was served with a copy of the petition attached, but it was not directed to the child as the Supreme Court in Gault required. Although in Gotham both parent and child were afforded written and timely notice, the charge frequently was indicated only by the initials of the offense. For example, the offense of "deportment endangering health and general welfare" appeared in notices as "Juvenile Delinquency: DEHGW." Moreover, even when the offense could be deciphered, a specific factual description of the conduct was still missing. *See In Re* Wylie, 231 A.2d 81 (D.C. Ct. App. 1967); N. Dorsen & D. Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 14 (Dec. 1967). In Zenith, written notice of the charge was not sent to the youth or his parents. Instead, the parties were informed verbally of the date and time of their first scheduled court hearing, and when a parent appeared a bailiff thrust into his hand a printed form to sign, which purported to waive service of process. The substance of the form was rarely—if ever—explained, and the consequences of waiver never discussed. The child typically was not asked to sign the waiver form. Only after the parent had signed was a copy of the petition containing the charge given to the parent or child. Clearly this procedure did not constitute timely fulfillment of Gault's notice of charges requirement. Nor did the purported waiver of service by the parent appear to have been "knowing and intelligent." *See* Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938). The procedure also failed to circumvent a statutory requirement that summons and a copy of the petition be served on the parties at least three days before the first court hearing.

right to counsel would be reduced. In federal criminal cases, the judge bears the responsibility of ascertaining that the defendant in fact knows of, and adequately understands, this right.

> When a defendant appears before the court without counsel, we think, as a minimum, the court, in order to discharge its duty, must advise the defendant of the seriousness of the charge, that the Constitution of the United States guarantees him the right to have the assistance of counsel for his defense, and that if he is unable to employ counsel, it is the duty of the court to appoint, and the court will appoint, counsel for him. Ordinarily, only by such an inquiry can the court be sure that the defendant understands his constitutional right . . . [30]

While it may be argued that the states are not bound to exercise all the precautions of federal criminal practice,[31] it would seem clear that the accused juvenile must be offered the right to counsel before it can be said that he has knowingly and intelligently waived it,[32] and that every presumption against such waiver must be indulged.[33] Similarly, it would seem that juvenile courts must insure that the minor and parents knew of their right to counsel, and that they understood its significance.[34] Indeed, particular care is necessary in cases involving minors in order to be assured that the youth knows he is entitled to a lawyer; in criminal prosecutions involving juveniles, it has frequently been held that the trial judge must so inform the defendant, or a subsequent waiver is invalid.[35] Since minors in delinquency proceedings are almost always younger than those prosecuted criminally, the need for a careful apprisal of rights is, if anything, more pronounced. Further support for this proposition may be found where, as in most delinquency

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30. Cherrie v. United States, 179 F.2d 94, 96 (10th Cir. 1949). *See* W. Thompson, *The Judge's Responsibility on a Plea of Guilty*, 62 W. VA. L. REV. 213, 216 (1960).

31. *See* Comment, *Waiver of the Right to Counsel in State Court Cases: The Effect of* Gideon v. Wainwright, 31 U. CHI. L. REV. 591, 594-95 (1964).

32. *See* Carnley v. Cochran, 369 U.S. 506 (1962).

33. *Id.;* Johnson v. Zerbst, 304 U.S. 458 (1938).

34. *See* Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality opinion by Black, J.); Cherrie v. United States, *supra* note 30; Snell v. United States, 174 F.2d 580 (10th Cir. 1949); People v. Hardin, 207 Cal. App. 2d 336, 24 Cal. Rptr. 563 (Dist. Ct. App. 1962).

35. *See* Uverges v. Pennsylvania, 335 U.S. 437 (1948) (17 years old); People v. Devanish, 285 App. Div. 826, 136 N.Y.S.2d 759 (1955) (16 years old); *In re* Gooding, 338 P.2d 114 (Okla. Crim. 1959) (18 years old). *Accord* United States *ex rel.* Brown v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965) (16 years old); People v. Byroads, 24 App. Div.2d 732, 263 N.Y.S.2d 401 (1965) (17 years old) (mem.); United States *ex rel.* Slebodnik v. Pennsylvania, 343 F.2d 605 (3rd Cir. 1965) (applying Pennsylvania law to a 17-year-old).

cases, the respondent and his parents are indigent. Reliance upon written notification presupposes that the recipient can read and understand the notice, that he does so if he can, and that, if it is the parent who is given notice, the parent conveys the information in an intelligible manner to the child. These assumptions, when applied to the population typically appearing before juvenile courts, are most dubious.[36]

Degree of Compliance

"Full advice" has been used to describe those cases where the respondent and his parents were fully informed of the child's right to retained or appointed counsel. The following colloquy from a case in Zenith illustrates full advice:

> The judge, "You understand this is a serious charge, don't you?" "Yes." [This is response by father.] Now speaking to both the father and the boy, he continued, "I want you to know that you have the right to a private attorney, I'll appoint a public defender for you."

This case may be taken as an exemplar: the advice of rights is directed to both the parent and the youth, and it is made clear that the judge will appoint an attorney if the respondent is indigent. Although every warning should be as straightforward and complete as this one, instances where compliance was not so satisfactory have been treated as "full" for purposes of this article. For example, it is certainly not sufficient to tell only the parent that he has a right to counsel; the right to be informed runs equally to the child. Thus, if the judge specifically addresses only the parent in rendering advice of counsel,

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36. Certainly there is much evidence to indicate that receipt and endorsement of a paper does not necessarily imply knowledge of the contents of the matter signed. The failure of poor persons to know and understand their commercial contracts has been carefully researched, *see* D. CAPLOVITZ, THE POOR PAY MORE 188-89 (1967), and the lack of education frequently found among the urban poor is unquestionable. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 69-70 (1967).

> It is also now quite clear that juvenile courts are, in practice, courts for the poor. The upper and middle classes show surprising agility in keeping their delinquent children out of the court. In some cases we can be sure that a petition has not been filed against an offending middle-class youngster because restitution has been supplied to the victim of the child's misconduct. In other cases, the upper and middle-class youths have been shielded against juvenile court adjudications by their parents' ability to provide privately arranged corrective treatment. After an adjudication, a person of means can often arrange for the use of private facilities not available to the poor.

Paulsen, *Juvenile Courts, Family Courts, and the Poor Man,* in THE LAW OF THE POOR 310, 372 (J. tenBroek, ed. 1966).

the requirements of *Gault* have not fully been met. On the other hand, if full advice was given and no person singled out, full compliance was assumed, even though only the parent responded and even though it was unclear that the child comprehended in any real sense that the right was *his*.

The judge also must clearly state that the respondent and his parent not only have the right to retained counsel, but that if they cannot afford an attorney, one will be appointed for them. If the court does not state that counsel will be appointed but merely says that a legal aid lawyer is available, the effect may not be the same. If appointment is made, the attorney is generally under an obligation to appear and either provide representation or satisfy the court that he cannot.[37] If the latter occurs, the court will be bound to appoint a substitute for him, and the defendant is assured of representation. Further, some legal aid offices require a registration fee, and in the absence of outright appointment the respondent or his parents may be required to absorb that expense or forego the legal services. Nevertheless, consistent with our practice of analyzing the data conservatively, a statement by the judge that a legal aid attorney was available has been treated as satisfying *Gault*'s requirements.[38]

On the basis of the above categorization, Zenith was found to have the highest degree of compliance with *Gault*'s mandate. Of the 18 youths in the sample of cases analyzed,[39] 10 (or 56%) were fully advised of the right to counsel. In Metro, the extent of compliance was substantially less. Only 2 youths of a sample of 71 (3%) were fully advised of the right to representation. Gotham was the least diligent in complying with *Gault*'s requirements. In not 1 case among 59 were the parents and minor adequately advised of their right to counsel. One of two things happened: Either no mention at all was made of the right to counsel or there was "partial advice" of the right, meaning

37. *See* Powell v. Alabama, 287 U.S. 45, 73 (1932): "Attorneys are officers of the court, and are bound to render services when required by such appointment."

38. This manner of informing of the right to appointed counsel was very common in Metro, and was incorporated into the written notice of rights sent to the parents of those appearing before the juvenile court. See text at note 29, *supra*. Because of the classification adopted, it is unnecessary to consider whether appointment to "Legal Aid," though entered on the record and formally made, is satisfactory where, as in Zenith, appointment is not made to an individual practitioner and the Legal Aid Office is not established as an office licensed to practice law and would, apparently, not technically be bound by an appointment.

39. See Tables 1 and 2 *supra*, and accompanying text for discussion of the Zenith as well as Gotham and Metro samples.

that necessary elements of the warning were omitted. A case from Metro in which the judge asked: "Mrs. C....., did you know that you have a right to have a lawyer?" illustrates what we have termed "partial advice." The warning, phrased in the form of a question, was directed solely and explicitly to the parent, and the judge failed to state that the boy and his parent were entitled to appointed counsel if they were indigent.[40] A breakdown of the degree of compliance with the right to counsel for all three cities is shown in Table 4.

TABLE 4

COMPLIANCE WITH THE RIGHT TO COUNSEL REQUIREMENT

Type of Compliance	*Gotham*		*Metro*		*Zenith*	
	N	%	N	%	N	%
Full Advice	(0)	0	(2)	3	(10)	56
Partial Advice	(9)	15	(46)	65	(7)	38
No Advice	(50)	85	(23)	32	(1)	6
TOTAL NUMBER OF YOUTHS	(59)		(71)		(18)	

N = number of youths.

Thus, a greater attempt at compliance was made in Zenith and Metro than in Gotham. Only one case was found in Zenith where a hearing was held without any mention of the right to counsel, and in Metro, at least some form of advice was given, albeit incompletely, in more than two-thirds of the cases. Gotham, in contrast, emerged as the most resistant to the newly imposed constitutional requirements.[41]

The failure of the courts in Metro and Gotham to comply with the right to counsel requirement cannot be dismissed as a technical matter. In one-third of the sample cases in Metro, and in 85% of the Gotham cases, the error cannot be ascribed to faulty terminology nor even to imperfect comprehension of the rules set out in *Gault;* neither the parent nor the child was informed in any fashion by the courts of the right to retained or appointed counsel.[42] Even in those instances where partial

40. *See* United States *ex rel.* Brown v. Fay, 242 F. Supp. 243 (D.C.N.Y. 1965); People v. Byroads, 24 App. Div.2d 732, 263 N.Y.S.2d 401 (1965).

41. It may be argued that Gotham's juvenile court was merely awaiting the anticipated changes in the rules of court, *supra* note 7. If this is a plausible argument, however, it does not abrogate the authority of the Supreme Court's decision in Gault. Indeed, if anything, it indicated the power of juvenile court tradition in resisting change.

42. As noted previously, the written notice of counsel supplied in these two cities was also deficient. See page 506, *supra.*

but inadequate advice was rendered, the omission cannot be considered insignificant. Failure to inform the child of the right, or to state that a "free lawyer" is available as a matter of right, is a most critical omission.[43]

Prejudicial Advice

Heretofore, we have been concerned with the relevant legal content of the communication regarding the right to counsel. Successful communication of a message from one person to another depends on many factors other than content of the message itself. Verbal and nonverbal cues may transform a statement's meaning into something altogether different from the actual words used. In considering the extent of meaningful as well as literal compliance with *Gault*, the manner of communication is highly relevant.[44]

Advice of the right to counsel may be rendered in such a way as to encourage the exercise of that right. When the judge says (as he did in a Zenith case), "Larry, I'd like to advise you that you are entitled to a lawyer and I'll be happy to appoint a free lawyer for you if you have no money," it may be supposed that any trepidation on the part of the youth or his parent concerning exercise of the right does not derive from the court.

The advice may be essentially neutral in quality. Consider this Zenith case:

> The judge continued that the law obliges him to tell them that they have a privilege of engaging an attorney. If they wish to get an attorney, the proceedings would be continued for them to do so. If they didn't have sufficient funds, he would appoint one.

Conversely, the advice may be given in such a manner as to discourage exercise of the right to counsel. Perhaps the most common is "a question so framed, or uttered with such emphasis, or accompanied by such non-verbal conduct of the questioner as to suggest the desired answer." [45] The following excerpt from a Zenith case is illustrative:

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43. *See* Cherrie v. United States, 179 F.2d 94 (10th Cir. 1949); Thompson, *supra* note 30.

44. See pages 550-552, *infra*, for a discussion of social factors influencing communication processes and their relevance to the issue of valid waiver.

45. E. D. MORGAN, BASIC PROBLEMS OF EVIDENCE (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association 1963), quoted in E. Webb, The Interview, or The Only Wheel in Town, 23 (unpublished ms. Northwestern University, undated).

> After the judge informed the boys and their mothers of the charges against them, he continued very rapidly, "At this time, I'd like to inform you that you have a right to have an attorney. If you cannot afford an attorney, I'll appoint an attorney for you. Or, on the other hand, if you'd like, we can have the case heard today."
>
> The woman said something and the judge said, "I can't hear you."
>
> Then the woman said that she would like to have it heard today.
>
> The judge said, "Let the record show that Mrs. G....., the mother of A....., waives the right to an attorney."

It is arguable here that the judge is merely performing his duty to inform the respondent of all possible courses of action open to her. Nevertheless, the effect of a rapid delivery plus the judge's invitation that "we can have the case heard today," suggesting that proceeding without a lawyer will expedite matters and that the case can competently be placed in his hands, tends to preclude a positive consideration of the right to counsel.

By failing to respond to the misapprehensions and questions of parties, judges may effectively discourage the use of counsel. Consider the following case from Metro:

> The judge begins by saying, "Mrs. C. . . . . , did you know that you have a right to have a lawyer?"
>
> She replied that she "didn't know." She paused, then she said, "Well, Mr. ..... [the probation officer] said that it was up to me, and I said that I didn't have any money."
>
> The judge said, "Well, one thing you have here is all kinds of lawyers." He said that they could get some at the Legal Aid Society.
>
> The mother replied, "Well, I have one, but he's so expensive."
>
> And the judge left it at this, and they went ahead and heard the case.

