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Procedural Rights in the Juvenile Court: Incorporation or Due Process?

GLEN W. CLARK*

The landmark Supreme Court decision in In re Gault established, among other things, a juvenile's right to counsel in delinquency prosecutions. However, the decision left unanswered certain questions relating to the nature and scope of that right. In this article, the author examines whether or not Gault initiated a special due process right to counsel for juveniles apart from that body of sixth amendment law previously developed in criminal cases. Alternatively, he wonders whether Gault was meant to initiate a process of selective incorporation of the Bill of Rights into the juvenile justice system. The author critically analyzes the resulting trends of decisional and statutory law in various jurisdictions. The particular focus on the right to counsel at pre-trial identification procedures provides a most useful paradigm for examining incorporation in the juvenile context.

In re Gault,[1] the landmark case in juvenile law, was decided by the United States Supreme Court in May of 1967. In December of that year, Dorsen and Rezneck, counsel for the appellant in the *Gault* case, wrote "[I]n *Gault* the Court embarked on the same course of selective incorporation of the Guarantees of the Bill of Rights into the Fourteenth Amendment, in the context of state juvenile proceedings, that it has previously undertaken with respect

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1. 387 U.S. 1 (1967).

to the rights of adult defendants in criminal courts."[2]

Five years later, another group of writers expressed the same thought with these words: "In *Gault*, the Court entered into the process of selective incorporation of the guarantees of the Bill of Rights in the Fourteenth Amendment for application to state juvenile proceedings as it had done in adult cases."[3]

The term "selective incorporation" is not familiar to everyone, and the concept will be briefly explained in what follows. However, the issue raised in these quotes which warrants detailed discussion and constitutes the subject of this paper, is whether or not *Gault* initiated a process of selective incorporation in the fullest sense of the word "incorporation." The paper will examine this question in terms of a specific right—the sixth amendment right to counsel, limiting examination of that right to a specific setting—the right to counsel at a lineup or show-up staged by police or juvenile authorities for purposes of identification. While such a narrow analysis of the issue will not produce a checklist of incorporated rights, it will provide a specific basis for discussion and will facilitate an understanding of the practical implications involved in the incorporation issue.

Looking to the language of the case, *Gault* clearly established right to counsel in juvenile cases. Whether it meant to establish this right as an incorporation of the sixth amendment right to counsel into the juvenile system, or to fashion a special due process right to counsel for juveniles separate and apart from the body of sixth amendment law developed in adult criminal cases, was left unanswered by the decision. Similar ambiguity exists, to a lesser degree, with the other rights dealt with in *Gault*. Hence the concentration on right to counsel epitomizes the question of incorporation in the juvenile context. The sixth amendment incorporation is brought into sharp focus in the setting of police identification procedures, thus the concentration on that setting is the most useful paradigm. The sixth amendment rules governing counsel at identification are well developed and clear. The question is, however, whether they apply to juvenile cases.

I. Selective Incorporation: Background And Application to Juvenile Justice

The preceding discussion suggests what is meant by "selective incorporation" of Bill of Rights guarantees into the juvenile jus-

2. Doren and Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 10-11 (Dec. 1967).

3. Popkin, Lippert and Keiter, *Another Look at the Role of Due Process in Juvenile Court*, 6 FAM. L.Q. 233, 274-75 (1972).

tice system, but a fuller explanation will be helpful to those not already familiar with constitutional theory. It will also provide an opportunity to introduce *shorthand* designations for certain concepts involved, which will facilitate later reference.

Incorporation, in the traditional sense, refers to the process by which most of the first eight amendments have been held by the Supreme Court to limit *state* power over the individual as well as *federal* power.[4] The first eight amendments, were designed to curb only the exercise of federal power, whereas the intent of the fourteenth amendment, added seventy-seven years later, was to limit the powers of state government. It was through the fourteenth amendment proscription, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ,"[5] that incorporation took place. It came about in the process of giving specific content to the "due process" clause. The term had been variously defined by the Court,[6] the central element being that of "fundamental fairness," defined by Justice White, in *Duncan v. Louisiana*, as that which is "fundamental to the American scheme of justice."[7] The Court turned to the Bill of Rights for guidance as to the meaning of fundamental fairness. Gradually, all but two of the guarantees[8] against encroachment by the federal government have been incorporated into the fundamental fairness definition of due process as it applies to the states.[9] The designation "selective incorporation" derives from the case by case approach taken by the Court to apply each of the individual rights contained in the Bill of Rights as limitations on

4. Duncan v. Louisiana, 391 U.S. 145 (1968), contains a good explanation of the incorporation rationale and cites the cases through which the concept was developed.

