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# From *Gault* to *Fare* and *Smith*: The Decline in Supreme Court Reliance on Delinquency Theory\*

VICTOR L. STREIB\*\*

*The Supreme Court's reliance upon research and scholarly commentaries which examine the sociological factors that contribute to delinquent behavior has declined considerably during the last fourteen years. The author, in an effort to explain this decline, analyzes the seven major juvenile cases which have been considered by the Court since 1966. He conducts this analysis by focusing upon the subject matter of each decision, the importance of the issues arising therein and the author of each opinion. While some similarities appear, no consistent pattern emerges from this analysis. The article concludes that while juvenile law is an area which is particularly susceptible to "sociological jurisprudence", the Court has, in recent years, placed declining emphasis on the evidentiary value of social delinquency research and has increasingly turned to legalistic conclusions as a basis for their holdings in juvenile cases.*

Twelve years ago the United States Supreme Court<sup>1</sup> ushered out the socialized era of the juvenile justice system and began the

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

constitutionalized era.<sup>2</sup> In doing so, the Court's opinion was heavily documented with references to delinquency research publications.<sup>3</sup> This article examines the opinions in seven juvenile cases decided by the Supreme Court<sup>4</sup> since 1966 to determine the instances in which the Court has relied upon such research and to reveal an apparent trend in the cases.

## I. SOCIOLOGICAL JURISPRUDENCE AND JUVENILE LAW

At least among legal scholars, the term "sociological jurisprudence" is an umbrella term for, among other things, the development of judicial recognition of social science factors.<sup>5</sup> Many would refer to the school desegregation cases<sup>6</sup> as leading manifestations of this jurisprudential school. While some observers have depreciated the import of social science evidence even in those cases,<sup>7</sup> most would agree that juvenile cases are prime candidates for court consideration of delinquency research.

Despite sweeping changes in the juvenile justice system, it remains unique, "a peculiar system for juveniles, unknown to our law in any comparable context."<sup>8</sup> The juvenile courts, in clear contrast to criminal courts, are "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."<sup>9</sup> To determine those needs and meet those objectives, it seems beyond question that juvenile courts would not stay within the narrow confines of case precedents, statutes, and traditional legal reasoning. If sociological jurisprudence is to flower anywhere it should be in juvenile court.

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2. See V. STREIB, *JUVENILE JUSTICE IN AMERICA* 7-13 (1978).

3. For the purposes of this article, delinquency research is a very broad term inclusive of any articles, reports, books, etc. which are neither case precedent, statute, nor narrow analyses of the law.

4. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. 2673 (1979); *Fare v. Michael C.*, 99 S. Ct. 2560 (1979); *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); and *Kent v. United States*, 383 U.S. 541 (1966).

5. The beginning of this jurisprudential school is generally agreed to be with Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

6. *Brown v. Board of Education*, 349 U.S. 294 (1954).

7. See, e.g., Doyle, *Can Social Science Data Be Used In Judicial Decision-Making?*, 6 J. LAW & EDUC. 13 (1977).

8. *In re Gault*, 387 U.S. at 17.

9. *Kent v. United States*, 383 U.S. at 554.

## II. SUPREME COURT DECISIONS IN JUVENILE LAW

The United States Supreme Court has established the basic guidelines for juvenile courts, at least as to the police interrogation stage,<sup>10</sup> the adjudication or fact-finding hearing,<sup>11</sup> and the waiver hearing.<sup>12</sup> Therefore, one might expect these Supreme Court opinions to have relied heavily upon delinquency research. The cases to be examined are the major Supreme Court juvenile cases from 1966 to 1979. The first juvenile case decided by the Supreme Court was *Kent v. United States* in 1966, in which the Court held that the waiver process must respect the essentials of constitutional due process and fair treatment.<sup>13</sup> The second is *In re Gault*, which, in 1967, imposed most of the essentials of fourteenth amendment due process on the juvenile court adjudication hearing, at least those involving delinquency allegations and the possibility of commitment to an institution.<sup>14</sup> In 1970, *In re Winship* held proof beyond a reasonable doubt is required in adjudication hearings in which the juvenile is charged with violation of a criminal law and faces incarceration.<sup>15</sup>

In contrast to *Kent*, *Gault* and *Winship* which greatly expanded the constitutional rights of juveniles, the tide seemed to turn in 1971, in *McKeiver v. Pennsylvania*, when the Court refused to constitutionally require trial by jury in juvenile cases.<sup>16</sup> Four years later, in *Breed v. Jones* a violation of the fifth amendment Double Jeopardy Clause was found in a criminal prosecution which followed a juvenile adjudication hearing.<sup>17</sup> In a recent case, *Fare v. Michael C.*, decided in 1979, the Court held that a juvenile's request to talk to his probation officer was not the same as a request to talk with an attorney and thus did not *per se* invoke his *Miranda* rights.<sup>18</sup>

One week after *Fare* the Court decided *Smith v. Daily Mail Publishing Co.*, which dealt primarily with using criminal law to punish newspapers for publishing names of juveniles without

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10. *Fare v. Michael C.*, 99 S. Ct. at 2567.

11. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2671-72; *McKiever v. Pennsylvania*, 403 U.S. at 533; *In re Winship*, 397 U.S. at 372; *In re Gault*, 387 U.S. at 13.

12. *Kent v. United States*, 383 U.S. at 552.

13. 383 U.S. at 541, 553, 562.

14. *In re Gault*, 387 U.S. at 30-31.

15. *In re Winship*, 397 U.S. at 368.

16. *McKeiver v. Pennsylvania*, 403 U.S. at 545.

17. *Breed v. Jones*, 421 U.S. at 541.

18. *Fare v. Michael C.*, 99 S. Ct. at 2573.

prior court approval.<sup>19</sup> *Smith* also considered in passing the State's interest in preserving the anonymity of its juvenile offenders.<sup>20</sup>

These Supreme Court cases considered a variety of issues that helped to establish broad, national guidelines and requirements to be followed by all juvenile courts in delinquency cases. In establishing such guidelines and requirements, the Court necessarily made several fundamental assumptions about delinquency and about adolescent behavior.<sup>21</sup> Since these are subjects not directly covered within the narrow confines of law and legal reasoning, we might expect the Court to have relied upon the findings of delinquency research.

### III. INSTANCES OF COURT RELIANCE ON DELINQUENCY RESEARCH

In the seven major juvenile decisions, a significant number of conclusions were drawn and premises established. Many were traditional legal issues and thus, not surprisingly, the Court relied solely upon legal precedents and analysis. However, many of the premises and conclusions drawn by the Court involved subject matters related to current delinquency research. For most of these areas, the Court relied, at least in part, upon some of the published research. The areas for which the Court regularly referenced such research have been roughly delineated into four categories:

1. operating principles of the original juvenile justice system;
2. magnitude of the delinquency problem in United States;
3. general failures of the juvenile system; and
4. characteristics of juvenile court respondents and effects of the proceedings upon them.