In this case the judge's failure to inform the respondent that the court would appoint an attorney if she could not afford one, taken with his failure to respond to her oblique reference of an inability to pay, militated against exercise of that right.

In Metro the judges consistently assumed that the written notice of right to counsel delivered before the hearing fully satisfied *Gault*. Communication between judge and respondent during the court hearing reflected an assumption by the judge that the parents and child had read the notice, understood their rights, and were waiving these rights

by appearing at the hearing without an attorney. The following is a simple illustration of this:

> Addressing himself to the mother the judge states, "I take it that you came without a lawyer because you think you didn't need it."
>
> Mrs. H..... replies, "Right."

The effect of this formulation is to discourage further and positive consideration of the right to an attorney, and the statement's directive quality is strengthened by the judge's status vis-a-vis those appearing before him.[46]

Still another case from Metro embodies a different type of prejudice. The judge not only failed to inform the respondents that a free attorney could be appointed, but was obviously unwilling to continue the case for such an appointment.

> The judge begins by saying, "We sent a notice out to you which stated that you can get a lawyer, and furthermore that if you can't afford one that we would get you one."
>
> The father stands up and says in broken phrases, "Well we—I can't afford . . . "
>
> The judge breaks him off and says, "That's no objection, we're able to get you one, but you've decided not to have one. Right?"
>
> The father replies, "Yes."

A case from Gotham presents a classic example of a judge leading the respondent to the position desired by the court. Before the case began a bailiff entered the court and told the judge that Mr. *X*, a legal aid attorney, had been assigned to the case, but no one from the legal aid office had appeared. A private attorney, Mr. G....., learned that the court might hear the case without counsel, and asked the bailiff to request an adjournment until such time as the legal aid attorney could be present. The following material is from our field notes:

> The judge, "I will not adjourn it."
>
> The bailiff, "Your honor, G..... is not the attorney."
>
> The judge, "He needn't come in. We have proof of the matter?"
>
> The police officer, "Yes."

46. The significance of the judge's status vis-a-vis those appearing before him is discussed later. See pages 550-552, *infra*.

The father and the boy entered the courtroom. The bailiff told them to be seated.

The judge said, "Tell me about this charge."

The police officer said that the youth before him was .....

He was 17 years of age. There were two complaints against the boy, one was illegal possession of marijuana, the other was illegal use of marijuana.

The judge said, "What are the two charges?"

The police officer answered, "Possession and unlawful use."

The judge turned to the boy and his father, "Are you the boy's father?"

The father said, "Yes. Can I say something. We were supposed to have an attorney here, but he's not here."

The judge said, "Did you get notice of the hearing today?"

The father said he didn't, but I don't think he understood the word notice, and so the boy explained it to him. And then he said he did.

The judge, "When did you get notice?"

The father said, "Some time ago. Our attorney was supposed to be here, but he didn't show up."

The judge then read off the new notice which says that they're entitled to have an attorney, Mr. *X*, etc.

The man said yes he knew about that, and he said, "I talked with Mr. *X* Monday, but there's been a mix-up." He went on to explain that there was supposed to have been someone here today. It sounded as if he had not discussed in detail the content of the case, but he had actually contacted him on Monday.

The judge said, "The important thing is whether the boy had possession of narcotics or not."

The father said that the boy stated that he did not have it, and he got scared when he was brought into the police station and then said it.

The judge said, "I'm going to hear testimony. If Mr. *X*'s office wants to take the blame, O.K. Swear them in. . . . " [Testimony concerning the charges was then heard by the judge.] After hearing some of the evidence during which time the boy denied that he had smoked marijuana, the judge turned to the father and said, "Now sir, I'm prepared today to place this boy on probation and let him go home. If you want to come back here next week and have this detective. . . . " He continued on to say that if he wanted to come back here and say the same thing over while the father had an attorney he may do so. The judge then said that he didn't know what he would do next week, however. [After some more

conversation, the judge said], "We can go through the mechanics of the court and have cross-examination and all the rest, but this court's interest is what is best for the boy . . . I think what I'm trying to do is save everybody's time."

The father then said that probation would be all right. The judge stated that he could sign the waiver. The father said that he wondered if the boy went on probation could he leave town. He said he had been planning on going to see his grandfather.

The probation officer present spoke up and said that this would present no problems. The judge agreed, and he stated that otherwise, we'll make a federal case out of this. And if we bring the boy back with an attorney, well, after an hour, I'll still have to make a decision and its probably not going to be so different from what I make here. Then he went on to explain that he wanted the father to understand that the boy should sign a waiver which would save him from a criminal record and from going into an adult court since this was a criminal offense. The boy went over to the table and signed it, apparently without question, and then the father was asked to come over to the table.

The foregoing case illustrates fully the coercive power of suggestion. Obviously the judge thought the case sustainable on the evidence presented by the detective and did not wish to be bothered by an attorney. The field notes also indicate that the judge had knowledge of a social record on the juvenile, which revealed that the youth had previously been before the court on a narcotics charge, but had not been adjudicated delinquent.[47]

Bureaucratic pressures may sometimes provide the impetus for biased communication. To avoid delay, a judge may fail to fully advise the child and his parents of their right to an attorney:

The probation officer stated, "Mrs. G..... mentioned the fact that she might want to have a lawyer."

The judge, "Well, we can't have them coming down here at the last minute." The judge then commented about how hard it is to get them down here.

47. Although foreknowledge of a juvenile's prior history may well constitute prejudicial error, traditional juvenile court philosophy and practice has tended to support procedures whereby the judge becomes familiar with the youth's background before an adjudication hearing. *See generally*, E. Krasnow, *Social Investigation Reports in the Juvenile Courts: Their Uses and Abuses*, 12 CRIME & DELIN. 151 (1966); Teitelbaum, *The Use of Social Reports in Juvenile Court Adjudications*, 7 J. FAM. L. 425 (1967).

> The mother said something. The judge said, "Have you changed your mind?" The mother replied, "Yes."

Finally, the content of a message may be compromised by the manner in which it is delivered. When rights are communicated to respondents in a rapid fashion, allowing no time for an answer, the communication must be deemed prejudicial. In the following example (a case in Metro) the rapidity with which the information was given plus the obvious desire to hear the case without delay undoubtedly discouraged exercise of the rights mentioned:

> Referee, "You have the right to be represented by an attorney and the right to cross-examine witnesses, and you do not have to say anything, either an admission or denial, if you don't want to. All right, officer, what is the situation?"

"Prejudicial advice" of the right to counsel was found almost uniformly where less than "full advice" of the right was rendered. Only three cases were observed where full advice was given in a manner deemed to be prejudicial, two in Zenith and one in Metro. A complete breakdown reflecting "prejudicial advice" together with "full," "partial," and "no advice," reveals the patterns in Table 5.

TABLE 5

COMPLIANCE WITH THE RIGHT TO COUNSEL REQUIREMENT*

Type of Compliance	*Gotham*		*Metro*		*Zenith*	
	N	%	N	%	N	%
Full advice	(0)	0	(1)	1	(8)	44
Full advice—also prejudicial	(0)	0	(1)	1	(2)	11
Partial advice	(7)	12	(15)	21	(6)	33
Partial advice—also prejudicial	(2)	3	(31)	44	(1)	6
No advice	(50)	85	(23)	32	(1)	6
TOTAL NUMBER OF YOUTHS	(59)		(71)		(18)	

* Percents may not add to 100 due to rounding.

V. PRIVILEGE AGAINST SELF-INCRIMINATION

In General

The privilege against self-incrimination was largely unrecognized in delinquency proceedings before the Supreme Court's decision in *Gault*.[48] Even those courts and authorities that held that the privilege was in some way appropriate in juvenile court hearings felt it unnecessary or even inadvisable to inform the minor of this right.[49] In *Gault*, the Supreme Court rejected the argument that the youth and his parent should not be advised of the right to silence,[50] and held that: "The constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." [51]

In criminal prosecutions, the defendant is exempt from answering all questions, since each may be incriminating.[52] While in principle the prosecution could call the defendant to the stand to determine whether he chose to exercise his right of refusing to answer any questions, no court has approved this practice.[53] Even the calling of a codefendant in a criminal case, without his having made a valid waiver, is a violation of the defendant's privilege.[54] Furthermore, the prosecutor is barred from commenting upon the accused's failure to testify, and no inference may properly be drawn from such failure.[55]

Now that *Gault* has extended the privilege against self-incrimination to delinquency proceedings, it seems clear that an uncounseled juvenile must be informed that he need not say anything before a single question is asked and, if he does testify, a valid waiver of the privilege must have

48. *See In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Driscoll, *supra* note 2; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 2.

49. *See* Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965); UNITED STATES CHILDREN'S BUREAU, STANDARDS FOR JUVENILE AND FAMILY COURTS 72 (1966).

50. 387 U.S. 1, 51-52.

51. *Id.* at 55.

52. 8 J. WIGMORE, EVIDENCE §2260, at 369 (McNaughten Rev. 1961).

53. *Id.* at §2268, p. 406, and cases cited at n. 6. THE UNIFORM RULES OF EVIDENCE, rule 23 (1), provides a typical statement of the principle: "Every person has in a criminal action in which he is an accused a privilege not to be called as a witness and not to testify."

54. *See* United States v. Housing Foundation of America, 176 F.2d 665 (3d Cir. 1959).

55. Griffin v. California, 380 U.S. 609 (1965).

been made. In *Johnson v. Zerbst,*[56] the Supreme Court established that every reasonable presumption against waiver of basic constitutional rights must be indulged. Relying upon the *Johnson* case, a federal court of appeals has held that: "Waiver of the privilege [against self-incrimination] must be informed and intelligent. There can be no waiver if the defendants do not know their rights. The rule must be the same, we think, when the record is silent or inconclusive concerning knowledge." [57] In *Miranda v. Arizona,*[58] invoking the *Johnson* decision and *Carnley v. Cochran,*[59] the Supreme Court held that waiver of the privilege against self-incrimination during in-custody interrogation, in the absence of an attorney, cannot be presumed from a silent record.

State courts have come to much the same conclusion. In *People v. Chlebowy,*[60] an unrepresented defendant was asked by the court if he wished to take the stand at the conclusion of the prosecution's case. He said that he did, and was thereupon sworn and examined by the judge. The reviewing court reversed, holding that the trial judge was required to inform the accused that he did not have to testify, that no inference could be drawn from his failure to testify, and that what he said could be used against him:

> When a defendant goes to trial upon a charge of a criminal nature without the benefit of counsel, it is the duty of the court to be alert to protect the defendant's rights. Good practice requires that any suggestion by the court that the defendant take the stand be coupled with advice as to his privilege against self-incrimination. The defendant may not be called to the stand in a criminal case unless he waives his privilege. He cannot be charged with a waiver of the privelege unless it appears that he was aware of its existence and its surrounding safeguards and voluntarily and intelligently elected to refrain from asserting it.[61]

Surely these rules applied to protect adults are even more appropriate when a juvenile is involved.

In this study, advice of the privilege against self-incrimination was considered relevant in all cases in our final sample, except those con-

56. 304 U.S. 458 (1938).

57. Wood v. United States, 128 F.2d 265, 277 (D.C. Cir. 1942).

58. 384 U.S. 436, 475 (1966).

59. 369 U.S. 506 (1962).

60. 78 N.Y.S.2d 596 (Sup. Ct. 1948).

61. *Id.* at 600. *See* People v. Glaser, 238 Cal. App.2d 819, 48 Cal. Rptr. 427 (1965), *cert. denied,* 385 U.S. 880, *reh. denied,* 385 U.S. 965; State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960) (grand jury investigation); People v. Morett, 69 N.Y.S.2d 540 (App. Div. 1947); State v. Halvorsen, 110 N.W.2d 132 (S.D. 1961) (coroner's inquest).

tinued for a lawyer or witness, or dismissed without a hearing.[62] It may appear that this approach fails to take into account the effect of a respondent's guilty plea which, in criminal prosecutions, is usually said to waive the privilege against self-incrimination.[63] When an uncounseled defendant in a criminal case enters a guilty plea, attack upon an ensuing conviction normally is directed to the validity of the plea itself, or to the competency of the waiver of counsel pursuant to which the plea was accepted. The issue of self-incrimination does not arise, since the guilty plea is not considered testimonial in nature and, once entered, it is deemed to waive the privilege. However, in many juvenile courts, certainly in Gotham and Metro, we are persuaded that the relevancy of the privilege against self-incrimination should not be related to whether the respondent admits the offense. The informality in these courts all too often leads to a blurring of procedural lines. It is often unclear whether the juvenile admits or denies the offense, and occasionally he is never even asked. Sometimes when a youth is asked to state his position, the judge has already heard the evidence against him. In criminal cases, by contrast, the plea-taking process occurs at a separate arraignment hearing; if a defendant subsequently wishes to plead guilty and withdraw a not guilty plea entered at arraignment, the record provides a clear statement of what has happened.

Although the procedure in Zenith provided that a definite plea be taken before the adjudication hearing, no such hearing existed in either Metro or Gotham. Thus no plea was taken in the usual sense in these two cities, but during the proceedings the youth usually was asked whether he committed the alleged act, or if he had anything to say. While sometimes there was an "admission" by the respondent, it was not a guilty plea, but a self-incriminatory statement in the testimonial sense. Therefore these admissions have been seen to pose self-incrimination issues. Similarly, in *Gault,* the alleged admissions by the respondent to the juvenile court judge were viewed as self-incriminatory

62. The final sample of cases is discussed at pages 497-500, *supra;* see Table 2 *supra,* for the number of cases in the three cities where the privilege was deemed relevant.