5. U.S. CONST. amend. XIV, § 1.

6. These definitions were described as follows in *Duncan v. Louisiana*:

> The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' Powell v. State of Alabama, 287 U.S. 45, 67 (1932); whether it is 'basic to our system of jurisprudence,' *In re* Oliver, 333 U.S. 257, 273 (1948); and whether it is a 'fundamental right, essential to a fair trial,' Gideon v. Wainright, 372 U.S. 335, 343-344 (1963).

391 U.S. 145, 148 (1968).

7. Duncan v. Louisiana, 391 U.S. 145, 148, 149 (1968).

8. The fifth amendment clause requiring that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury. . . ." has not been incorporated. Neither has the federal bail guarantee of the eighth amendment.

9. *See* Duncan v. Louisiana, 391 U.S. at 147-50, for a concise review of this process.

the states. Selective incorporation is to be contrasted with "total incorporation," the rejected procedure recommended by Justice Black, whereby all of the Bill of Rights, as a unit, would have been applied to the states in a single decision.[10]

Another and very important aspect of incorporation is that once a federally guaranteed right is incorporated, the whole body of federal constitutional law defining the right is also made applicable to the states. State and federal power are thereafter limited by the right in the same way and to the same extent.

The term incorporation hereinafter will be used to identify a second level of incorporation upon which the present inquiry is focused. Where a particular right such as the sixth amendment right to counsel has been incorporated for application to state criminal proceedings, the issue becomes whether it has been further incorporated into the juvenile justice systems of the states. The result of this second level of incorporation would be that the same rights safeguarded for adults in criminal cases against governmental encroachment by way of fourteenth amendment due process, would also protect juveniles in delinquency prosecutions. This second level of incorporation would merge all of the federal gloss developed in adult criminal cases into application of the right to juvenile cases. This is the incorporation which was referred to in the opening quotations. It is *selective* incorporation inasmuch as *Gault* dealt with only four rights,[11] while other rights have been selected[12] or denied[13] in subsequent cases.

The concept that the constitutional rights which the Supreme Court has directed to apply in juvenile cases are not, or at least not necessarily, the *same* rights with the same federal gloss as applied in adult criminal cases, is a viewpoint contravening this second level of incorporation. Instead, it is argued, the constitutional rights are to be applied in the way the respective state authorities responsible for making legal policy deem to be fundamentally fair to juveniles. For example, the particulars of the juvenile version of right to counsel would be worked out by the state legislatures or courts to accommodate their perception of the peculiar needs of juvenile justice. A particular right would not necessarily have the same scope in different jurisdictions. The only limit on state definition of the right would be the ultimate review by the United

10. Justice Black first expressed this view in his dissent in Adamson v. California, 332 U.S. 46, 68 (1943).

11. Rights to notice of charges, counsel, confrontation and cross-examination, and against self-incrimination.

12. Breed v. Jones, 421 U.S. 519 (1975) (right against double jeopardy); *In re* Winship, 397 U.S. 358 (1970) (right to proof beyond a reasonable doubt).

13. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (right to a jury trial).

States Supreme Court in cases which reached that level. In time, with sufficient appeals, the Court would define which forms of right to counsel would satisfy the due process fundamental fairness test. In the meantime, the states will have been free to explore innovative forms, one of which might fit the requirements of juvenile justice better than the automatic and inflexible application of the adult rules. Such was the view of Justice Harlan as expressed in his opinion in *Gault*. This view will be referred to here as the "due process model."

II. THE LEGACY OF *GAULT*

Justice Fortas, who wrote for the majority in *Gault*, simply did not make clear his position on the incorporation of fundamental rights into the juvenile justice system as opposed to the due process model. In dealing with fifth amendment self-incrimination, he used language which implied that such incorporation was intended. However, trying to discern his true meaning involves a greater degree of speculation than certainty. Referring to the privilege against self-incrimination, he stated that:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement . . . ; juvenile proceedings to determine 'delinquency,' which may lead to commitment in a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination.[14]

These references to the fifth amendment and the characterization of juvenile delinquency proceedings as criminal for purposes of the fifth amendment carry a strong indication of authority for this second level of incorporation. They equate the fields of criminal and juvenile law in terms of constitutional rights and suggest that the same procedural rules apply to both. Although he makes reference to the landmark *Miranda* case,[15] Justice Fortas does not specify, as he could easily have done, that *Miranda* and other Supreme Court interpretations of the fifth amendment in adult cases apply with equal force to juveniles. It is possible that Justice Fortas did not deal with the point, either here or in connection with the other rights afforded juveniles in *Gault*, primarily because he held a unique minority viewpoint on incorporation. He expressed this viewpoint one year after *Gault* in his concur-

14. 387 U.S. at 49.
15. *Id.* at 44. Miranda v. Arizona, 384 U.S. 436 (1966).

ring opinion in *Duncan v. Louisiana*, where he said that he did not agree:

> That the tail must go with the hide; that when we hold, influenced by the Sixth Amendment, that due process requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts.[16]

Given his limited view of incorporation, it becomes understandable why the majority opinion in *Gault* expressed no clear position on the incorporation of the Bill of Rights into the juvenile process theory as opposed to the due process model.