What follows is a categorical analysis of the issues contained therein.

Inasmuch as *Gault* substantially revised the procedures of the original juvenile justice system, Mr. Justice Fortas' majority opinion understandably and laudably devoted considerable space<sup>22</sup> to a description of the original system. This description was not drawn from analysis of statutory language or case precedents, but

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19. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2668.

20. *Id.* at 2671, 2673.

21. The Court has expressly noted that juvenile court judges should understand "the complex problems of childhood and adolescence." *McKeiver v. Pennsylvania*, 403 U.S. at 534.

22. *In re Gault*, 387 U.S. at 14-17.

rather from studies of that system by historians, criminologists and legal scholars. Indeed, the quantity and quality of studies<sup>23</sup> relied upon by the Court was most impressive and a model of sociological jurisprudence. It is only fair, however, to note that very few statutes or case precedents existed upon which the Court could have relied for this information, so heavy reliance upon delinquency research may have been as much a result of necessity as of desire.

Regarding the second category, in establishing procedures for juvenile courts to follow, the Supreme Court logically referred to the general characteristics of the juvenile delinquency problem in the United States. Among the fundamental premises for the Court's conclusions in *Gault* were that delinquency was a major social problem and that high recidivism rates reflected the failure of the traditional juvenile court system.<sup>24</sup> The source of this information was a variety of studies, reports, articles, and books.<sup>25</sup>

Closely associated with these first two categories was, thirdly, the Court's conclusion that the original juvenile court system was generally a failure. This conclusion was expressly made in *Kent*,<sup>26</sup> *Gault*,<sup>27</sup> and *McKeiver*.<sup>28</sup> The sweeping term "failure" seemed appropriate, as the Court notes,<sup>29</sup> primarily because the

23. The studies relied upon by the Court were HURLEY, *Origin of the Illinois Juvenile Court Law*, in THE CHILD, THE CLINIC, AND THE COURT 320 (1925); MACK, *The Chancery Procedure in the Juvenile Court*, in THE CHILD, THE CLINIC, AND THE COURT 310 (1925); MACK, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719 (1962); and Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights*, 12 J. CRIM. L. & CRIM. 339 (1922).

24. *In re Gault*, 387 U.S. at 20-22.

25. The sources relied upon by the Court were CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 415, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (1964); CHILDREN'S BUREAU, DEP'T. OF HEALTH, EDUCATION, AND WELFARE, CHILDREN'S BUREAU STATISTICAL SERIES NO. 85, JUVENILE COURT STATISTICS (1966); NEW YORK JUDICIAL CONFERENCE, TWELFTH ANNUAL REPORT (1967); PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT (1966); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); WHEELER & COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL (1965); Foster, *Social Work, the Law, and Social Action*, SOCIAL CASEWORK; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966); and Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

26. *Kent v. United States*, 383 U.S. at 555-56.

27. *In re Gault*, 387 U.S. at 29-30.

28. *McKeiver v. Pennsylvania*, 403 U.S. at 543-45.

29. *In re Gault*, 387 U.S. at 29-30.

rhetoric of the juvenile court's beginning was so naive and optimistic.<sup>30</sup> In *Kent*, the "failure" comment was only dicta since the Court rejected the invitation to examine the entire system<sup>31</sup> and instead limited its holding to the waiver procedure in the District of Columbia.<sup>32</sup> However, in *Gault*, this conclusion was central to the Court's subsequent broad opinion. This seems curious since in *Kent* the passing comment was heavily referenced,<sup>33</sup> but in *Gault* little support was given for this specific point.<sup>34</sup>

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30. "To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest." *McKeiver v. Pennsylvania*, 403 U.S. at 545 (1971) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967)).

31. The Court noted that several "basic issues" were suggested, such as affording juvenile respondents less rights than would be given a criminal defendant. However, because the case was to be remanded due to procedural errors during waiver, the Court did not reach those questions. *Kent v. United States*, 383 U.S. at 551-52.

32. Before returning to the District of Columbia's statute and cases upon which the holding was to be based, the Court provided an insight of its view of the system in language which has since been so often quoted:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees available to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guarantees which would be applicable to adults charged with the serious offenses for which *Kent* was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for the decision of this case, and we go no further.

*Id.* at 555-56.

33. The *Kent* opinion referred to *Amending the Juvenile Court Act of the District of Columbia*, Hearings before Subcommittee No. 3 of the House Committee on the District of Columbia, 87th Cong., 1st Sess. (1961); *Juvenile Delinquency*, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959-1960); *Additional Judges for Juvenile Court*, Hearing before the House Committee on the District of Columbia, 86th Cong., 1st Sess. (1959); H.R. REP. NO. 1041, 87th CONG., 1st SESS. (1961); S. REP. NO. 841, 87th CONG., 1st SESS. (1961); S. REP. NO. 116, 86th CONG., 1st SESS. (1959); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; and Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

34. The *Gault* opinion referred to PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); and WHEELER & COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL (1965).

Mr. Justice Blackmun's plurality opinion in *McKeiver* again referred to this failure,<sup>35</sup> but the Court chose yet another direction and retreated from the thrust of *Gault*.<sup>36</sup> Declaring that the "ultimate disillusionment"<sup>37</sup> had not yet arrived, Justice Blackmun recognized the failures but believed they were specifically outweighed by the studies which had recommended against jury trials.<sup>38</sup>

Finally the fourth category covers the characteristics of the "clients" of juvenile justice systems. In a unanimous opinion written by Chief Justice Burger in *Breed*, the Court expressly noted the anxiety and personal strain experienced by a child involved in a juvenile court adjudicatory hearing.<sup>39</sup> In coming to this conclusion the Court relied on two cases and one article.<sup>40</sup> In another reference to the characteristics of children, the *Breed* Court noted that some juveniles under the original jurisdiction of the juvenile court should be transferrable to adult court since they could not "benefit from the special features and programs of the juvenile court system. . . ."<sup>41</sup> Again, the Court's opinion made reference to non-legal authority for this conclusion.<sup>42</sup>

Related to this category is Mr. Justice Harlan's conclusion, in his concurring and dissenting opinion in *Gault*, that a substantial number of children brought to a juvenile court have violated no criminal laws.<sup>43</sup> For this conclusion, Justice Harlan referred to

35. The *McKeiver* opinion relied solely upon PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

36. "Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." *McKeiver v. Pennsylvania*, 403 U.S. at 545.

37. *Id.* at 551.

38. *Id.* at 545-46, 549-50.

39. *Breed v. Jones*, 421 U.S. at 530-31.

40. Expressly noting the "anxiety and insecurity" and the "heavy personal strain" imposed upon juveniles by adjudicatory hearings, the Court referred to *Green v. United States*, 355 U.S. 184 (1957); *United States v. Jorn*, 400 U.S. 470 (1971); and Snyder, *The Impact of Juvenile Court Hearings on the Child*, 17 CRIME & DELINQUENCY 180 (1971). *Breed v. Jones*, 421 U.S. at 530-31.