63. United States v. Gernie, 252 F.2d 664 (2d Cir. 1958), *cert. denied,* 356 U.S. 968, *reh. denied,* 357 U.S. 944; Knox v. State, 234 Md. 203, 198 A.2d 285 (1964); Commonwealth *ex rel.* Blackman v. Banmiller, 405 Pa. 560, 176 A.2d 682 (1962); State v. Nelson, 65 Wash. 2d 189, 396 P.2d 540 (1964). *See* United States v. Cioffi, 242 F.2d 473 (2d Cir. 1957), *cert. denied,* 353 U.S. 975; People v. Sierra, 117 Cal. App. 2d 649, 256 P. 2d 577 (1953). *But see* Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).

statements.[64] *In re Butterfield,*[65] a recent decision of a California appellate court, provides a further illustration. After the respondent and her mother were advised of and purportedly waived the right to counsel, the charges were read. At this point, there was the following dialogue:

> MR. PALMA [Deputy Probation Officer]: Now, Rachelle, did you understand the petition that was read?
>
> THE MINOR: Yes.
>
> MR. PALMA: Are these allegations true?
>
> THE MINOR: Yes.
>
> MR. PALMA: Will you explain to the Court what happened at the time?
>
> THE MINOR: I just got suspended from school, and my aunt came and picked me up and she said that she thought she was going to put me back in Juvenile Hall and I just—she left the house and I got in the cabinet and took some medication.
>
> MR. PALMA: What was your reason for taking the medication, Rachelle?
>
> THE MINOR: I didn't want to go back to Juvenile Hall.
>
> MR. PALMA: Request the petition be sustained.
>
> THE COURT: All right . . . [66]

The reviewing court, in reversing the adjudication, analyzed the case as follows:

> No evidence other than the minor's admission was received. The adjudication was one of "delinquency" because it found her guilty of disobedience to a court order and committed her to confinement in a correctional institution. It was used "against" her in the sense that it formed the entire evidentiary basis for the judgment. *The statement was self-incriminating. She had no prior warning and there is no evidence that she had any awareness of her right to refrain from self-incrimination. Evidentiary use of her self-incriminating statement without that awareness infected the hearing with a violation of due process.*[67]

Degree of Compliance

Full advice of the privilege against self-incrimination requires that the minor be informed that he need not answer any questions before any questions are in fact put to him. We did not assume in our

64. 387 U.S. at 42-57, *passim.*
65. 61 Cal. Rptr. 874 (1967).
66. *Id.* at 877, n. 5.
67. *Id.* at 877 (emphasis added).

analysis that the judge was bound to advise the respondent that no inference would be drawn from his failure to speak, although this is arguably required by *Gault*. The Supreme Court stated the issue as: "whether . . . an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was *made with knowledge that he* was not obliged to speak and *would not be penalized for remaining silent.*" [68] The import of the Court's language seems to be that unless a youth has been so informed, any statement he may make is improperly obtained.[69] Had this criterion been used there would not have been any case in the three cities where the privilege was fully implemented.

In Zenith, the relevant sample for purposes of the privilege against self-incrimination contained only six cases, due to the large number continued for an attorney. In two of these the youths were fully advised of the privilege. The remaining four juveniles were not advised at all, and all entered admissions. Since Zenith employs a formal plea-taking procedure, it can forcefully be argued that the requirements of the privilege did not apply in these cases.[70]

TABLE 6

COMPLIANCE WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION REQUIREMENT

Type of Compliance	*Gotham*		*Metro*		*Zenith*	
	N	%	N	%	N	%
Full advice	(0)	0	(18)	29	(2)	33
No advice[71]	(53)	100	(44)	71	(4)	67
TOTAL NUMBER OF YOUTHS	(53)		(62)		(6)	

In Metro, of a relevant sample of 62 cases, 18 respondents (29%) were advised of the right to remain silent. In 44 cases (71%), the

68. 387 U.S. 1, 44 (emphasis added).

69. *Cf.* People v. Chlebowy, *supra* note 56.

70. However, the validity of the guilty plea upon which waiver of the privilege is predicated may be questioned and the effect of an unrepresented juvenile's admission is considered later. See text at notes 107-11, *infra.*

71. A "partial advice" category, used in Tables 4 and 5, *supra*, to describe compliance with the right to counsel, is inappropriate in analyzing the privilege against self-incrimination. Since the only requirement for compliance with the privilege is that the juvenile be informed of his right to silence, advice must be either full or not at all.

privilege was never mentioned. In Gotham, the sample contained 53 relevant cases, and in not one of these was mention made of the privilege against self-incrimination. As explained previously, in neither Metro nor Gotham was an admission by the juvenile considered a waiver of the privilege.[72]

Prejudicial Advice

We found that advice of the privilege invariably was communicated in a prejudicial manner in Metro. Frequently the warning was transmitted very quickly, and the proceeding continued without further reference to the privilege. Both the speed with which the information was communicated and the abrupt change of subject, without waiting for an answer, clearly tended to discourage exercise of the privilege. In one hearing a judge informed eight boys involved in a single offense of their privilege not to testify in the following way:

> Initially, the judge made comments to the effect that all boys were involved in the arson, although some may have taken part in different ways. After these statements, the judge stated, "Now, none of you have to answer anything. You don't have to say anything. I'll start with A....." The judge asks A..... if he was involved saying, "A.....?" And A..... says, "Yes."

The judge then received admissions or denials from all eight boys without first ascertaining whether any of the youths actually wanted to invoke the privilege. Subsequently all of the boys testified. The privilege against self-incrimination was particularly relevant in this case because there was no presentation of evidence, with the exception of extrajudicial confessions made to police officers by five of the boys. Three of the boys during the hearing repudiated their confessions and denied involvement, but all were adjudicated delinquent.

Advice of the privilege also was classified as prejudicial when the judge, after giving the warning, immediately invited the respondent to forego his right of silence. Consider these examples from Metro:

> The judge first asked the boy if it was true that he stole the merchandise in question from the company. After receiving a response from the boy which is unclear [Although the statement of the child was unclear, the judge treated the case as a denial.], the judge stated, after a detective

72. See pages 519-520, *supra.*

from the department store was sworn in, "B....., you don't have to tell us anything unless you want to, but you can tell us if you want to."

* * *

The judge says, "All right, B....., you don't have to say a word here, but you may do so if you wish. Swear them in. You can talk or be quiet."

The court's conduct here cannot be considered neutral. By swearing the respondent, the uniform rule in criminal cases that a defendant has a right not to be called or sworn as part of his privilege is breached.[73] In addition, an explicit invitation to testify may make it difficult for some juveniles to decline. During a coroner's inquest in a South Dakota case,[74] the state's attorney observed that the 18-year-old defendant was present, but stated that he would not call him to testify. The coroner then said: "Did you hear what the state's attorney said, Mr. Halvorsen? He's not going to call on you to testify. You have the right if you so wish on your own behalf to come up and be sworn and testify."[75] The Supreme Court of South Dakota held that the information given was insufficient, and further that: "After . . . it was announced that he would not be called, but had a right to come forward and testify in his own behalf, he was not free to exercise an uncoerced volition."[76] The status of the juvenile court judge, as perceived by those appearing before him, may be expected to strengthen the impact of the invitation to testify, thereby weakening or entirely negating any previous statement of the right.[77]

While there were no youths in Gotham who were fully or even prejudicially advised of their right to remain silent, there was one case that demonstrated a unique and imaginative response to the privilege against self-incrimination requirement:

The judge began, "Are you the boy's mother?"

"Yes."

"Have you talked with the boy about this?"

"Yes."

"Does he admit it?"

"Yes."

---

73. 8 WIGMORE, EVIDENCE §2268, at 406, and cases cited at n. 6.

74. State v. Halvorsen, 110 N.W.2d 132 (S.D. 1961).

75. *Id.* at 134.

76. *Id.* at 136-37.

77. *See* discussion at pages 550-552, *infra*.

By asking the boy's mother if the child had admitted his involvement, the judge circumvented the self-incrimination issue. Subsequently, the youth testified, denied his guilt, but was adjudicated delinquent.

The table below reveals patterns of compliance for the following three categories: full advice of the privilege, full advice—also prejudicial, and no advice.

TABLE 7

COMPLIANCE WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION REQUIREMENT

Type of Compliance	*Gotham*		*Metro*		*Zenith*
	N	%	N	%	N
Full advice	(0)	0	(1)	2	(2)
Full advice—also prejudicial	(0)	0	(17)	27	(0)
No advice	(53)	100	(44)	71	(4)
TOTAL NUMBER OF YOUTHS	(53)		(62)		(6)

In Metro, consideration of literal compliance with the requirement, (i.e., whether the privilege was mentioned to the respondent) revealed that in 17 cases (27%) the privilege was accorded.[78] However, when an analysis is made of the manner and meaningfulness of the communication, the instances of full nonprejudicial compliance with the privilege are reduced to 1 case (2%).

VI. RIGHT TO CONFRONTATION

In General

In *Gault*, the only evidence against the respondent, except for an invalid admission, was a probation officer's secondhand account of the respondent's conversation with the complaining witness. The complainant, a woman, allegedly told the probation officer that Gerald Gault had spoken obscene words to her over the telephone, but she failed to testify in court, and the trial judge explicitly stated that her presence was unnecessary.[79] Noting its recent extension of the sixth

78. *See* Table 6 *supra.*

79. 387 U.S. at 43.

amendment confrontation clause to state criminal prosecutions,[80] the Supreme Court held: "Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross examination were essential for a finding of 'delinquency.' . . ." [81]

The Court's holding may be interpreted as differentiating between evidence that the juvenile court may receive, and evidence upon which a constitutionally sufficient delinquency adjudication must be founded.[82] In any event, it is clear that a delinquency finding must, in light of *Gault*, satisfy normal standards of confrontation.

The principal objective of the right to confrontation is to secure an opportunity for the accused to cross-examine the witnesses against him.[83] To that extent, constitutional significance is accorded to the evidentiary rule against hearsay.[84] In criminal cases, failure of confrontation typically occurs where statements of a third party are related by a witness. The impropriety lies in receiving evidence not subject to cross-examination.

The informality of juvenile courts presents a situation rarely found in criminal prosecutions. In delinquency cases a necessary witness frequently does not appear, and no evidence is introduced in lieu of the anticipated testimony. In an auto theft case, for instance, the owner of the stolen car may not be present to testify that the vehicle is his and that it was taken without his authority. Instead, a police liaison officer or some other court offiical will read the charge at the beginning of the hearing, and the charge will include allegations of ownership and theft. While no testimony has been given, these allegations are nevertheless before the court, and their truth is frequently accepted. In criminal cases, the failure to produce a key witness would be treated as a failure to prove essential elements of the crime, and result in dis-

80. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

81. 387 U.S. at 56.

82. *See* Dorsen & Rezneck, *supra* note 29, at 20; Teitelbaum, *supra* note 47, at 431. *Cf.* CAL. WELF. & INST'NS. CODE §701 (1966), which permits the juvenile court to admit any evidence that is relevant and material, but requires that a finding of delinquency be supported by a preponderance of the evidence admissible in criminal cases.

83. 5 WIGMORE, EVIDENCE §1395 (3d ed. 1940).

84. *See* Pointer v. Texas, 380 U.S. 400 (1965); Dorsen & Rezneck, *supra* note 29, at 20; Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366, 372 (1966).

missal. During this analysis, when we encountered similar failures in proof which were ignored by the juvenile courts, the confrontation was classified as inadequate.

The same standards of relevancy used to identify the privilege against self-incrimination cases were applied to determine cases in the right to confrontation category.[85] Although a guilty plea excuses confrontation in criminal cases by making it unnecessary for the state to prove its case, for reasons noted in the discussion of the privilege against self-incrimination in Gotham and Metro, a juvenile's admission or denial was not considered decisive.

Degree of Compliance

Satisfactory implementation of the right to confrontation normally requires that every essential witness testify whenever there is not a guilty plea. Because formal pleas were never rendered in Metro and Gotham, it could be argued that all necessary witnesses should have testified in every hearing. However, we rejected this argument, principally because we wanted to know whether all necessary witnesses were *present,* not whether in fact they *testified.* The objective was to determine to what degree the action of the juvenile court judge in *Gault,* when he stated that the complainant did not have to be present, was unusual, or whether it would occur even after the Supreme Court's decision. Moreover, it was not difficult to report accurately who was present during a hearing, but our observers sometimes did experience difficulty in reporting everyone who spoke and the complete substance of what they said. If, during an informal hearing with multiple parties, suddenly everyone spoke at once, the observer might have missed one or more "witness's testimony." With these concerns in mind, the following categories were formulated: "full confrontation"—all essential witnesses present in the courtroom regardless of whether they testified; "partial confrontation"—one or more of several essential witnesses present regardless of whether any testified; and "no confrontation"—no essential witnesses present. The table below shows the data analyzed according to these categories.

85. As a result, the same cases, with but one exception, have been analyzed in the two categories, *i.e.,* 121 cases were deemed relevant for the privilege against self-incrimination and 122 cases have been included in the right to confrontation sample. The additional case in the confrontation category is explained in Table 2, note d, *supra.* The standards of relevancy are set forth on pages 497-500, *supra.*

TABLE 8

COMPLIANCE WITH THE RIGHT TO CONFRONTATION REQUIREMENT

Type of Compliance	*Gotham*		*Metro*		*Zenith*
	N	%	N	%	N
Full Confrontation	(20)	38	(14)	22	(3)
Partial Confrontation	(16)	30	(42)	68	(0)
No Confrontation	(17)	32	(6)	10	(4)
TOTAL NUMBER OF YOUTHS	(53)		(62)		(7)

In Zenith, of the seven cases deemed relevant for purposes of the right to confrontation, full opportunity for cross-examination of witnesses was found in three cases, and no confrontation in four. But in the four cases lacking confrontation, admissions to the offense were entered by the respondent, and, as noted previously, the plea-taking procedure is sufficiently formalized in Zenith to make it comparable with criminal cases. Indeed, the pattern in Zenith is normally what one expects in a formal prosecutorial system—full confrontation afforded when there is a denial and no confrontation if an admission is entered.

In Gotham the right to confrontation was more frequently afforded the respondent than were the other requirements of *Gault*. In 20 of 53 cases (38%), there was full confrontation; but in 16 cases (30%), only some of the necessary witnesses were present and available for cross-examination, and none were present in 17 cases (32%). In Metro, by contrast, the majority of cases, 42 (68%), fell into the "partial confrontation" category. Complete failure of confrontation was relatively rare, occurring in only 6 cases (10%), and full confrontation was found in 14 cases (22%).