41. *Breed v. Jones*, 421 U.S. at 535.

42. The authorities were NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967); Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266 (1972); and Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. TOL. L. REV. 1 (1974).

43. *In re Gault*, 387 U.S. at 76-77 (Harlan, J., concurring and dissenting).



one article<sup>44</sup> and then bemoaned the inadequacy of information on this point.<sup>45</sup>

#### IV. INSTANCES OF INCONSISTENT COURT RELIANCE ON DELINQUENCY RESEARCH

In contrast to the above areas for which the Court regularly relied upon the published findings of delinquency research, it has, in other areas, been inconsistent in its documentation. These areas have been grouped into two broad categories:

- A. specific problems in the juvenile justice system, and
- B. the need for due process in the juvenile justice system.

Less reliance upon delinquency research was predictable for these two categories since they involved issues which are traditionally within the narrow confines of law and legal reasoning.

##### A. *Specific Problems*

Among the several specific problems considered in the Court's opinions were the general insufficiency of staff, facilities, and knowledge. A typically broad summary was provided in *McKeiver*: "The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment."<sup>46</sup> For this sweeping indictment, Mr. Justice Blackmun's plurality opinion referred generally to the 1967 Task Force Report on Juvenile Delinquency.<sup>47</sup> This general assumption reappeared as late as 1975 in *Breed*, wherein the Court maintained unwaivering reliance upon the 1967 Task Force Report without any mention of intervening studies.<sup>48</sup> This may be an instance of the Court apparently relying upon delinquency research but resting their decision upon outdated information and assuming the condition was still prevalent.

This reliance upon inappropriate delinquency research seems to occur more often in the opinions of Chief Justice Burger. In contrast to Chief Justice Burger's reference to dated research in

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44. The article referred to was Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, 31 FED. PROB. 26 (1967).

45. *In re Gault*, 387 U.S. at 76 n.6 (Harlan, J., concurring and dissenting).

46. *McKeiver v. Pennsylvania*, 403 U.S. at 544.

47. See note 28 *supra*.

48. *Breed v. Jones*, 421 U.S. at 537.

his opinion in *Breed*,<sup>49</sup> his dissent in *Winship* referred to the same problem with no references or footnotes at all.<sup>50</sup> In fairness, that dissenting opinion made several broad statements, all without reference to legal or criminological authority, and seemed to be simply an angry policy statement by the Chief Justice which perhaps forewarned of a watershed in the Court's remodeling of the juvenile justice system.<sup>51</sup>

Another specific problem which has concerned the Court is the professional qualifications of juvenile court judges. In the two opinions<sup>52</sup> in which this problem surfaced, the Court relied upon the same language from the same study.<sup>53</sup> However *Gault*, predictably, also referred to other studies.<sup>54</sup> In neither *Gault* nor *McKeiver* was this an issue of major concern, and both opinions made only passing reference to it.<sup>55</sup> It is of particular interest in *McKeiver*, however, given the Court's ultimate holding that jury trials are not constitutionally mandated;<sup>56</sup> the Court first recognized that juvenile court judges are often poorly qualified but then, in effect, left the decision-making power in the hands of those judges.

In *Gault*, the Court considered another juvenile justice problem: The claim of benefits accruing from the secrecy provided by

49. *Id.*

50. Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate juvenile court staffs and facilities; we "burn down the stable to get rid of the mice." The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many if not most juvenile courts. Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases.

*In re Winship*, 397 U.S. at 376 (Burger, C.J., dissenting).

51. See generally V. STREIB, *JUVENILE JUSTICE IN AMERICA* 11-12 (1978).

52. *McKeiver v. Pennsylvania*, 403 U.S. at 544; *In re Gault*, 387 U.S. at 14 n.14.

53. "A recent study of juvenile court judges . . . revealed that half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: *JUVENILE DELINQUENCY AND YOUTH CRIME* 7 (1967).

54. The studies were McCune, *Profiles of the Nation's Juvenile Court Judges* (1965) (unpublished monograph, George Washington University, Center for the Behavioral Sciences); and Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

55. In *Gault* the reference was in a footnote to a statement in the text of the opinion generally referring to the widespread adoption of juvenile court statutes. 387 U.S. at 14 n.14. In *McKeiver* the reference was in general dicta laying a background for the Court's holding. 403 U.S. at 544.

56. *McKeiver v. Pennsylvania*, 403 U.S. at 545.

Arizona's summary juvenile court procedures.<sup>57</sup> Seeming to assume that confidentiality of juvenile records was a laudable attribute, the Court asserted that the present system did not, in fact, provide confidentiality<sup>58</sup> and that constitutionalizing juvenile court procedure would not be inconsistent with providing and improving confidentiality.<sup>59</sup> For purposes of this analysis, it is noteworthy that the Court makes a statement about the actual operations of the system and relies upon delinquency research in making such statements.<sup>60</sup> The Court did not expressly state that confidentiality would benefit juveniles and provided no reference to any delinquency research studies to support or refute that principle.

In its most recent consideration of confidentiality in the juvenile justice process, the Court in *Smith* (through Chief Justice Burger's majority opinion) recognized the State's interest in protecting the anonymity of the juvenile offender.<sup>61</sup> However, the Court held that this State interest in confidentiality was not sufficient to justify criminal punishment of a newspaper for the truthful publication of an alleged juvenile delinquent's name lawfully obtained by the newspaper.<sup>62</sup> Although precedent was referred to briefly,<sup>63</sup> the opinion of the Court, somewhat surprisingly, did not describe or discuss the confidentiality issue beyond its mere mention and dismissal.

Mr. Justice Rehnquist's concurring opinion in *Smith* discussed the State's confidentiality interest in more detail and considered it to be of the "highest order."<sup>64</sup> Mr. Justice Rehnquist noted the concern for this interest mentioned in *Gault*<sup>65</sup> and that confidentiality has been part of the juvenile process since its beginning.<sup>66</sup> Thus, the Court's inconsistent reliance on delinquency research

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57. *In re Gault*, 387 U.S. at 24.

58. *Id.* at 24-25.

59. *Id.* at 25.

60. The studies relied upon were PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 *CRIME & DELINQUENCY* 97 (1961); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 *HARV. L. REV.* 775 (1966); and Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 *COLUM. L. REV.* 281 (1967).

61. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2671.

62. *Id.* at 2671-72.

63. The Court expressly relied upon *Davis v. Alaska*, 415 U.S. 308 (1974), and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In the Court's reasoning, since the State's confidentiality interest was subordinate to a defendant's sixth amendment right of confrontation (*Davis*), it was similarly subordinate to a newspaper's first amendment rights.

64. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2673 (Rehnquist, J., concurring).