VII. ARGUABLE JUSTIFICATIONS FOR FAILING TO IMPLEMENT GAULT

The previous discussion has noted that failure to comply with *Gault*'s rules was widespread, particularly in Gotham and Metro and to a lesser extent in Zenith. The following section presents an examination of several arguable justifications for failing to abide by the Supreme Court's pronouncements.

Admissions of Guilt

In Gotham and Metro, we noted that whether the juvenile admitted or denied the offense was unimportant in determining whether compliance with the privilege against self-incrimination and the right to confrontation were relevant. Admissions in these cities were testimonial in nature and could be considered neither a waiver of the privilege against self-incrimination nor of the right to confrontation. (In Zenith, by contrast, where formal pleas were obtained, admissions and denials were taken into account as they affected these rights.) But what if, in all the Gotham and Metro cases where violations of these rights were reported, the juveniles did admit their involvement in the offense? Despite being testimonial in nature, these admissions (though insufficient from a legal standpoint) might provide as a practical matter justification for not complying with *Gault*'s requirements.

In the tables below, which include only Gotham and Metro, the juvenile's "plea" has been cross-tabulated with advice of the privilege against self-incrimination and compliance with the right to confrontation.

Table 9 discredits any suggestion that failure to implement the self-incrimination privilege occurred only when youths admitted their involvement. In Gotham, where the privilege was never mentioned, 17 youths denied the charges completely, and 9 denied at least one of several offenses with which they were charged. Metro's record was only slightly better—18 youths either denied all or some of the offenses and were either not advised of the privilege or were advised prejudicially.

Table 10 reflects that witnesses are apt to be called and testimony sometimes adduced without regard to whether the respondent admits or denies the offense. Why, for example, should there be full confrontation in eight cases in Gotham and three in Metro where the youths admitted the offense? It seems that these courts were not particularly concerned with obtaining a plea, but followed the practice of holding an informal hearing regardless of the juveniles' statements concerning the charges. Occasionally (as in the cases of 16 youths in Gotham and 10 juveniles in Metro) the informal hearing resulted in a complete or partial failure of confrontation when respondents denied either all or some of the charges.

Historically, it has been argued that the overwhelming majority of youths admit their involvement in juvenile courts, and that attorneys

and adversary procedures are therefore unnecessary. This position obviously has no force as a legal justification for not applying *Gault*'s rules. But even on its own terms the argument is not persuasive. The "plea" data from Tables 9 and 10 and the similar data for Zenith provide a composite picture of pleas for the three cities.

TABLE 9

JUVENILE'S "PLEA" AND PRIVILEGE AGAINST SELF-INCRIMINATION

Type of Plea	*GOTHAM*			*METRO*		
	Full Advice	Full Advice—Also Prejudicial	No Advice	Full Advice	Full Advice—Also Prejudicial	No Advice
	N	N	N	N	N	N
Admit	0	0	20	0	6	29
Deny	0	0	17	1	9	7
Part admit, part deny	0	0	9	0	1	1
No plea taken	0	0	7	0	1	7

N = number of youths.

TABLE 10

JUVENILE'S "PLEA" AND CONFRONTATION

Type of plea	*GOTHAM*			*METRO*		
	Full confrontation	Partial confrontation	No confrontation	Full confrontation	Partial confrontation	No confrontation
	N	N	N	N	N	N
Admit	8	5	7	3	28	4
Deny	9	6	2	8	8	1
Part admit, part deny	1	5	3	1	1	0
No plea taken	2	0	5	2	5	1

N = number of youths.

TABLE 11

"PLEAS" OF JUVENILES IN ALL CITIES

Type of Plea	*Gotham*		*Metro*		*Zenith*	
	N	%	N	%	N	%
Admit	(20)	38	(35)	56	(4)	22
Deny	(17)	32	(17)	27	(1)	6
Part admit, part deny	(9)	17	(2)	3	(0)	0
No plea taken	(7)	13	(8)	14	(13)	72
TOTAL NUMBER OF YOUTHS	53		62		18	

The incidence of admissions in Gotham and Metro is not great enough to permit argument that the right to counsel only adds a foreign element to an *ex parte*, uncontested inquiry into the child's best interests. In Metro, although 35 youths (56%) admitted the offense at some point in the proceedings, and 2 more (3%) made partial admissions, either a denial was entered or no plea was taken in the cases of 25 youths (41%). In Gotham 24 youths (45%) either denied wholly their involvement in the offenses or were never asked. That 13 youths (72%) in Zenith did not enter a plea is attributable to that court's arraignment procedure, where the cases frequently were continued for a lawyer without a plea being taken.

Loss of Liberty

If in those cases where *Gault*'s requirements were violated the courts' dispositions were probation or something less severe, it could be hypothesized that the judges somehow had decided in advance that there was no chance of incarceration, and that *Gault*'s requirements therefore did not apply. Surely if none of the cases reported in this article had resulted in loss of liberty, this would be substantial mitigation of the sometimes flagrant disregard of constitutional rights.

RIGHT TO COUNSEL

The table below, which includes only cases where delinquency adjudications were made, relates compliance with the right to counsel to the disposition ordered.

In Zenith, both youths committed to an institution received full advice of the right to counsel. The other two youths found delinquent did not receive a final disposition on the day our fieldworker attended

court, and they were not held in custody, pending a social investigation. Although this sample is too small to be considered conclusive, it is extremely unlikely that judges in Zenith prejudged cases in terms of which ones were likely to involve commitments, since so many of the hearings were continued for the appointment of counsel.[86]

In Metro, none of the 22 youths committed to an institution received an adequate warning of the right to counsel. An interesting pattern emerged, however. In 20 of the 22 commitments, at least some mention of the right to counsel was made, even if incomplete in content and prejudicial in manner. Moreover, in 10 of the 12 cases where the respondent was committed, but execution of the sentence suspended, some notification of the right to counsel was rendered. But in cases that did not involve a commitment, the instances of some mention and no mention of the right were divided about equally. In view of this overall pattern, it may be inferred that judges had an idea before the hearing began whether incarceration was likely, and in cases where it was, took care to mention the right to counsel.[87]

In *Gault*, the Supreme Court held that the guarantees announced were applicable in every delinquency hearing that entailed the possibility of incarceration,[88] and under the statute governing Metro's juvenile court, commitment to an institution is possible in every case where a minor is charged with delinquency.[89] If there was a way by which

86. See page 498, *supra*.

87. The relationship is particularly striking when the categories of "Committed to institution" and "Committed to institution—sentence suspended" are combined and then correlated with whether any mention was made of the right to counsel:

Disposition	Fully Advised, Partially and/or Prejudicially Advised of Right to Counsel	No Mention Made of Right to Counsel
Committed to institution and committed to institution—sentence suspended	30	4
All other dispositions	7	13

This distribution yields a lambda of .40 (a directly interpretable measure of association for nominal scales). See L. C. FREEMAN, ELEMENTARY APPLIED STATISTICS 71-78 (1965). Although a chi-square test of significance is not strictly applicable, due to lack of random assignment, computation of this statistic yields a value of 14.17, p. $<$ .001. It is obvious that there is an unusually strong relationship between institutionalization and the likelihood that a child will in some manner be told of his right to a lawyer.

88. 387 U.S. 1, 41.

89. The state statute governing Metro's court provides that

> If the court finds that the child . . . is delinquent . . . it may by order entered proceed as follows: (A) Place the child . . . in an institution . . . ; (B) Commit

(Footnote continued on p. 533.)

TABLE 12

RIGHT TO COUNSEL AND DISPOSITIONS—DELINQUENCY ADJUDICATIONS ONLY

Disposition	*GOTHAM*			*METRO*			*ZENITH*			Total
	Full Advice	Prej. and/or Partial Advice	No Advice	Full Advice	Prej. and/or Partial Advice	No Advice	Full Advice	Prej. and/or Partial Advice	No Advice	
	N	N	N	N	N	N	N	N	N	
Committed to institution	0	0	11	0	20	2	2	0	0	35
Committed to institution—sentence suspended	0	1	10	1	9	2	0	0	0	23
Disposition continued (not held in custody)	0	0	4	0	2	2	0	2	0	10
Disposition continued (held in custody)	0	1	7	0	0	5	0	0	0	13
Probation	0	1	9	0	3	4	0	0	0	17
Other	0	0	1	0	2	2	0	0	0	5
TOTAL	0	3	42	1	36	17	2	2	0	103

N = number of youths.

Metro's judges estimated the likelihood of commitment before the adjudicatory hearing, this process was informal in nature and not binding upon the court should the evidence at the hearing have differed from preconceived notions.

In Gotham, the results admit of only one interpretation—a consistent failure to implement the right to counsel. None of the 11 youths committed to institutions was informed in any way of his right to retained or appointed counsel, and only 1 of 11 juveniles who received a suspended commitment was partially advised of the right. Indeed, the right was mentioned in only 3 of 45 cases where a delinquency adjudication was made. Advice of the right to counsel obviously was not dependent upon the likelihood of incarceration, nor on any other considerations.

PRIVILEGE AGAINST SELF-INCRIMINATION

Were those youths who were not advised of the privilege spared from dispositions involving incarceration, so that, even if *Gault* was not satisfied, the effect of noncompliance was mitigated? The table below cross-tabulates dispositions in the cases of youths found delinquent with the quality of advice of the right to remain silent.

In Gotham implementation of the privilege was uniformly ignored, for juveniles committed to institutions as well as others. In Zenith, conclusions cannot safely be drawn due to the small sample. In Metro, the privilege was most often mentioned in cases resulting in incarceration. However, the pattern did not extend to cases in which institutionalization was ordered with a suspended sentence, as it did for mention of the right to counsel. Thus, the relation between mention of the privilege and an order of commitment, with or without suspended execution, cannot be predicted.[90]

RIGHT TO CONFRONTATION

Nor can it be argued that there was a failure of confrontation only in cases where commitments did not occur. The table below cross-

(Continued from p. 531.)

the child temporarily or permanently . . . to the youth commission or to a county or district training facility . . . or to any institution, or to any agency . . . authorized and qualified to provide or secure the care, treatment or placement required in the particular case . . . .

90. Combining "commitment" and "suspended commitment" categories (*supra* note 87) and correlating them with the mention of the privilege against self-incrimination yields a lambda of 0 and a chi-square value of 3.34, $.05>p<.10$. There is no discernible relationship between these categories.

TABLE 13

PRIVILEGE AGAINST SELF-INCRIMINATION AND DISPOSITIONS —DELINQUENCY ADJUDICATIONS ONLY

Disposition	*GOTHAM*			*METRO*			*ZENITH*			Total
	Full Advice	Full Advice—Also Prejudicial	No Advice	Full Advice	Full Advice—Also Prejudicial	No Advice	Full Advice	Full Advice—Also Prejudicial	No Advice	
	N	N	N	N	N	N	N	N	N	
Committed to institution	0	0	11	0	13	9	2	0	0	35
Committed to institution—sentence suspended	0	0	11	0	2	10	0	0	0	23
Disposition continued (not held in custody)	0	0	4	0	0	4	0	0	2	10
Disposition continued (held in custody)	0	0	8	0	0	5	0	0	0	13
Probation	0	0	10	0	1	6	0	0	0	17
Other	0	0	1	1	1	2	0	0	0	5
TOTAL	0	0	45	1	17	36	2	0	2	103

N = number of youths.

tabulates the incidence of confrontation with court dispositions where delinquency adjudications were made.

Seventeen of 22 youths committed to an institution in Metro were adjudged delinquent despite the absence of, and lack of opportunity to cross-examine, essential witnesses. The same was true for 10 of the 12 youths committed to an institution with a stay of execution. (Five were held in custody pending a final disposition, and five were placed on probation.) In summary, the cases of a majority of juveniles (36) fell in the partial confrontation category.

In Gotham, the number of full, partial and no confrontation cases were almost equal. Of the youths committed to institutions, four were not confronted with any opposing witnesses, and in the cases of five juveniles the confrontation was incomplete. When a suspended commitment to an institution or probation was ordered, the pattern of confrontation was very similar.

In the cases of the four youths in Zenith adjudicated delinquent, the lack of confrontation is attributable to admissions that were given in that court's arraignment hearing. Admissions in Zenith, as noted previously, were the functional equivalent of a guilty plea in a criminal prosecution, and therefore constituted a waiver of the self-incrimination privilege as well as the right to confrontation.[91]

One inescapable conclusion stands out from these data on the right to confrontation (Table 14), the right to counsel (Table 12), and the privilege against self-incrimination (Table 13). Despite the Supreme Court's concern for protecting youths in jeopardy of losing their liberty, juveniles were at the time of this study and presumably still are remanded to peno-custodial institutions without being afforded their constitutional rights. Indeed, in Gotham not one of 11 youths committed to institutions was told of his right to retained or appointed counsel; not one of these youths was informed of his privilege against self-incrimination, and 9 out of the 11 were not afforded an opportunity to confront and cross-examine all of the witnesses against them. In Metro, 2 of 22 youths ordered institutionalized for indefinite periods were not informed of the right to counsel, and the remaining 20 were not satisfactorily advised of the right. Nine of these 22 youths were in no way informed that they could remain silent, and the other 13 were advised of the privilege in a manner that inhibited its exercise. Seventeen of the youths were adjudicated delinquent without an opportunity to

91. See page 517, *supra*.

TABLE 14

RIGHT TO CONFRONTATION AND DISPOSITIONS—DELINQUENCY ADJUDICATIONS ONLY

Dispositions	*GOTHAM*			*METRO*			*ZENITH*			Total
	Full Confrontation	Partial Confrontation	No Confrontation	Full Confrontation	Partial Confrontation	No Confrontation	Full Confrontation	Partial Confrontation	No Confrontation	
	N	N	N	N	N	N	N	N	N	
Committed to institution	2	5	4	5	16	1	0	0	2	35
Committed to institution—sentence suspended	5	2	4	2	10	0	0	0	0	23
Disposition continued (not held in custody)	3	1	0	2	1	1	0	0	2	10
Disposition continued (held in custody)	3	4	1	0	3	2	0	0	0	13
Probation	3	3	4	2	4	1	0	0	0	17
Other	0	1	0	2	2	0	0	0	0	5
TOTAL	16	16	13	13	36	5	0	0	4	103

N = number of youths.

confront all of their accusers. Only the data from Zenith are reassuring. Both youths committed by that city's court received full advice of the right to counsel and full and neutral advice of the privilege against self-incrimination. Although neither youth was confronted with the witnesses against him, the reasons for this were compatible with the *Gault* decision's requirements.[92]

VIII. THE WAIVER CONCEPT

We have thus far ignored what is perhaps the most troublesome issue in implementing *Gault*'s rulings—the proposition that minors and their parents can waive their newly guaranteed constitutional rights. Our study of *Gault*'s implementation, however, has strengthened the credibility of the alternative proposition—that the concept of waiver of rights in juvenile delinquency proceedings is unrealistic. The Supreme Court in *Gault* assumed without discussion that the waiver doctrine could be imported to juvenile court hearings. Only with respect to the privilege against self-incrimination did the Court concede that "special problems" might be encountered because minors were involved.[93] We

92. Given the overall thrust of the data reported in this part of the article and in sections IV through VI, it is not surprising to find that in Metro and Gotham the overwhelming majority of youths in our sample were adjudicated delinquent. The following table summarizes the outcomes of all cases in the three cities:

	Gotham	*Metro*	*Zenith*
Adjudicated delinquent	45	54	4
Case dismissed	3[a]	0	1
Continued for a lawyer	6	6[b]	11
Continued for witnesses or other evidence, denial entered by youths	2[c]	3	0
Case heard, continued until further order of court, no finding recorded	3	8[d]	2
Total youths in sample	59	71	18

a. This includes one case that was technically dismissed but the juvenile was held in custody for a violation of parole.

b. In three of these cases the evidence against the juvenile was heard by the judge before the continuance was granted.

c. In one case the continuance for a witness was unimportant, since the case against the juvenile turned on an eyewitness identification and the complainant—the only eyewitness to the offense—was unable to make a positive identification.

d. This figure includes two cases where our observer left the courtroom before the conclusion of the case.

93. *In re* Gault, 387 U.S. 1, 55 (1967). The failure to consider the waiver issue with care is especially surprising because several of the justices displayed great interest in the question during oral argument.

submit that these special problems are extremely serious, and that a review of the appropriateness of this doctrine for juvenile courts is necessary.

If, as the Court assumed, minors can relinquish the rights guaranteed by *Gault*, their action must be "knowing and intelligent," [94] a standard implying a sophistication and capacity not usually associated with children. Following a waiver, the Court necessarily assumed that the rights relinquished would still be meaningful in operation. To the extent *Gault* sanctioned parental participation in the decisional process, the Court assumed a unity of interest between parent and child that is not only frequently absent, but the presence of which may be impossible to determine with any real confidence. The Court implicitly assumed that minors and their parents are capable of intelligent and objective waivers of their rights, despite the social factors present in juvenile court proceedings which militate against such results. Nor did the Court consider the minor's capacity in the light of established legal principles deemed applicable to minors.

In General

In deciding whether an accused has effectively relinquished a fundamental constitutional right, courts have inquired whether the waiver was "knowing and intelligent." [95] This rule has been applied to juveniles as well as to adults, youth being one of many relevant facts.[96] The fact of minority, even when combined with subnormal intelligence,[97] or poor education,[98] has been held to be among the totality of circumstances according to which validity of a waiver must be judged. This test was recently affirmed in a decision by the California Supreme Court, *People v. Lara*.[99] Alvarez, a codefendant, was 17 at the time of his arrest. He had reached the ninth or tenth grade, and while he was Mexican-American, there was no evidence of his language skills. It was

94. *Id.* at 42.

95. Johnson v. Zerbst, 304 U.S. 458 (1938).

96. Williams v. Huff, 142 Fed. 91 (D.C. Cir. 1941); People v. Hardin, 207 Cal. Supp.2d 336, 24 Cal. Rptr. 563 (1962); Carpentier v. Lainson, 248 Iowa 1275, 84 N.W.2d 32 (1957).

97. Shaffer v. Warden of Md. House of Correction, 211 Md. 635, 126 A.2d 573 (1956).

98. *See* United States v. Dunbar, 55 F. Supp. 678 (E.D.N.Y. 1944) ("limited schooling"); *Ex parte* Ray, 87 Okla. Crim. 436, 198 P.2d 756 (1948) (3d grade).

99. 62 Cal. Rptr. 586, 432 P.2d 202 (1967).

unquestioned that he was mentally retarded, with an IQ between 65 and 71, and a "mental age" of 10 years and 2 months.[100] Against this, the police testified that Alvarez seemed "cognizant and aware," that he had a substantial prior record, and that he had been informed of the rights then obtaining in California under *People v. Dorado*.[101] Based on these facts, it was determined that he could have, and had in fact, made a competent waiver of rights during interrogation.[102]

Regardless of whether this decision represents a correct application of the "totality of the circumstances" test, it nevertheless indicates the inappropriateness of the test itself, at least as applied to minors. The Supreme Court heretofore has "always set high standards of proof for the waiver of constitutional rights," [103] and has further required that courts indulge every reasonable presumption against the waiver of such rights.[104] As long ago as *Powell v. Alabama*,[105] the Court held that the right to be heard in many cases would be meaningless without the assistance of counsel.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[106]

Adequate conduct of a trial is not a simple matter. At the outset, the accused must decide whether to admit or deny the charge against him. There are many situations in which the defendant, especially a

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100. *Id.* at 595, 432 P.2d at 211.

101. *Id.* at 594, 432 P.2d at 210.

102. *See* People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968), holding that a murder confession was not inadmissible "merely because of his youth [14 years of age] and below normal mental faculties [mental age of 9 years, 9 months]."

103. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

104. Carnley v. Cochran, 369 U.S. 506 (1962).

105. 287 U.S. 45 (1932).

106. *Id.* at 69.

juvenile, simply does not know whether his conduct was legally wrong, and many in which he may conclude that his actions were illegal where, in fact, they were not.[107] He may not be certain of the precise nature of the offense alleged until he actually appears in court, if the notice of charges is brief or vague, or if he does not receive it until the court date. Traditionally it was the practice of many juvenile courts to use an affidavit or petition merely stating that the respondent was delinquent in that he "did violate a state law," or "was incorrigible." Although the *Gault* case established that such notice of charges is unconstitutional,[108] an uncounseled juvenile is almost surely unaware of this, and unless it is challenged the judge may not inquire into, or act upon, the sufficiency of notice of the petition.

There are, of course, many other factors relevant to the giving of a plea. It may be, for instance, that while the respondent has committed the alleged offense, the only evidence against him has been obtained illegally. The advisability of some sort of plea bargaining may present a question. A youth may be charged with an auto theft in which he was not involved, although he had been in the car with the knowledge that it was stolen. For many reasons, it may be to his advantage to enter a guilty plea to the lesser charge, a course of conduct usually not open without the assistance of an attorney.[109]

Thus, it appears that the taking of a plea, and especially of a guilty plea, from an uncounseled minor is a most dubious practice. It has been observed, with reference to adult cases, that:

> Inferences of waiver from a plea of guilty or from failure to request counsel are inconsistent with the basic right itself. The apparent intent of *Gideon* is that counsel must be made available to indigent defendants at all important stages of the criminal proceeding. Certainly, the entry of a

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107. Such a situation may arise where, for example, a youth is charged with criminal trespass to a vehicle. This offense typically applies where the accused has knowingly entered a vehicle without the authority of the owner. One unsophisticated in law may not surprisingly conclude that the mere fact of having ridden in what turned out to be a stolen car constitutes guilt of the offense charged. His erroneous conclusion may be reinforced by the fact that he is treated as guilty by the police and the juvenile court's intake officer, as indicated by the fact that he is arrested, questioned and then referred to court as a delinquent.

108. 387 U.S. 1, 33.

109. Admittedly, plea bargaining is not so great a factor in juvenile cases as in adult prosecutions, because the result of having been found involved, no matter what the charge, is the same (*i.e.*, delinquent) and because dispositions, since they take into account the social record of the child, are not directly related to the underlying charge.

> plea is an act which itself requires counsel. . . . It is internally illogical to presume a waiver of the right to have counsel appointed from an act which can only be intelligently exercised with the aid of counsel.[110]

If entry of a plea requires the advice of counsel, it is not only illogical to presume a waiver of the right from the plea, but it is also inconsistent to allow waiver at that stage in any manner. And if there is some question as to whether an adult can effectively waive the right to counsel at the plea-taking stage, is it not more doubtful that a juvenile is competent to do so. Undeniably, the decision in making a plea involves a highly sophisticated judgment requiring a certain degree of information and experience. In most other areas of the law, a juvenile is presumed to possess neither,[111] and a contrary presumption where liberty is at stake should not be embraced unreflectively.

If the charge is denied by the youth, the presence of an attorney would appear to be an important guarantee of the integrity of the guilt-determining process. *Powell v. Alabama* first pointed out the inability of even the educated and mature layman to defend himself in a court of law. The importance of counsel's participation has repeatedly been affirmed, and in *Gideon v. Wainwright*[112] the Supreme Court decided that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [113]

These considerations led not only to establishment of the right to counsel, but to considerable reluctance in accepting waiver of that right.[114] Surely the problems are even greater when the accused is a juvenile. He is no better, and almost surely less well informed than

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110. Comment, *Waiver of the Right to Counsel in State Court Cases: The Effect of* Gideon v. Wainwright, 31 U. CHI. L. REV. 591, 601 (1964).

111. See text at notes 151-178, *infra.*

112. 372 U.S. 335 (1963).

113. *Id.* at 344. The difficulty of the defendant's position is, of course, maximized where the State's Attorney's Office appears for the people. Speaking of adult cases, the United States Supreme Court has recognized that "A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance and bewilderment." William v. Kaiser, 323 U.S. 471, 476 (1943). While most juvenile courts do not now employ the services of the prosecutor's office, Gault recognized that the situation of a minor before the court is such that the right to counsel is of fundamental importance even without prosecutorial participation. The present trend, it may be noted, is toward bringing the State's Attorney into juvenile court, and the Vera Institute of Justice has recently begun a study directed to that end for New York City.

114. See text at notes 103-04, *supra. See generally* Comment *supra* note 110.

an adult appearing in court, and the fact that it is a family court makes very little difference in the minor's ability to present his case. As the *Task Force Report on Juvenile Delinquency and Youth Crime* points out:

> The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge.[115]

It cannot be expected that examination of prosecution witnesses by a juvenile will contribute much to the elucidation of facts.[116] In addition, he will not be able to present his own side of the story convincingly. If there are witnesses, he may not know which he should ask to appear for him, and if witnesses are not eager to appear, the respondent will not know how to compel their attendance. Even his own presentation may be sorely prejudiced by his lack of knowledge and experience.

> For the Court to ask a respondent child or adult to tell his version of an incident and then proceed to question them about it is likewise meaningless. These people, often frightened and bewildered, are in no position to make a full factual disclosure to the Court. The task of proper examination of witnesses and aiding a respondent in the telling of his story belong to an attorney. . . .[117]

The fact that the judge is in a sense charged with the protection of the youths' rights does not and cannot alleviate the necessity for participation of counsel. In no reliable sense does the judge effectively represent the respondent, even though he may state, or even believe to the contrary.[118] The *Gault* case itself rejects the adequacy of judicial representation.

> The probation officer cannot act as counsel for the child. . . . Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of the court.[119]

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115. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, *supra* note 2, at 32.

116. See text at note 135 *infra.*

117. C. Schinitsky, *The Role of the Lawyer in Children's Court,* 17 RECORD OF N.Y.C.B.A. 10, 15 (1962), quoted in TASK FORCE REPORT at 32.

118. *See* H. Pollock, *Equal Justice in Practice,* 45 MINN. L. REV. 737, 741 (1961).

119. 387 U.S. at 36, citing Powell v. Alabama, 287 U.S. 45, 61 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

The traditional family court judge may well feel that his duty to the child is not necessarily to ensure that the evidence against him is legally admissible, or to protect him from a finding of delinquency if such finding appears to be in the minor's best interest. Consequently his interpretation of the nature of representation may differ radically from that of the usual defense attorney.[120]

In *Gault*, the Court required procedural regularity in delinquency proceedings in the belief that "the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts," [121] and because failure to abide by these requirements has "resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." [122] Toward this end, notice of charges, the privilege against self-incrimination, and rights of confrontation and cross-examination were all established, with the recognition that the right to counsel is necessary to give these procedures vitality. The following statement by the President's Crime Commission on the necessity of counsel for the implementation of the other rights was quoted by the Court:

> The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence . . . have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke these rights effectively.[123]

Certainly the relevance of this question to meaningful exercise of the privilege against self-incrimination is obvious. The United States Supreme Court pointed out in *Griffin v. California*[124] that the decision

120. One former juvenile court judge in Los Angeles made it a practice to call attorneys into chambers to explain that "his function in juvenile court was very different from that of counsel in any other kind of court . . . ," and that he could best serve his client's interests "by helping to interpret the philosophy of the court to the ward . . . " W. McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843, 846 (1961). The same judge met the suggestion by counsel that strict rules of evidence be followed by stating that it would then be necessary to transfer the case to criminal court. "This suggestion usually brought a change of attitude in belligerent counsel." *Id.*

121. 387 U.S. 1, 21.

122. *Id.* at 19-20.

123. *Id.* at 38, n. 65.

124. 380 U.S. 609 (1965).

whether or not to testify may be based on complicated considerations, quite apart from guilt or innocence.

> It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious nature, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.[125]

In delinquency cases we are dealing with what are sometimes called "younger minors" as opposed to those youths who are over 18 years of age. A 13- or 14-year-old child, appearing before the juvenile court, can in no meaningful or realistic sense "be expected to make an informed and intelligent decision on whether to speak, and speaking without a lawyer to put his disclosures into context and to develop aspects of the events favorable to him might seriously jeopardize his interests." [126] This observation, while made with specific reference to the propriety of drawing inferences from the failure to testify, indicates with equal force that, without the assistance of counsel, the privilege may be of little real value to the juvenile. The necessity for someone trained in law to help the youth in elucidating the facts, the relevance of which may not be understood by the subject, and the unsuitability of the judge or probation officer to that function, have already been demonstrated.