65. *In re Gault*, 387 U.S. at 24-25.

66. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2673 (Rehnquist, J., concurring). To support this assertion, he referred to H. LOU, *JUVENILE COURTS IN THE UNITED*

in considering the confidentiality issue is exemplified most clearly in the Court's most recent venture into juvenile law.

Another problem area, that of juvenile corrections, though clearly tangential to the issues under consideration, was expressly mentioned in Justice Fortas' majority opinion in *Gault*<sup>67</sup> and in Justice Douglas' dissent in *McKeiver*.<sup>68</sup> The disparity in degree of reliance on juvenile studies was clear in their critical assessment of the capabilities and effects of juvenile corrections, Justice Fortas relied upon a variety of studies<sup>69</sup> but Justice Douglas referred to only one institution mentioned in an insignificant state case.<sup>70</sup> The difference in documentation can be partly ascribed to the difference between a majority opinion and a dissenting opinion and partly to the difference between the writing styles of the two Justices, but neither thereby satisfactorily explains the striking difference in the quantity and quality of authority upon which the statements rested.

In the same sections of both opinions, the problem of mixing juveniles with adults was mentioned. In contrast to the Justices' documentation of general statements about juvenile corrections with respect to the mix problem, they reversed roles. In *Gault*, Justice Fortas made only passing reference to several studies already relied upon for other purposes,<sup>71</sup> however, Justice Douglas' dissent in *McKeiver* quoted specific language from a very influen-

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STATES (1927), and Geis, *Publicity and Juvenile Court Proceedings*, 30 KY. MT. L. REV. 101 (1958).

67. *In re Gault*, 387 U.S. at 22 n. 30, 27.

68. *McKeiver v. Pennsylvania*, 403 U.S. at 560 (Douglas, J., dissenting).

69. The studies referred to were: PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, *REPORT* (1966); *IN THE MATTER OF THE YOUTH HOUSE, INC., REPORT OF THE JULY 1966 "A" TERM OF THE BRONX COUNTY GRAND JURY, SUPREME COURT OF NEW YORK, COUNTY OF BRONX, TRIAL TERM, PART XII* (March 21, 1967); F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); POLIER, *A VIEW FROM THE BENCH* (1964); WHEELER & COTTRELL, *JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL* (1965); Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966); and Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

70. "One Pennsylvania correctional institution for juveniles is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire, and guard towers. A former juvenile judge described it as 'a maximum security prison for adjudged delinquents.'" *McKeiver v. Pennsylvania*, 403 U.S. at 560 (Douglas, J., dissenting) (Paraphrasing and quoting *In re Bethea*, 215 Pa. Super. 75, 76, 257 A.2d 368, 369 (1969)).

71. *In re Gault*, 387 U.S. at 22 n.30.

tial study.<sup>72</sup> While neither opinion sufficiently documented the claims, on this point Justice Douglas was more specific than Justice Fortas.

### B. *Need for Due Process*

The need for due process in the juvenile justice system and the ramifications of its implementation have resulted in an even more inconsistent Court reliance upon delinquency research. This might have been expected since these are primarily questions of constitutional law instead of criminological theory or conclusions from empirical data. The beginning point is the language from *Gault*: "there appears to be little current dissent from the proposition that the Due Process Clause has a role to play."<sup>73</sup> To document this premise, Justice Fortas referred to nine studies.<sup>74</sup> One year earlier in *Kent*, Justice Fortas had equated the needs of adults and children for procedural fairness encompassing the elements of due process,<sup>75</sup> but the opinion made no reference to studies supporting that specific conclusion. The *Kent* opinion was based upon the "statute read in the context of constitutional principles relating to due process . . .",<sup>76</sup> but referred to very little delinquency research in making the decision to employ that context.

As it did with other premises and conclusions, *Gault* referred to several studies to conclude that "[t]he absence of procedural rules based upon constitutional principle . . ." <sup>77</sup> has often been harmful to juveniles.<sup>78</sup> In refuting the assumption that juveniles

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72. "In 1965, over 100,000 juveniles were confined in adult institutions. Presumably most of them were there because no separate juvenile detention facilities existed. Nonetheless, it is clearly undesirable that juveniles be confined with adults." *McKeiver v. Pennsylvania*, 403 U.S. at 560 (Douglas, J., dissenting) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 179 (1967)).

73. *In re Gault*, 387 U.S. at 13.

74. The studies were PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); CHILDREN'S BUREAU, DEP'T. OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 437, *STANDARDS FOR JUVENILE AND FAMILY COURTS* (1966); F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers*, 52 A.B.A.J. 923 (1966); Ketcham, *The Legal Renaissance in the Juvenile Court*, 60 NW. U. L. REV. 585 (1965); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); and Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171 (1966); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

75. *Kent v. United States*, 383 U.S. at 554.

76. *Id.* at 557.

77. *In re Gault*, 387 U.S. at 18.

78. The studies referred to were BOVET, *PSYCHIATRIC ASPECTS OF JUVENILE*

benefit from informal proceedings,<sup>79</sup> the Court noted:

But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.<sup>80</sup>

The studies referred to by the Court were two books and the National Crime Commission's 1967 report.<sup>81</sup>

In contrast to Justice Fortas' view of "surprising unanimity" of studies on this point, Justice Harlan stated in his concurring and dissenting opinion in *Gault* that the studies are at least "inconclusive,"<sup>82</sup> and referred to a substantial list of studies for this observation.<sup>83</sup> Thus, the debate between the opinions is not limited to legal authority and reasoning but also pits the findings of one set of studies against another.

It is noteworthy to compare the above situation to others in which statements about the effects of due process were made but no authorities were cited. Relying upon the force of his reasoning alone, Justice Stewart, in his dissent in *Gault*, asserts:

I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution.<sup>84</sup>

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DELINQUENCY (World Health Organization, 1951); Lehman, *A Juvenile's Right to Counsel in a Delinquency Hearing*, 17 JUV. CT. JUDGES J. 53 (1966); Vanderbilt, *Foreword to VIRTUE, BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN* (1953); Woodward, *Letter*, 18 SOC. SERVICE REV. 366 (1944); and Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

79. The basis for this assumption was Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

80. *In re Gault*, 387 U.S. at 26.

81. The references were to PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); and WHEELER & COTTRELL, *JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL* (1966).

82. *In re Gault*, 387 U.S. at 75 (Harlan, J., concurring and dissenting).

83. The studies referred to were Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206 (1960); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; McLean, *An Answer to the Challenge of Kent*, 53 A.B.A.J. 457 (1967); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719 (1962); and Siler, *The Need for Defense Counsel in the Juvenile Court*, 11 CRIME & DELINQUENCY 45 (1965).

84. *In re Gault*, 387 U.S. at 79 (Stewart, J., dissenting).

Generally, Justice Stewart's dissent presents a stark contrast to Justice Fortas' majority opinion, wherein Justice Fortas heavily relied upon delinquency research and Justice Stewart relied totally upon strict legal analysis and his own judicial policy.

One of Justice Fortas' statements about the effects of due process in the *Kent* case was a broad generalization and no studies were cited to support the statement. Justice Fortas' majority opinion concluded that disclosure of the social service file and probation staff report to the juvenile's lawyer would not have significant adverse effect on juvenile court staff.<sup>85</sup> In support of this conclusion Justice Fortas cites only a self-professed "maxim" to that effect.<sup>86</sup>

Another instance of inconsistent Court reliance upon delinquency research is in discussions of the right to counsel for juveniles. As could be predicted, Justice Fortas' majority opinion in *Gault* is the ultimate example of strong reliance on delinquency research. In verifying the need for counsel, Justice Fortas covers the waterfront: "During the last decade, court decisions, experts, and legislatures have demonstrated increasing recognition of this view."<sup>87</sup> The "experts" cited included articles, books, and model acts.<sup>88</sup> This right to counsel portion<sup>89</sup> of the *Gault* opinion was particularly lavish in its use of references to delinquency research. The text of the opinion quoted portions of crime commission reports,<sup>90</sup> juvenile court standards,<sup>91</sup> and the New York Family Court Act.<sup>92</sup> The opinion was supported with footnotes containing lengthy quotes from and citations to a variety of

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85. *Kent v. United States*, 383 U.S. at 564.

86. "Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause heaven to fall." *Id.* at 564 n.32.

87. *In re Gault*, 387 U.S. at 37.

88. Included were National Probation and Parole Assn., *Standard Family Court Act (1959) § 19*, and *Standard Juvenile Court Act (1959) § 19*, 5 N.P.P.A.J. 99 (1959); Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L. Q. 387 (1961); Elson, *Juvenile Courts & Due Process*, in JUSTICE FOR THE CHILD 95 (Rosenheim ed. 1962); Ketcham, *The Legal Renaissance in the Juvenile Court*, 60 NW. U. L. REV. 585 (1965); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Schinitsky, *The Role of the Lawyer in Children's Court*, 17 THE RECORD 10 (1962); and Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

89. *In re Gault*, 387 U.S. at 34-42.

90. *Id.* at 38 & n.65 (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967)).

91. *In re Gault*, 387 U.S. at 38-39 & n.66 (CHILDREN'S BUREAU, DEP'T. OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 437, STANDARDS FOR JUVENILE AND FAMILY COURTS (1966)).

92. *In re Gault*, 387 U.S. at 40-1 (New York Family Court Act § 241 & § 741).

studies.<sup>93</sup>

In contrast to his view of including all elements of due process, Justice Harlan agreed with the majority as to right to counsel for juveniles.<sup>94</sup> In addition to reliance upon legal precedent,<sup>95</sup> Justice Harlan also footnoted delinquency research.<sup>96</sup> While not as extensive as Justice Fortas' treatment of the issue, Justice Harlan also considered a broad range of authority.

Ramifications of the right to counsel for juveniles were also addressed in *Fare*.<sup>97</sup> Justice Blackmun's majority opinion saw the juvenile's lawyer as the only true protector of the juvenile's legal rights.<sup>98</sup> However, the majority opinion did not seem to address the question of whether the juvenile sees only the lawyer in that capacity. In contrast, Justice Marshall's dissenting opinion in *Fare* assumed: "A juvenile in these circumstances will likely turn to his parents, or another adult responsible for his welfare, as the only means of securing legal counsel."<sup>99</sup> The somewhat startling fact about this instance in both the majority opinion and the dissent is that neither referred, either implicitly or expressly, to delinquency research.

The Court has also been inconsistent in reliance upon delin-

93. In addition to those mentioned in note 78, *supra*, the Court relied upon PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT (1966); NEW YORK JUDICIAL CONFERENCE, TWELFTH ANNUAL REPORT (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L. Q. 499 (1963); Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501 (1963); Lehman, *A Juvenile's Right to Counsel in A Delinquency Hearing*, 17 JUV. CT. JUDGE'S J. 53 (1966); Riederer, *The Role of Counsel in the Juvenile Court*, 2 J. FAM. L. 16 (1962); Rosenheim, *Standards for Juvenile and Family Courts: Old Wine in a New Bottle*, 1 FAM. L. Q. 25 (1967); Skoler & Tenney, *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1964); and Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

94. *In re Gault*, 387 U.S. at 72 (Harlan, J., concurring and dissenting).

95. Justice Harlan relied upon *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); and *Powell v. Alabama*, 287 U.S. 45 (1932).

96. While observing that the "statistical evidence here is incomplete. . .," Justice Harlan relied generally upon Skoler & Tenney, *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1964). *In re Gault*, 387 U.S. at 74 n.3 (Harlan, J., concurring and dissenting).

97. *Fare v. Michael C.*, 99 S. Ct. at 2569-71.

98. "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Id.* at 2569.

99. *Fare v. Michael C.*, 99 S. Ct. at 2574 (Marshall, J., dissenting).



quency research in considering a juvenile's right to remain silent. This issue carries strong legal implications, thus the Court understandably relied heavily on constitutional interpretation<sup>100</sup> and case precedent.<sup>101</sup> The trustworthiness of confessions seems to be a particular problem when the confessor is a child.<sup>102</sup> The untrustworthiness of juvenile confessions was illustrated in *Gault* by reference to, and quotations from, three previous cases<sup>103</sup> instead of to any psychological studies of the tendency of children to know and tell the truth under such stressful circumstances. The Court seemed to assume that a juvenile's confessions were generally more untrustworthy than an adult's confessions<sup>104</sup> and thus the privilege against self-incrimination, since available to "hardened criminals," should be available to children.<sup>105</sup>

The *Gault* Court also addressed Arizona's claim that "confession is good for the child as the commencement of the assumed therapy of the juvenile court process. . . ." <sup>106</sup> This claim was contested and discarded by the Court through reference to the findings of delinquency research.<sup>107</sup> In *Breed* the Court noted, without reference to delinquency research, the dilemma facing a juvenile in deciding whether to talk to juvenile authorities.<sup>108</sup> Particularly where a waiver of rights is a possibility, a juvenile who talks freely with juvenile authorities "runs a risk of prejudicing his chances in adult court if transfer is ordered."<sup>109</sup> Thus, for the reasons adopted in *Gault* based on delinquency research and for reasons of legal procedure given in *Breed*, the Court accepted the notion that juveniles need the right to remain silent.

*Fare* dealt directly with a juvenile's understanding of and waiver of his right to remain silent.<sup>110</sup> In comparison to earlier ju-

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100. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. CONST. amend. V.

101. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. Note, however, that the Court has not yet held that *Miranda* fully applies to juvenile proceedings. See *Fare v. Michael C.*, 99 S. Ct. at 2567 n.4.