The right to confrontation, which enjoys the protection against casual relinquishment accorded to other fundamental constitutional rights,[127] is closely linked to the right to counsel. In *Pointer v. Texas*,[128] the state introduced in evidence the statements of a witness under oath during a preliminary hearing. Pointer and Dillard, a codefendant, seemingly were accorded the opportunity to cross-examine the complaining witness, Phillips, and in fact Dillard tried to do so. The question before the court was phrased as follows: ". . . petitioner's objection is based . . . on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity *to have the benefit of counsel's cross-examination* of the principal witness against him. It is that latter ques-

125. *Id.* at 613, quoting Wilson v. United States, 149 U.S. 60 (1892).

126. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, *supra* note 2, at 37.

127. *See* Brookhart v. Janis, 384 U.S. 1 (1966).

128. 380 U.S. 400 (1965).

tion which we decide here." [129] The court held that Pointer had been denied the right to confrontation under the sixth amendment ". . . because the transcript of Phillips' statement . . . had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine . . ." [130] and observed that: "The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing *at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.*" [131]

In view of the repeated emphasis upon the lack of counsel to undertake the cross-examination, it could be argued that participation of an attorney is necessary to satisfy the right to confrontation.[132] Indeed, in both *Douglas v. Alabama*[133] and *Brookhart v. Janis*[134] the court indicated that it would closely scrutinize a waiver of the right to cross-examine, even when purportedly made by the defendant's counsel on behalf of the accused. According to this analysis, in all cases where the respondent appears without counsel, the confrontation guarantee is not satisfied even if the witnesses in fact testify and there is an opportunity for cross-examination. Greater justification for such a position arises where the unrepresented person is a juvenile, who cannot be expected to cross-examine meaningfully those appearing against him, particularly if they are adults. A juvenile usually does not know the elements of the charge to which his questioning should be directed, nor would he be able to secure the information that might be useful for impeachment purposes, even if he knew how to proceed once he had it. In many instances, he will not understand the substance or the significance of testimony that he is to cross-examine. However, the minor is expected to subject to searching scrutiny on a more or less equal footing the statements of those who have always been placed in authority over him. Charles Schinitsky, the Director of the New York Law Guardian Program, has made the following observation:

> In almost every hearing, the judge will ask the respondent if he desires to question a witness who has testified. The respondent may be an eleven

129. *Id.* at 403 (emphasis added).

130. *Id.* at 407.

131. *Id.* (emphasis added).

132. *See* Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366, 367 (1966).

133. 380 U.S. 415 (1965).

134. 384 U.S. 1 (1966).

> year old child, or a foreign speaking adult, and the witness may be a police officer or a social investigator. To ask such respondents to cross-examine experienced witnesses in a court of law is to dignify a form of procedure and nothing more.[135]

Even if the right to cross-examination is waivable without the assistance of counsel, it would seem that the underlying waiver of right to counsel must be constitutionally adequate, and it would follow that no waiver of the right is possible where the right to counsel has not been intelligently and knowingly relinquished.

Parent-Child Relations and the Waiver Doctrine

In suggesting that the rights guaranteed by *Gault* were subject to waiver, at least in some circumstances, the Court appeared to place substantial reliance on the participation of the parents in the decision process. In holding that Mrs. Gault's knowledge that she could have appeared with counsel did not constitute a waiver of the right "which she and her juvenile son had," the majority seemed to indicate that had the Gaults been properly informed of the right to retained or appointed counsel, Mrs. Gault could have effectively relinquished "their right."[136] With regard to the privilege against self-incrimination, 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."[137] The thrust of this statement appears to be that, where the respondent is extremely young, and it is evident that he cannot be found to make an "intelligent and competent" waiver of the privilege, a parent may do so on his behalf, assuming the latter's relinquishment is "intelligent" under ordinary standards. But such a rule cannot easily be dismissed as a matter of "technique" if, as the Court maintains, the privilege applies to juveniles as it does to adults. The privilege against self-incrimination, as all other privileges, is personal to the claimant,[138] and ordinarily no person can claim the privilege for, or on behalf of,

135. Schinitsky, *supra* note 117.

136. 387 U.S. at 41-42.

137. *Id.* at 55.

138. "The privilege is that of the person under examination as witness and . . . is intended for his protection alone." 8 WIGMORE, EVIDENCE §2270, at 414-15.

another.[139] It may be argued, however, that the adult in this situation can be thought to act, in a sense, as the youth's attorney, since the parent would not be exercising the child's privilege for the benefit of another person.[140]

Placing reliance on parental participation in the exercise of these rights is not only unusual (the very existence of this practice indicates, in a sense, the difficulties in applying waiver in the juvenile court context) but fraught with danger. In a substantial number of cases, the parent is himself the complaining witness, and probably hostile to the respondent's position. A case from Zenith illustrates this problem. The minor was charged with the theft of $80 from his mother, who brought the charges. The mother stated that she did not want the child at home. It further appeared that the mother was responsible for keeping the child in detention pending adjudication and that she had refused the services of a lawyer for her son. The same situation arises in almost all cases where the delinquency petition alleges "incorrigibility" or "runaway," since the parent is necessarily the complainant. It is obviously no guarantee of the right to counsel, or of the other rights, to allow the parent to waive these rights where his position is obviously antagonistic to the child's.[141]

It may be suggested that where there is what we have termed an "explicit conflict" (i.e., the parent is the complaining witness), the court can adequately respond by appointing a guardian ad litem or counsel. Regardless of whether this suggestion provides a desirable basis for deciding whether a minor will enjoy the benefit of legal assistance, it does not satisfactorily dispose of those cases where conflict is present, but the parent does not happen to be the complaining witness. It frequently occurs that parents manifest hostility toward the child, and disapprobation of his conduct, generally or particularly. This "implicit conflict" may take many forms. In a glue-sniffing prosecution in Metro, the father volunteered that "the boy would not tell him

139. *Id.*, n. 1.

140. If the child is of very tender years, and as a practical matter could not be found to make a valid waiver, and appeared through counsel, the attorney, should he decide to have the youth testify, would in effect waive the minor's privilege on his behalf. The child himself, by hypothesis, is not capable of making an effective waiver, and if he is incompetent for that purpose, it is clear that the decision to take the stand is for all intents and purposes made by the lawyer, though for the child's benefit. The Supreme Court apparently suggests that this decision can be made by a parent as well as by counsel, assuming he is present and competent.

141. *See In re* Sippy, 97 A.2d 455 (D.C. Mun. Ct. App. 1953).

anything" and further stated that his wife had found "a bag in the basement," thereby implying the use of glue in the home. In another Metro case, the police officers present stated that they had enjoyed the cooperation of both parents, and further recalled that the father had previously brought his son to the police "for discipline." Again, another mother complained to the probation officer (and repeated to the court) that the boy continued to roam the street at night, and "was definitely out of her control." All this is not to say that the parents somehow acted wrongly; but rather that we cannot with great confidence entrust the child's legal rights to their custody, since their expressed feelings are to some extent inimical to what may be the child's legal interest.

The table below indicates the extent of explicit and implicit conflict in the cases observed.

TABLE 15

INCIDENCE OF CONFLICT BETWEEN PARENT AND CHILD

Type of Conflict	*Gotham*		*Metro*		*Zenith*	
	N	%	N	%	N	%
No apparent conflict	(40)	68	(54)	76	(16)	89
Implicit conflict	(9)	15	(9)	13	(0)	0
Explicit conflict	(10)	17	(8)	11	(2)	11
TOTAL NUMBER OF YOUTHS	59		71		18	

It appears that in approximately 10% of the cases in Zenith, one-fourth of those in Metro, and one-third of those in Gotham, significant hostility was expressed by the parent concerning the minor respondent. In 17% of those in Gotham and in 11% in Metro and Zenith, the parent was at the same time the complaining witness. It will be appreciated that these are rough measures indicating only evident conflict; that is, conflict manifested during the proceeding itself. As such, they may be taken as understating, if anything, the extent of such conflict. In addition, there are many instances in which the parent may be largely disinterested or apathetic toward the proceedings, or where he feels embarrassed or inconvenienced by the necessity of appearing at court. If the parent is so affected, he may wish to get the ordeal over with as quickly as possible in order to get home to other children, or back to

work, or to avoid further expenses which he can ill afford, or to avoid further embarrassment. He may find further justification for his actions in the belief that his child would not be before the court if he had not done *something* wrong, and in a concomitant disinclination to "uphold" the child's wrongdoing, whatever it may be. In these situations, the parent's concern, while understandable and indeed not blameworthy from his point of view, obviously does nothing to ensure that the respondent makes an intelligent and informed decision as to either his plea or his conduct of the case generally.

This conflict, even where manifest, typically does not become evident until the adjudication has progressed to some extent. Witnesses may have been heard, and the opportunity for cross-examination lost. If the problem is to be cured by appointment of counsel when conflict becomes evident, a new trial will be required in almost all cases, greatly increasing the expenditure of time and resources. Moreover, it should be recognized that this solution is available only where the conflict becomes apparent to the court; otherwise, the court simply must assume that the parent is devoted to the protection of his child's rights and interests—a position that cannot be taken with great confidence.

Even where the parent is inclined to support the child, the "competence" required on the part of an adult to waive his right is very different from the "competence" of an attorney. It is not assumed that the average, or even the educated, intelligent layman can effectively plead and try his own cause; indeed, the contrary has expressly been stated in Supreme Court decisions.[142] Competence in the former sense generally means only that the adult is of adequate or normal intelligence and apparently suffers from no gross mental disorder. The latter, of course, implies far more knowledge and experience of the specialized sort involved in legal proceedings. While it may be acceptable to say that the first will suffice as a basis for allowing the adult to accept the risk of conducting his defense, it by no means necessarily follows that this standard can meaningfully be transferred to his waiver of the rights of others.

Social Factors and Communication

As a result of the *Gault* decision, the right combination of words is decisive in determining whether constitutional rights are afforded and whether parties have waived these rights. The assumption is that intel-

142. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 69 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

ligent waiver is possible when the warning of rights is legally adequate. We submit, however, that a realistic appraisal of any alleged waiver must be assessed against more than the background of the judge's language and the words spoken by the parties. Indeed, the notion that parents can intelligently relinquish constitutional rights (particularly for their children) while conversing with a judge in his courtroom is extremely dubious in light of the social conditions that invariably influence these conversations.

Message content is only one of many factors that influence communications. According to principles of role theory, people interact with one another in accordance with their social positions.[143] The importance of this in communication has long been noted by professional interviewers. One standard reference states that the behavior of each member of an interview situation "is determined to a considerable extent by his perception of the other: his perception of the other's status and power position, the other's probable views, and the other's similarity to people with whom he interacts or would like to interact." [144]

Historically, juvenile courts have sought to make delinquency hearings less formal than criminal proceedings, in an effort to present a picture of benevolent authority. Fulfillment of this ideal notwithstanding, even the most benign judge is in a position to exercise awesome authority over the juvenile and his family. The literature dealing with interview situations illustrates why this unequal power influences the communication process:

> An essential element of the interviewer's role is that he should not be in a position to control sanctions affecting the respondent. He should be *outside* the power hierarchy in which the respondent normally finds himself. If he is not, the respondent will attempt to put himself in such a light as to gain the interviewer's support and avoid his censure, and will not talk freely about the topic where he fears he might discredit himself.[145]

However benevolent the juvenile court process, the judge is in a position to control sanctions. It is therefore reasonable to suppose that statements made by a youth or his parents will be influenced by their

143. A short but comprehensive discussion of role theory is found in T. Sarbin, *Role Theory*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 223 (G. Lindzey ed. 1954).

144. E. Maccoby and N. Maccoby, *The Interview: A Tool of Social Science*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 462 (G. Lindzey ed. 1954).

145. *Id.* at 463.

desire to present themselves in the best possible light. When a judge hints that legal representation might be a good idea, the parties are apt to accept the court's appointment of counsel. Conversely, when a judge, verbally or otherwise, implies that he would like to hear the case now, who are the respondents to argue?

The judge's power is enhanced by the relatively low economic status of many of the court's "clients." Low status and lack of power over the vagaries of bureaucratic structures may lead to a state of situational dependency:

> The problems of the poor are not so much of poverty as of a particularly difficult variety of situational dependency, a helplessness to affect many important social factors in their lives, the functioning or purpose of which they do not understand, and which are essentially unpredictable to them.[146]

Those who are poor and accused of delinquency may not only be influenced by the content of the judge's communication, but also may feel helpless to take affirmative action in their own behalf.[147]

Communication of rights to children is complicated by their inability to withstand suggestion: "Children are particularly susceptible to suggestion, and can be counted on to answer leading questions in the predicted way. This is a weakness in capacity, and we counter-act it by asking multiple questions on the same topic." [148] Another authority explains it this way:

> They are accustomed to taking cues from adults when they are unsure about what they should say or do, and they therefore are quick to agree with the interviewer if he says, "I imagine you feel [think] thus and so, don't you?" The usual rules about non-directive phrasing of questions are, then, even more important for child interviews than adult interviews.[149]

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146. W. Haggstrom, *The Power of the Poor*, in POVERTY IN AMERICA 329 (L. Fermin, J. Kornbluh & A. Haber eds. 1966).

147. "The poor are generally ineffective constituents of legal institutions. They rarely have the motivation or capacity for using legal agencies to their own advantage or for exerting pressures on agencies to remain true to statutory objectives." J. E. Carlin, J. Howard, & S. L. Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 L. & SOC. REV. 9, 43 (1966).