102. This was an early premise followed by the Court. See *In re Gault*, 387 U.S. at 48.

103. *In re Gault*, 387 U.S. at 52-55. The cases were *In re Gregory W. and Gerald S.*, 19 N.Y.2d 55, 224 N.E.2d 102 (1966); *In re Carlo and Stasilowicz*, 48 N.J. 224, 225 A.2d 110 (1966); and *In re Four Youths*, Nos. 28-776-J, 28-778-J, 28-773-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961.

104. *In re Gault*, 387 U.S. at 48.

105. *Id.* at 47.

106. *Id.* at 51.

107. The studies relied upon were PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); and WHEELER & COTTRELL, *JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL* (1966).

108. *Breed v. Jones*, 421 U.S. at 540.

109. *Id.*

110. *Fare v. Michael C.*, 99 S. Ct. at 2573.

venile cases decided by the Supreme Court, Justice Blackmun's majority opinion in *Fare* is remarkable in its nonreliance upon delinquency research in establishing its premises or conclusions. The *Fare* Court first considered general rules for cases of this kind and then applied those general rules to what had happened to respondent Michael C. The *Fare* Court concluded a juvenile's request to speak to his probation officer, having just been given his *Miranda* warnings, would not of itself be a request to remain silent.<sup>111</sup> The Court saw no persuasive difference between adults and juveniles in determining if *Miranda* rights had been knowingly and voluntarily waived.<sup>112</sup> In either determination, the juvenile court is to use the totality of circumstances test: "This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."<sup>113</sup> While recognizing the "special concerns that are present when young persons . . . are involved,"<sup>114</sup> the Court assumed juvenile courts "special expertise in this area"<sup>115</sup> and concluded that juvenile courts would be able to apply the totality of circumstances analysis. This general conclusion was made with no reference whatsoever to any delinquency research and is in vivid contrast to the Court's skepticism which surfaced in *Gault*<sup>116</sup> and *McKeiver*<sup>117</sup> concerning the claimed special expertise of juvenile courts.

Justice Blackmun's majority opinion in *Fare* turned next to the specific circumstance of the case before the Court. While not as important as the general rules first established, the Court's application of its own general rules was enlightening. The Court held that Michael C. had made a knowing and voluntary waiver of his *Miranda* rights.<sup>118</sup> In their application of the totality of circumstances test, the Court considered both the events which took place and the individual characteristics of Michael C. The events which persuaded the Court in its findings were that the police

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111. *Id.* at 2571.

112. *Id.* at 2572.

113. *Id.*

114. *Id.*

115. *Id.*

116. *In re Gault*, 387 U.S. at 14.

117. *McKeiver v. Pennsylvania*, 403 U.S. at 544.

118. *Fare v. Michael C.*, 99 S. Ct. at 2573.

told Michael C. that he was being questioned about a murder, the police gave him the *Miranda* rights and ascertained that he understood them, and he then expressed a willingness to talk with the police.<sup>119</sup> In fairness, this describes the procedure required by law and thus the lack of reference to delinquency research is perhaps understandable.

The Court also examined the personal characteristics of the juvenile. Expressly considered were:

1. Michael C. was 16½ years old;
2. he had considerable experience with the police;
3. he had a record of several arrests;
4. he had served time in a youth camp;
5. he had been on probation for several years;
6. he was under the full-time supervision of probation authorities;
7. there was no indication of insufficient intelligence; and
8. he was not worn down by improper interrogation tactics.<sup>120</sup>

While the effects of most of these express criteria have been studied in delinquency research, no references of any kind were made to such research in the Court's opinion.

In keeping with this close-minded approach, the Court rejected as immaterial the fact that the police indicated that a "cooperative attitude would be to respondent's benefit."<sup>121</sup> Also rejected was the fact that the juvenile had directly refused to answer some questions<sup>122</sup> and that he was crying at the time he talked with the police officers.<sup>123</sup> Again, the Court made no reference to any delinquency research studies.

Considering the same personal characteristics as did the majority opinion, Justice Powell's dissent concluded that the juvenile was "immature, emotional, and uneducated, and therefore likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation to which he was subjected."<sup>124</sup> Like the subscribers to the other opinions, Justice Powell rested his conclusion neither upon personal observation and testing of Michael C. nor upon references to delinquency research.

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119. *Id.* at 2572.

120. *Id.* at 2572-73.

121. *Id.* at 2573. Note the conflict with *Gault* which held the admission must be made "with knowledge that he was not obliged to speak and would not be penalized for remaining silent." *In re Gault*, 387 U.S. at 44.

122. *Fare v. Michael C.*, 99 S. Ct. at 2573. Note the conflict with *Miranda* which is alluded to by Justice Marshall. *Id.* at 2573-74 (Marshall, J., dissenting).

123. *See Fare v. Michael C.*, 99 S. Ct. at 2573, 2576 n.2 (Powell, J., dissenting).

124. *Id.* at 2576.

The last example of the Court's consideration of the value of one of the elements of due process is the need for juries in a juvenile court adjudication hearing. *McKeiver* found no such constitutional requirement.<sup>125</sup> Among the thirteen enumerated reasons for coming to this conclusion,<sup>126</sup> the Court rested upon the findings of a major report<sup>127</sup> and several model acts.<sup>128</sup> Reliance upon research findings was also prevalent in Justice Douglas' dissent when he pointed out that very few requests for jury trials are actually made.<sup>129</sup> To bolster his position, Justice Douglas appended, to his dissent an opinion of a Rhode Island family court judge.<sup>130</sup> Thus, this final example reveals the Court's sketchy reliance upon extra-legal authority instead of delinquency research relating to the issue in question.

#### V. INSTANCES OF COURT NONRELIANCE ON DELINQUENCY RESEARCH

The Court has ignored delinquency research in the three areas:

1. the stigma of the term "delinquency;"
2. free will and determinism in law; and
3. political use of the juvenile court.

Perhaps more than any other issue discussed herein, the topic of the stigma associated with the term "delinquent" is amply treated in delinquency research. The Court did refer to this phenomenon in *Gault*, *Winship* and *Smith* but made no reasonable reference to delinquency research to substantiate it. In analyzing the term "delinquent," the *Gault* Court observed: "It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults."<sup>131</sup> Authority footnoted in Justice Fortas' majority opinion for this conclusion is a tangential conclusion drawn from a law review note about per-

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125. 403 U.S. at 545.

126. *Id.* at 545-50.

127. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

128. UNIFORM JUVENILE COURT ACT, § 24(a); STANDARD JUVENILE COURT ACT, Art. V, § 19; and the CHILDREN'S BUREAU, DEP'T. OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 472, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 29(a) (1969).

129. *McKeiver v. Pennsylvania*, 403 U.S. at 561-62 & n.\* (Douglas, J., dissenting).

130. *Id.* at 563-72.

131. *In re Gault*, 387 U.S. at 23-24.

sons in need of supervision!<sup>132</sup>

In *Winship*, the Court first concluded that an adult would be severely "stigmatized by . . . conviction"<sup>133</sup> for the commission of a crime. In applying the same proof standard to juveniles accused of violating criminal laws, the Court expressly assumed that a similar stigma would attach to juveniles.<sup>134</sup> No reference was made to criminology research for the premise of adult stigma from the term criminal, and no reference was made to delinquency research for the application of that premise to juveniles.

Concurring in the *Winship* decision, Justice Harlan also agreed with the premise that a delinquency determination "stigmatizes a youth."<sup>135</sup> Justice Harlan referred to legislative committee reports<sup>136</sup> for this conclusion but not to any of the numerous delinquency research studies in this regard.<sup>137</sup>

In *Smith*, Mr. Chief Justice Burger's majority opinion discussed the State's confidentiality interest in terms implying the issue of stigma,<sup>138</sup> but styled this as a petitioner's assertion rather than as a point judicially noticed or established by delinquency research.<sup>139</sup> In contrast, Mr. Justice Rehnquist's concurring opinion in *Smith* relied upon the stigma of delinquency as a central theme and cited substantial delinquency research for this theme.<sup>140</sup> Of particular note is Mr. Justice Rehnquist's footnote

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132. *Id.* at 24 n.31. The law review note that was so influential here and throughout this opinion was Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. (1966).

133. *In re Winship*, 397 U.S. at 363.

134. "We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *In re Winship*, 397 U.S. at 365.

135. *Id.* at 374 (Harlan, J., concurring).

136. *Id.* at 374 n.6 (Harlan, J., concurring).

137. This may mean that Justice Harlan meant to refer collectively to this delinquency research and did so by referring to the report of the New York legislative committee, which presumably rested its recommendations on delinquency research.

138. The single sentence in the *Smith* majority opinion describing the State's interest was the following: "It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense." *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2671. Finding an implication of stigma in this sentence seems possibly stretching a point.

139. *Id.*

140. In contrast to the now-dated research relied upon by earlier cases, Mr. Justice Rehnquist relied upon quite current publications. They were NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PROTECTION, STANDARD 5.13 (1976); E. ELDEFONSO, LAW ENFORCEMENT AND THE YOUTHFUL OFFENDER (3d ed. 1978); and Howard, Grisson and

pointing to the relevance of empirical support for these legislative and judicial premises.<sup>141</sup>

The last two issues to be discussed are, in all fairness, only passing comments in concurring opinions, but they illustrate the basic theme previously discussed. Justice White, in his concurring opinion in *McKeiver*, established that criminal law assumes defendants have a free will while juvenile law "rests on more deterministic assumptions."<sup>142</sup> Even though this reference was intended to be simply part of a prologue for his conclusions, Justice White could have considered the vast delinquency and criminology research on these topics.

*McKeiver* also made two references to the "temptation to use the [juvenile] courts for political ends."<sup>143</sup> Neither reference was grounded upon any delinquency research findings. Simply considering the prevalence of condemnation of juvenile crime by today's politicians seems to refute these references. In any event, this was a conclusion that was far from obvious and totally without reference to authority.

## VI. TRENDS AND PATTERNS EMERGING FROM THE USE OF RESEARCH IN JUVENILE CASES

The themes which emerge from the seven Supreme Court cases previously discussed are inconsistent and unpredictable. That is, issues which lent themselves most easily to reliance upon delinquency research were found both within those instances in which the Court did so rely and within those instances in which the Court did not so rely.

The Court most regularly relied upon delinquency research in describing the original juvenile justice system and its failures, as well as the characteristics of delinquency in general and of juvenile court respondents in particular. This appears to be predictable, since so much delinquency research exists on these topics. Moreover, very little within traditional legal analysis would be relevant to these considerations.

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Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203 (1977).

141. *Smith v. Daily Mail Pub. Co.* 99 S. Ct. at 2673 n. 1 (Rehnquist, J. concurring).

142. *McKeiver v. Pennsylvania*, 403 U.S. at 551-52 (White, J., concurring).

143. *Id.* at 552 (White, J., concurring) and at 556 (Brennan, J., concurring and dissenting).

The inconsistency and unpredictability is revealed in the instances in which the Court did not rely at all upon delinquency research. These instances included the stigma of delinquency, free will versus determinism in law, and the political use of the juvenile court. The first two of these have certainly been the topic of as much delinquency research as any of the topics for which the Court relied upon delinquency research.

The instances in which the Court inconsistently relied upon delinquency research included such topics as heavy caseloads, confidentiality of records, need for counsel and jury trials, and the right to remain silent. Each of these topics include some legal factors and some sociological factors. However, even though these topics are somewhat mixed and variable as to the areas of knowledge and perspective to which they pertain, the Court's resulting mixed and variable reliance upon delinquency research in considering these topics is not fully understandable. The Court's reliance pattern did not consistently fit the topic's inherently suggested need for reference to delinquency research.

Thus, it would seem that the nature of the topic itself would not allow one to predict whether the Court would rely upon delinquency research in its considerations. Perhaps the only pattern that partially emerges is that the Court may rely upon delinquency research if the topic tends to involve both legal analysis and delinquency research, but will not if the topic involves very little legal analysis and mostly delinquency research. This, of course, is exactly the opposite of what one might expect.

Another pattern which might be considered is the Court's tendency to rely upon delinquency research according to the importance of the issue to the particular opinion. For example, if it is a major premise upon which the decision rests, perhaps more complete documentation (including reference to delinquency research) could be expected. Somewhat less documentation might be used for minor premises and casual references to tangential concerns. Although not easily discernible, this does seem to be one pattern in these cases. This pattern is revealed somewhat in the three topics for which the Court made no reference to delinquency research. Particularly the passing references to free will versus determinism<sup>144</sup> and to possible political use of the juvenile court<sup>145</sup> are not major premises upon which conclusions rest and indeed are not in the majority opinions of the Court.

Compare, however, the Court's heavy reliance upon delin-

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144. *Id.* at 551-52 (White, J., concurring).

145. *Id.* at 552 (White, J., concurring) and at 556 (Brennan, J., concurring and dissenting).

quency research for its premise that the original juvenile justice system was largely a failure. In *Kent* this was only a passing comment but was heavily referenced,<sup>146</sup> and in *Gault* this was a major premise for the Court's holding but was scantily referenced.<sup>147</sup> In *McKeiver*, this failure was noted in passing but was not persuasive in the Court's final holding.<sup>148</sup> Thus, the pattern does not seem to hold true for this topic.

*Gault* is a prime example of extensive use of references to delinquency research in support of a major premise.<sup>149</sup> In holding a constitutional right to counsel for juveniles<sup>150</sup> the Court made this a major premise of its opinion. *Fare* also considered a juvenile's right to and request for counsel as a major issue<sup>151</sup> but did not refer to delinquency research. Again, the pattern is not borne out.