148. Webb, *supra* note 45, at 15.

149. Maccoby and Maccoby, *supra* note 144, at 472. A related problem is the predisposition to respond to questions without regard to their content. This phenomenon, termed a "response set,"

> means there are people who are either very acquiescent or very negative about answering questions. They tend strongly to say yes or no to a question, irrespective

The position of children within a social class may tend to explain and reinforce their susceptibility to suggestion. In attempting to determine the extent of moral knowledge among children, it has been found that a child's perception of moral authority is influenced by his class:

> The institution with moral authority [law government, family, the work order] and the basic moral rules are the same regardless of the individual's particular position in society. A child's position in society does to a large extent however, determine his interpretation of these institutions and rules. Law and the government are perceived quite differently by the child if he feels a sense of potential participation in the social order than if he does not. The effect of such a sense of participation on development of moral judgment related to the law is suggested by the following responses of 16 year olds to the question, "Should someone obey a law if he doesn't think it is a good law?" A lower class boy replies, "Yes, a law is a law and you can't do nothing about it. You have to obey it, you should. That's what it's for." [For him the law is simply a constraining thing that is there. "You can't do nothing about it," means that it should be obeyed.]
>
> A lower middle class boy replied, "Laws are made for people to obey and if everyone would start breaking them. . . . Well, if you owned a store and there were no laws, everyone would just come in and not have to pay." [There laws are seen not as arbitrary commands but as a unitary system, as the basis of social order. The role of perspective taken is that of a storekeeper, of someone with a stake in the order.]
>
> An upper middle class boy replied, "The law is the law but I think people themselves can tell what's right or wrong. I suppose the laws are made by many different groups of people with different ideas. But if you don't believe the law, you should try to get it changed, you shouldn't disobey it." [Here the laws are seen as the product of various legitimate ideological and interest groups varying in their beliefs as to the best decision in policy matters. The role of law obeyer is seen from the perspective of the democratic policy maker.][150]

If one accepts the proposition that many youths appearing in juvenile courts can be classified as members of the "lower class," the above conclusions imply that these children are likely to go along with whatever the court suggests, not because they understand, but because the moral authority of the law (embodied in the words of its representative, the judge) demands obedience.

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of its content. When only one question is used to learn about an area, one runs the strong risk that the response set and not the true feeling of the respondent, will dominate the answer. Thus, it is the response style of the person, rather than his information that you may be getting. [Webb, *supra* note 45 at, 17.]

150. L. Kohlberg, *Development of Moral Character and Moral Ideology*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 383, 407 (L. Hoffman & M. Hoffman eds. 1964).

Responsibility of Minors in Other Areas of the Law

In view of the inability of most juveniles to protect themselves from the consequences of the waiver of rights, or from the forces impelling them to effect a waiver, and because of the difficulties in placing substantial reliance on parental assistance, it may be argued that a minor should not, except in the most unusual circumstances,[151] be held to a waiver of the right to counsel, nor an uncounseled minor to a waiver of the rights to silence, confrontation, and cross-examination. Such a result is not so radical as it might appear at first.

In most other areas of the law, a juvenile is presumed to possess neither the informational nor experiential background necessary to justify holding him to his legal decisions. He cannot be bound by his contracts for personal property on the express assumption that he is immature in both intellect and experience.[152] In most jurisdictions, infancy is a real defense to an action upon a negotiable instrument,[153] the policy being "one of protection of the infant against those who take advantage of him, even at the expense of occasional loss to an innocent purchaser."[154] A minor's contract of partnership is voidable,[155] and if he elects to disaffirm, he may recover the capital he contributed, subject only to creditor's rights, and is not individually liable upon any partnership debts or obligations.[156] With regard to an infant's liability for the torts of an agent, some courts have held him liable as a master.[157] Other courts, however, have retained the view that an infant cannot have a servant, since a finding of vicarious liability would necessarily

151. If, for example, a minor and his parent decided to proceed without an attorney after having consulted with one and decided his services were unnecessary, a valid waiver might be found. *See* Dorsen & Rezneck, *supra* note 29, at 1, 18.

152. Winslich v. Farrow, 159 S.W. 520 (Mo. App. 1942); McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930); Hines v. Cheshire, 36 Wn. 2d 467, 219 P.2d 100 (1950).

153. The usual rule is that infancy is a defense to an action upon a negotiable instrument to the extent that it is a defense to a simple contract. W. BRITTON, BILLS AND NOTES §126 (1943); UNIFORM NEGOTIABLE INSTRUMENTS LAW §22; UNIFORM COMMERCIAL CODE §§3-207 and 3-305, and Comments thereto.

154. UNIFORM COMMERCIAL CODE §3-305, Comment 4.

155. 1 S. ROWLEY, PARTNERSHIPS §6.4 (2d ed. 1960).

156. Pelletier v. Couture, 148 Mass. 269, 19 N.E. 400 (1889); Sacco v. Schallus, 11 N.J. Super. 197, 79 A.2d 143 (1950). *See* 1 Rowley, *id.;* Comment, 28 TENN. L. REV. 395 (1961). Even the limitation of the infant's right to withdraw his capital contribution is attributable to the desire for commercial stability rather than to any belief in the minor's competency. *See* Note, 40 HARV. L. REV. 472, 475 (1927).

157. Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943). *See* W. SEAVEY, AGENCY §14 (1964).

involve recognition of an underlying agency contract, and such a finding is impermissible.[158] It has been suggested that in cases such as these: "*The result should not depend upon whether the infant has capacity,* but whether it is or is not good policy to require him to be responsible for the unauthorized acts of those employed to act for him." [159]

The common law rule that a minor could not devise real property[160] has been retained in some states,[161] while others have lowered the age to 18.[162] Since it is clear that an infant can *own* property, both real and personal,[163] the reason for these rules must lie in the presumed incapacity of a minor to make an intelligent scheme of distribution. Thus, even though minimal capacity is normally required to make a valid testamentary disposition,[164] it appears that a minor is deemed to lack even that.

An infant is capable of suing and being sued, but ordinarily he must be represented by someone charged with protecting his interests throughout any litigation by which his interests may be affected.[165]

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158. Hodge v. Feiner, 388 Mo. 268, 90 S.W.2d 90 (1936); Wilcox v. Wunderlich, 73 Utah 1, 272 Pac. 207 (1928).

159. SEAVEY, *supra* note 157 (emphasis added).

160. *See* H. Wood, *Validity of Transactions with Minors and Incompetents,* 1951 U. ILL. L.F. 212, 217. It appears that a youth over the age of 14 could dispose of his personalty. Deane v. Littlefield, 18 Mass. (1 Pick.) 239, 243 (1822).

161. *E.g.,* MASS. ANN. LAWS ch. 191, §1 (1955).

162. *E.g.,* ILL. REV. STAT. ch. 3, §42 (1965).

163. *In re* Tetsubumi Yano's Estate, 188 Cal. 645, 206 Pac. 995 (1922); Cadwell v. Sherman, 45 Ill. 348 (1867).

164. Ordinarily a testator must have sufficient mental ability "to know and remember who are the natural objects of his bounty, to comprehend the kind and character of his property, and to make disposition of that property according to some plan formed in his mind." Malone v. Malone, 26 Ill. App. 2d 291, 167 N.E.2d 703 (1960). *See* Sloger v. Sloger, 26 Ill. App. 2d 366, 186 N.E.2d 288 (1963). If the testator possesses such capacity, he need not be of absolutely sound mind. Anthony v. Anthony, 20 Ill.2d 584, 170 N.E.2d 603 (1961). One may have adequate testamentary capacity though not capable of engaging in an ordinary business transaction, McClean v. Barnes, 285 Ill. 203, 120 N.E.2d 628 (1918), and it has been held that old age, or feeble health, or both, even though combined with a defective memory, do not necessarily constitute incompetence to make a valid will. Challiner v. Smith, 396 Ill. 106, 71 N.E.2d 324 (1947).

165. Doornbos v. Doornbos, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Yager v. Yager, 313 Mich. 300, 21 N.W.2d 138 (1946). It is generally held that a judgment secured against an unrepresented minor, while it may be erroneous and subject to reversal, *see* Haskell v. Perkins, 16 Ill. App. 2d 428, 148 N.E.2d 625 (1958), is voidable only. *See* Skaggs v. Industrial Commission, 371 Ill. 535, 21 N.E.2d 731 (1939); Bucher v. Haskell, 292 N.Y.S. 387 (App. Div. 1936). Some courts, however, have gone

Not only is such representation necessary, but in addition the court is charged with the responsibility of further protecting the minor's interests on its own motion.[166]

Statutory restrictions on marriage are pervasive, and the common law ban on marriage by a boy under 14 and a girl under 12[167] has been raised in most states. The increased age restrictions are grounded on the perceived need to protect society from immature alliances.

> In keeping with the increasing complexity of our modern civilization and the absolute necessity of a certain amount of maturity on the part of each member thereof, the *General Assembly has declared that male persons under 18 and female persons under 16 do not have the maturity and knowledge requisite to the entering of the marriage relationship with a full awareness* of the ensuing obligations and responsibilities to their spouses, to the society in which they would establish themselves and to the children which they would rear. The *General Assembly has further declared that, although male persons between the age of 18 and 21 and female persons between 16 and 21 might have such a degree of maturity and knowledge as to be capable of creating a stable marriage relationship in which to rear children, final judgment on such matters must be made by a mature person or an institution having such right.*[168]

Transactions by minors involving real property are generally held voidable[169] (and, in the case of gifts by minors, void),[170] on the assump-

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further and found that lack of representation constitutes a jurisdictional defect, and any judgment against the minor is void. *See In re* Powell, 167 Kan. 283, 205 P.2d 1193 (1949); Bielawski v. Burke, 121 Vt. 62, 147 A.2d 674 (1959).

166. *See In re* Anderson's Estate, 20 Ill. App.2d 305, 155 N.E.2d 839 (1959); Quillen v. Board of Education, 203 Misc. 400, 115 N.Y.S.2d 122 (Sup. Ct. 1952).

167. 1 W. BLACKSTONE, COMMENTARIES *436.

168. State v. Gans, 168 Ohio St. 174, 179, 151 N.E.2d 709, 712-13 (1958), *cert. denied*, 359 U.S. 945 (1959) (emphasis added). The strength of this societal judgment that minors below a given age are not capable of entering into marriage is further indicated by the decisions holding that acts leading to the marriage of a girl below marriageable age constitute contributing to the delinquency of a minor, even in the absence of other indications of delinquency on the part of the minor. Thus, the adoptive parents of an 11-year-old girl, who took her out of state and consented to her marriage have been held guilty of an act tending to cause delinquency. *Id. See* Denkins v. Denkins, 76 N.Y.S.2d 465 (Dom. Rel. Ct. 1948). *But see* Spencer v. People, 133 Colo. 96, 292 P.2d 971 (1956).

169. Masterson v. Cheek, 23 Ill. 72 (1859); Cole v. Manners, 76 Neb. 454, 307 N.W. 777 (1906) (lease); Faircloth v. Johnson, 189 N.C. 429, 127 S.E. 346 (1925) (mortgage); 3 AMERICAN LAW OF PROPERTY §12.69 (A. J. Casner ed. 1952). The minority rule is even more cautious, holding that deeds by minors are void. 3 AMERICAN LAW OF PROPERTY §12.69 (A. J. Casner ed. 1952).

170. Gillmett v. Tourncott, 213 Mich. 617, 182 N.W. 128 (1921); Person v. Chase, 37 Vt. 647 (1865). *Compare* Mott v. Iossa, 119 N.J.Eq. 185, 181 Atl. 689 (1935) (gift by minor voidable, but not void).

tion that one who has not reached majority has not that perspicacity and experience necessary to justify holding him to his bargains. The juvenile is to be protected not only from actual overreaching by adults, but also from his own improvidence, where the adult party acts in good faith. In effect, an adult deals with a minor at his peril. And, in addition to protecting a minor, the law in some areas operates affirmatively in his behalf to do what he should do,[171] and to repudiate what he should not have done.[172]

In the area of torts, it is generally true that infancy does not provide immunity from liability.[173] The rationale for this rule does not, however, lie in a belief that an infant is competent to evaluate his actions; it lies rather in the fact that, unlike other areas, "the law of torts . . . has been more concerned with the compensation of the injured party than with the moral guilt of the wrongdoer. . . ." [174] In justifying application of the traditional waiver principle to the criminal prosecution of minors, courts have sometimes analogized to the tort principle that minority is not itself an excuse for wrongdoing.[175] Not only does such an analysis overlook the theory behind civil liability in tort actions, but mistakes the nature of the waiver issue. The question is not whether the respondent should be held legally responsible for his allegedly delinquent act, but whether he should be bound by, or allowed to make, a decision to relinquish certain rights. A six-year-old child may be answerable

171. The rule that delivery and acceptance of a deed are ordinarily essential to the validity of a conveyance is relaxed where the deed is beneficial to an infant grantee. Masterson v. Cheek, *supra* note 169; McReynolds v. Stoat, 288 Ill. 22, 122 N.E. 860 (1919). Similarly, no formal acceptance on the part of a minor donee is required; if the gift is to the minor's advantage, acceptance is presumed by law. Klingaman v. Burch, 216 Ind. 695, 25 N.E.2d 996 (1940); Davis' Committee v. Loney, 290 Ky. 644, 162 S.W.2d 189 (1942).

172. It has been held that if a gift of land does not inure to the minor's benefit, it will be repudiated by law even though the infant may have made a formal acceptance. *See* De Levillain v. Evans, 39 Cal. 120 (1870). And he cannot be bound by any gift he may purport to make. Gillmett v. Tourncott, *supra* note 170. The doctrine of equitable conversion has been held inapplicable to transactions involving a minor party, on the theory that an infant is not capable of determining whether a change in property nature is beneficial. Horton v. McCoy, 47 N.Y. 21 (1871).

173. W. PROSSER, LAW OF TORTS §128 (3d ed. 1964). Indeed, 6-year-old children have been held liable in trespass, for entering plaintiff's premises and destroying the shrubbery, Huchting v. Engel, 17 Wis. 230 (1863), and for assaulting plaintiff by hitting him with a stone, Jorgenson v. Nudelman, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963).

174. *Id.* at 1024.

175. *See* People v. Lara, 62 Cal. Rptr. 586, 596, 432 P.2d 202, 212 (1967).

in trespass,[176] yet it does not follow that he is therefore capable of deciding whether assistance of counsel is necessary, or of understanding and evaluating the possible consequences of foregoing his privilege against self-incrimination, much less of conducting cross-examination. It might further be noted that lack of judgment on the part of minors is explicitly recognized in tort cases where an adult defendant raises the defense of consent,[177] and in the rule that application of tort liability cannot impair the minor's nonliability on his avoided contracts.[178]

The strength and uniformity of these rules concerning the legal capacity of a minor indicate a basic societal judgment—that youths are not to be held finally responsible for their words and deeds, save in exceptional circumstances, because they are considered not to have the intelligence and experience to justify so binding them. Finally, it is important to note that this situation is thought to be generalizable to all minors so that the law will not investigate the actual state of knowledge or sophistication of any particular juvenile.

The import of these legal propositions, which indicate that a minor should not be held to a waiver of the right to counsel, might be lessened if it could be shown that children coming before a juvenile court have understood the proceedings and have exhibited intelligent behavior on the basis of this understanding. Research in this area, although limited, suggests the opposite conclusion. One writer, speaking from personal experience in both detention and probation work has classified the respondents' images of the court into three components.

> The first is an image of a confused and confusing organization, in which it is difficult to know what to expect from whom. A second image, held chiefly by older teen-agers, is that of a naive and unrealistic organization. The tone associated with this image is a mixture of boredom, impatience, and contempt; it stems from the feeling of the older adolescents that to be dealt with as a "child" is both foolish and degrading. A third image, found among parents, is that the juvenile court, as *"parens patriae,"* usurps all parental rights and responsibilities, leaving the parents bereft and helpless.[179]

More recent research on children's perceptions of the legal process has concentrated, in part, on their interpretation of the courtroom

176. Huchting v. Engel, 17 Wis. 230 (1863).

177. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941).

178. PROSSER, *supra* note 173 at 1025.

179. E. Studt, *The Client's Image of the Juvenile Court,* in JUSTICE FOR THE CHILD 200 (M. Rosenheim ed. 1962).

experience itself. Based on a survey of boys recently incarcerated in a Massachusetts institution, Baum and Wheeler concluded:

> Almost all of these youths had been in juvenile court before; indeed, over a third had been there at least three times prior to their current hearing. Yet, although no strangers to the court, many were quite unprepared for events that took place there. There seems to be little understanding of what was going on, and for many youths the whole scene remained a blur. There were many faces, but the youths were not always sure of the relevant roles. . . . Descriptions of what the youths were told were also vague, largely because they were waiting to hear the central message—commitment or no commitment.[180]

It is important to recognize that while juveniles do receive impressions of the juvenile court, and frequently consider the dispositions as being "fair," they do so only in regard to an assessment of outcomes rather than to any specific knowledge of the process.[181] On the basis of this information, it cannot be asserted with confidence that youths appearing in delinquency proceedings have sufficient comprehension of the process to intelligently waive their rights.

IX. CONCLUSION

The present movement toward procedural due process in juvenile court hearings did not begin with the *Gault* decision. Prior to May 15, 1967, several populous states revamped their juvenile codes and included greater legal protections for children.[182] During the past decade representation of the poor by legal aid and legal service program members has been increasingly extended to juvenile delinquency cases. Even

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180. M. Baum & S. Wheeler, *Becoming an Inmate,* in CONTROLLING DELINQUENTS 153, 165 (S. Wheeler ed. 1968).

181. The bulk of the youths accepted their commitment as fair. . . . Save for those whose first reaction was one of indignation, they did not, by and large, deny the rightness or justness of the decision. This seems very important, for it means that despite their haziness about the court proceeding, despite the fact that they have been told, oftentimes various and conflicting things about what is happening to them, despite their shock and unhappiness at commitment, they still largely accord legitimacy to the decision, and by doing so, to the decision-making apparatus of the courts. *Id.* at 171.

See B. A. Maher, *The Delinquent's Perception of the Law and the Community,* in CONTROLLING DELINQUENTS 187, 220 (S. Wheeler ed. 1966).

182. *E.g.,* CAL. WELFARE & INSTITUTIONS CODE §500 *et seq.* (1961); ILL. REV. STAT. ch. 37 §701 *et seq.* (1966); N. Y. Family Court Act (1962).

before the *Gault* decision there was a marked increase in the number of state court appellate decisions dealing with delinquency procedures.

These observations, however, should not overshadow the revolutionary dimensions of the *Gault* decision. The privilege against self-incrimination (the lever by which the adversary-minded lawyer can silence his young client and put the state to its proof) was almost totally unrecognized. While a few courts frequently appointed lawyers as a matter of practice, and several states had statutes that required the appointment of counsel upon request, the requirement that counsel be appointed in the absence of a legally valid waiver was virtually unknown. While rights to cross-examination, confrontation, and sworn testimony were generally acknowledged before *Gault*, their faithful implementation, as the data in this study suggest, very likely depended upon the presence of an attorney.[183]

If there is one central conclusion which emerges from our study, it is that total compliance with the word and spirit of the pronouncements in *Gault* will come gradually. Our data, of course, are taken from juvenile courts in only three cities, and in these courts, as well as in juvenile courts throughout the country, the process of change, begun before the *Gault* decision, is continuing. Indeed, *Gault* appears to have greatly accelerated the trends towards legislative reform and increased legal representation.[184] In the three courts discussed in this

183. The status of the privilege against self-incrimination and rights to counsel, cross-examination, confrontation prior to Gault are discussed in note 2 *supra.*

184. At least three states undertook substantial revision of their juvenile court laws during 1967, apparently in response to the Gault decision. Colorado enacted a new Children's Code, COLO. REV. STAT. ch. 22, §22-1-1 *et seq.* (Supp. 1967), explicitly guaranteeing the right to retained or appointed counsel (§22-1-6), and providing generally that the rules of evidence applicable to civil proceedings shall apply to delinquency hearings (§22-1-7). Vermont added a new chapter to its Code, specifically devoted to juvenile court procedures. VT. STAT. ANN. tit. 33, ch. 12 (Supp. 1968). This chapter contains provisions relating to notice of charges (§§645-648), the privilege against self-incrimination (§652), and the right to counsel (§653). California's Welfare and Institutions Code was amended to further guarantee the rights to notice of charges (CAL. WELF. & INST. CODE §§630, 630.1, 658 [Supp. 1967]), counsel (§§634, 679, 700), confrontation and cross-examination (§702.5) and the privilege against self-incrimination (§702.5). It is also noteworthy that other amendments were directed to assuring that a juvenile to be charged with delinquency would be afforded Miranda-type rights. (CAL. WELF. & INST. CODE §§625, 627.5 [Supp. 1967]). The practical effect of Gault's requirements, particularly the right to counsel, have not gone unnoticed. One observer states that "Already the trend is clear. In Philadelphia, only about 5 percent of the children appearing in juvenile court had been represented by counsel in the period immediately preceding 1967. At present, close to 40 percent of the children are represented." S. Coxe, *Lawyers in Juvenile Court*, 13 CRIME & DELIN. 488 (1967). Presumably statutory modifications of the sort mentioned above will further reinforce this trend.

study, for example, we excluded observation of numerous cases involving attorneys.[185] While there are no statistics available, we doubt that before *Gault* we would have seen as many cases with counsel present. But having acknowledged all of this, the fact remains that in the Metro and Gotham juvenile courts—and in courts like Metro and Gotham—children are frequently and sometimes flagrantly denied their constitutional rights.[186] Moreover, if we are correct in the belief that resistance

185. *See* pages 497-498, *supra.*

186. Is it conceivable that what we have reported observing in Metro and Gotham is terribly unusual, so much so that one would have great difficulty finding other courts that indulged in the same practices? The answer is yes—it is conceivable—but we strongly doubt it. First, we know of nothing extraordinary about these courts, save perhaps that they frequently functioned under the gaze of our observers. In addition, frequent conversations during the past several years with juvenile court judges and occasional observations of delinquency hearings in various parts of the country have substantiated our belief that the courts in Metro and Gotham are quite typical. Significantly, in the only study we have seen of actual court hearings made subsequent to Gault, substantially the same findings as our own are reported. During October and November 1968, The Washington Post published a series of articles based on a 5 month survey of the six suburban juvenile courts in the metropolitan area surrounding Washington, D. C. (Incidentally, none of the courts studied were Metro, Gotham or Zenith.) The following excerpts are from the third article in the Washington Post series and appeared on page G2 in the paper's October 24, 1968, edition:

> The six juvenile courts in the major Washington suburbs are adopting many of the courtroom formalities required by the Supreme Court decisions, the study by The Washington Post found.
>
> But, in effect, most of their day-to-day practices still differ considerably from the changes called for by the Supreme Court and Federal experts, and they appear to discourage juveniles from exercising their rights.
>
> Only one of the eight [*sic*] suburban juvenile court judges, Frank L. Deierhoi of Fairfax, enthusiastically embraces the changes in his court. He feels juveniles are "entitled to the same rights as an adult defendant in a criminal case whenever they are in danger of losing their liberty. A juvenile judge is not infallible."
>
> Judges in the other suburbs studied—Montgomery and Prince George's counties in Maryland, and Arlington County, Alexandria and Falls Church in Virginia—express doubts or downright disapproval of what they have been told to do. . . .
>
> Most of the courts generally follow the demand for written notice, and confrontation and cross-examination.
>
> However, there are exceptions.
>
> In Arlington, for example, one youth was held overnight in jail without being told the charges against him, then brought into juvenile court for an initial hearing.
>
> In Alexandria, two boys without attorneys appeared before Judge Irene Pancoast, accused of stealing $5 from a locker in George Washington High School. The principal testified against them but refused to identify the boy who witnessed the theft and reported it to him. The judge found the boys delinquent.
>
> All six suburban courts will assure that any juvenile in a felony case has a lawyer, but only Arlington's Judge Burton V. Kramer insists that all children must be represented by counsel in all types of cases. . . .
>
> At the other extreme is Alexandria, where the procedures in Judge Pancoast's courtroom generally seem to differ most from what the Supreme Court and Federal experts are demanding. Only one child in 20 who comes before Judge Pancoast is represented by an attorney.

to change is related to deep-seated adherence to *parens patriae* concepts, nurtured over long years of service on the juvenile bench,[187] then the changing of judges from their present ways may be painfully slow. In many courts the need undoubtedly is for new juvenile court judges, less oriented to a traditional juvenile court philosophy and more disposed to a "legalistic" approach in their courtroom procedure.

The problem of achieving compliance with changes in the law is not peculiar to the implementation of *Gault*. Recent studies concerned with the impact of *Miranda v. Arizona*[188] have demonstrated that overnight compliance with Supreme Court decisions is not always the rule.[189] A study of the impact of legislative changes on California juvenile courts

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The other three courts, in Fairfax, Montgomery and Prince George's counties, will provide lawyers for misdemeanor cases if requested by parents who cannot pay, but in Fairfax and Prince George's courts, the judges do not always make this clear to parents.

In these jurisdictions, parents often ask in court if they need an attorney, and are told, "It isn't necessary" or, "It is all right to go ahead without."

During a hearing on a breaking and entering charge against two boys, J. Edward Hutchinson, a master (assistant judge) presiding in Prince George's Juvenile Court, told one boy's mother, "I can't personally recommend but it is not going to make any difference in how I decide the case whether you have an attorney or not." She then signed the waiver of her right to counsel. . . .

When children—some as young as 10 years old—appear in the suburban courts without counsel, the judges allow them and their parents to question all witnesses. But the youngsters and their parents, untrained in legal procedures, seldom question witnesses at all.

The technically correct admonition given each child by Judge Pancoast in Alexandria—that he has a right to question all witnesses "but not to quarrel" with their testimony—often leaves a child afraid to ask any questions. . . .

Judge Pancoast doesn't ask a juvenile to give a plea of guilty or not guilty—as is done in other juvenile courts. "This would put him on the spot," she said. Instead, she reads the charge against him and asks him why he "did it."

"They don't have to say not guilty," explained Judge Pancoast. "Juvenile procedure doesn't require it. They have a chance to deny it when I ask them if there is anything they want to say."

"Kids are the most honest people in the world," she says. "They don't have to be forced to tell the truth. . . . "

None of the judges except in Alexandria and Montgomery County were observed pointing out specifically in court to a child that such confession is not required, that he does not have to testify against himself. And the recent ruling by a Montgomery Circuit Judge that a 16-year-old being tried on assault and battery charges had been denied all his rights indicates it isn't always done there.

In Alexandria, where Judge Pancoast tells each child, as required, that he has a right to remain silent, she usually adds, "But I don't think it will help you if you do. . . . "

187. *See generally*, section I, *supra*.

188. 384 U.S. 436 (1966).

189. R. Medalie, L. Zeitz & P. Alexander, *Implementation of Miranda in D. C.*, 66 MICH. L. REV. 1347 (1968); A. Reiss & D. Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (1967); and *Interrogation in New England: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

concluded that "compliance has been partial and inconsistent." [190] In short, depending upon the content of the new rule and the degree of commitment to the old, we have come to expect a lack of conformity between institutional practices and new legal norms.

It is in this context that we speculate on what would have happened had the Supreme Court in *Gault*, recognizing that a child cannot intelligently waive his rights, made the requirement of counsel in delinquency cases nonwaivable. As the Supreme Court surely realized, this would have precipitated a crisis of grave proportions. In most jurisdictions there simply would not have been sufficient lawyers available for appointment. Ironically, the situation probably would have been badly exacerbated because the judges would have found it virtually impossible to circumvent the counsel requirement.

But what was true in 1967 need not necessarily be true in the future. The time may soon come when the recommendation of the President's Crime Commission, that "counsel should be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent," [191] may be capable of implementation. As legal representation in juvenile courts increases, and as judges, lawyers, and probation officers become more familiar with each other's roles, the way will be smoothed for altering the concept that a child can validly relinquish all of his rights, including the right to legal representation. While it may only be premature speculation, we predict that in the not too distant future, either as a result of legislative changes or court decisions, juveniles will not be permitted to waive their right to an attorney. Other constitutional rights, such as the privilege against self-incrimination, confrontation, and cross-examination, will be validly relinquished only upon legal advice. Through these—perhaps only through these rules—will the objectives of *In re Gault* be realized.

190. E. Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 431.

191. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967).