The pattern of whether the Court relied upon delinquency research can be tied to the Justice who authored the opinion. In chronological order the majority opinions are:

1966: *Kent*—Justice Fortas

1967: *Gault*—Justice Fortas

1970: *Winship*—Justice Brennan

1971: *McKeiver*—Justice Blackmun (plurality opinion)

1975: *Breed*—Chief Justice Burger

1979: *Fare*—Justice Blackmun

1979: *Smith*—Chief Justice Burger

Concurring and/or dissenting opinions have been written in these cases by Justices Black,<sup>152</sup> Brennan,<sup>153</sup> Burger,<sup>154</sup> Douglas,<sup>155</sup> Harlan,<sup>156</sup> Marshall,<sup>157</sup> Powell,<sup>158</sup> Rehnquist,<sup>159</sup> Stewart<sup>160</sup> and White.<sup>161</sup> Comparison of these opinions suggests a rough pattern.

146. *Kent v. United States*, 383 U.S. at 555-56. See note 29, *supra*.

147. *In re Gault*, 387 U.S. at 29-30. See note 30, *supra*.

148. *McKeiver v. Pennsylvania*, 403 U.S. at 543-45.

149. *In re Gault*, 387 U.S. at 34-42.

150. *Id.* at 41.

151. *Fare v. Michael C.*, 99 S. Ct. at 2569-71.

152. *In re Gault*, 387 U.S. at 59-64; *In re Winship*, 397 U.S. at 377-86.

153. *McKeiver v. Pennsylvania*, 403 U.S. at 553-57.

154. *In re Winship*, 397 U.S. at 375-76.

155. *McKeiver v. Pennsylvania*, 403 U.S. at 557-72.

156. *In re Gault*, 387 U.S. at 65-78; *In re Winship*, 397 U.S. at 368-75; *McKeiver v. Pennsylvania*, 403 U.S. at 557.

157. *Fare v. Michael C.*, 99 S. Ct. at 2573-75.

158. *Id.* at 2575-77.

159. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. at 2672-75.

160. *In re Gault*, 387 U.S. at 78-81; *Kent v. United States*, 383 U.S. at 568.

161. *In re Gault*, 387 U.S. at 64-65; *McKeiver v. Pennsylvania*, 403 U.S. at 551-53.



Justice Fortas' majority opinion in *Gault* is clearly the most extensive in its references to delinquency research. His only other juvenile law opinion (*Kent* majority opinion) is only slightly less so. Contrast the aforementioned majority opinion by Justice Blackmun in *Fare*, which has little reliance upon delinquency research although he makes sweeping generalizations about juveniles. The other primary opinions (in *Winship*, *McKeiver*, and *Breed*) fall somewhere in between, with each having some reliance upon delinquency research but not to the extent of *Gault*. Among all of the separate opinions in these cases, perhaps the opinions by Justice Harlan relied most heavily upon delinquency research and were also the most carefully reasoned and documented in general.

One major pattern or trend seems apparent. In considering the opinions chronologically, beginning with *Kent* and *Gault* and ending with *Fare* and *Smith*, there is a clear decline in the tendency to rely upon delinquency research. Indeed, these cases are benchmarks for the opposite ends of the spectrum, not only in juvenile law but in consideration of Supreme Court cases generally. Part of this difference is undoubtedly due to the thrust of the cases, with *Gault* being a substantial redesigning of the juvenile justice system<sup>162</sup> and *Fare* being a more narrow consideration of the *per se* aspects of the *Miranda* holding in relation to juvenile confessions.<sup>163</sup> Nevertheless, in each case sweeping and penetrating statements were made about juveniles, juvenile courts, and constitutional protections in juvenile law. *Gault* fully documented such conclusions while *Fare* and *Smith* stated them nakedly.

The other juvenile cases from 1967 to 1979 fall somewhere between the extremes of *Gault*, *Fare* and *Smith*, and a trend is suggested. *Winship* and *McKeiver* rely less upon delinquency research than did *Kent* or *Gault*, and *Breed* even less than *Winship* and *McKeiver*. Thus, while other patterns may be operative, it appears that the Court is relying less and less upon delinquency research in juvenile cases as we move further away from *Gault*.

## VII. CONCLUSIONS AND RECOMMENDATIONS

Juvenile cases are prime examples of instances in which sociological jurisprudence should be dominant. As compared to most other areas of law, the United States Supreme Court has very rarely ventured into consideration of juvenile procedure or the ju-

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162. See V. STREIB, *JUVENILE JUSTICE IN AMERICA* 9-12 (1978).

163. *Fare v. Michael C.*, 99 S. Ct. at 2568.

venile justice system. As a result, the seven cases decided and twenty-two opinions filed by the Justices have been and will continue to be scrutinized carefully. More importantly they have impact upon juvenile justice far beyond the normal impact of most Court decisions and opinions.

Juvenile cases also deal with a subject matter—juvenile delinquency and the rights of children—which particularly demands extra-legal considerations. Traditional legal analysis sheds inadequate light upon the causes of juvenile delinquency, the psychological makeup of the typical juvenile respondent, or the effectiveness of juvenile court-imposed treatment. If any area provides an opportunity for cooperation and coordination between law and social science or between legal agents and sociological researchers, juvenile justice is such an area.

Given the Court's rare consideration of juvenile justice and the clear relevance of delinquency research in such cases, it would be expected that the Court would carefully document its opinions with references to delinquency research. For some issues in some opinions this has occurred. Of particular note are Justice Fortas' majority opinions in *Kent* and *Gault*. For other issues in other opinions this has been noticeably lacking. The extreme examples are Justice Blackmun's majority opinion in *Fare* and Chief Justice Burger's majority opinion in *Smith*.

An attempt has been made herein to find an explanation for this inconsistent and unpredictable phenomenon. While some factors explain some of the variance, particularly the varying styles of the Justices in writing opinions and the primary thrust of the cases, no clear pattern has emerged. The one clear theme is that the years from 1966 to 1979 have shown a marked decline in the Court's reliance upon delinquency research in juvenile case decisions.

This theme is most unfortunate. The history of the juvenile justice experiment has been first to design a system based upon delinquency research and pointedly ignoring the traditional requirements of law.<sup>164</sup> Marking a zenith in juvenile jurisprudence, *Gault* added the stabilizing elements of law while leaving intact the important benefits of the system.<sup>165</sup> Recent considera-

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164. See *In re Gault*, 387 U.S. at 14-17.

165. "The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *In re Gault*, 387 U.S. at 21.

tions by the Court seem to have lost the tenor of this approach. Particularly in the instance of *Fare*, the Court has regressed to narrow, legalistic conclusions and broad, seat-of-the-pants conjecture. Our continuing high hopes for juvenile justice, and our respect for the reasoning of the Court, are not thereby advanced.