As to incorporation of the fifth amendment self-incrimination standard into the juvenile system, whether via interpretation of *Gault* or by judicial assumption, it is clear from the state cases subsequent to *Gault*, that this incorporation has, in fact, occurred.[17]

Gault's discussion of the constitutional requirements for notice, confrontation, and cross-examination are of little help in resolving the general question regarding incorporation into the juvenile system. To some extent, the parts of the opinion relevant to these subjects provide encouragement for those who would argue for the due process model. While the language seems to emphasize due process, it must be kept in mind that the rationales of both the incorporation of rights into the juvenile system and the due process model are rooted in the same due process clause.

Referring to notice, Mr. Justice Fortas says: "Due process of law requires . . . notice which would be deemed constitutionally adequate in a civil or criminal proceeding."[18] At this point, the argument advocating the incorporation of rights into the juvenile justice system runs into difficulty because the sixth amendment notice requirement is limited to criminal proceedings and excludes civil matters.

Confrontation and cross-examination receive only brief discussion in *Gault*, thus shedding little light on the incorporation issue. The lines are more clearly drawn on right to counsel which, as previously indicated, justify our concentration on that issue. In requiring counsel at adjudicatory hearings in juvenile delinquency cases, Mr. Justice Fortas stated:

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16. 391 U.S. at 213 (incorporating the right to a jury trial).

17. *See, e.g.*, People v. Ledesma, 171 Colo. 404, 468 P.2d 27 (1970); People v. Horton, 126 Ill. App. 2d 401, 261 N.E.2d 693 (1970); Bridges v. State, 260 Ind. 651, 299 N.E.2d 616 (1973); State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974); *In re* K.W.B., 500 S.W.2d 275 (Mo. Ct. App. 1973). In Fare v. Michael C., 99 S. Ct. 2560 (1979), the Supreme Court assumed, without deciding, that Miranda principles were fully applicable in juvenile proceedings.

18. 387 U.S. at 33.

> There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention [that the judge represent the child] has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[19]

This equation of juvenile delinquency proceedings to criminal prosecutions provides a solid basis for arguing that the sixth amendment right to counsel guarantee has been incorporated. The opinion goes on to quote from a publication by the Children's Bureau of the former United States Department of Health, Education and Welfare. "As a component part of a fair hearing required by due process guaranteed under the 14th amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel."[20] The language here connotes determination of procedural rights directly under the fourteenth amendment, rather than the incorporation of rights to the juvenile justice system. The section of the opinion on right to counsel concludes with a reference to fourteenth amendment due process which could be cited in support of either view:

> 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.[21]

The only conclusion regarding the incorporation of the rights assured under the Bill of Rights into the juvenile justice system as opposed to a method employing the due process model based on *Gault*, is that it is not clear which of them has been adopted. The concurring opinion of Justice Black, and Justice Harlan's opinion concurring in part and dissenting in part, highlight the ambiguity of the majority opinion.

Justice Black, the advocate of total incorporation in the original context, would have preferred that approach with incorporation in the juvenile context as well. He supported what he considered to be selective incorporation of rights into the juvenile system, because the development was, in his judgment, in the right direc-

19. *Id.* at 36.
20. *Id.* at 39 (citing Children's Bureau of the United States Department of Health, Education and Welfare, *Standards for Juvenile and Family Courts*).
21. *Id.* at 41.

tion. The following passages from his concurring opinion in *Gault* explain his position:

> [B]oth courts and legislators have shrunk back from labeling these [juvenile] laws as "criminal" and have preferred to call them "civil." This, in part, was to prevent the full application to juvenile court cases of the Bill of Rights safeguards, including notice as provided in the Sixth Amendment, the right to counsel guaranteed by the Sixth, the right against self-incrimination guaranteed by the Fifth, and the right to confrontation guaranteed by the Sixth. The Court here holds, however, that these four Bill of Rights safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years. This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation . . . .
>
> . . . .
>
> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.[22]

Justice Harlan, after criticizing the majority for failing to make its position clear, supported some of the rights extended to juveniles by the majority and opposed others. He made it clear that the majority did not follow the due process model in the manner he preferred. Perhaps influenced by his continuing debate with Justice Black on the incorporation issue, Justice Harlan seemed willing to concede that the majority view was at least closer to incorporation than due process:

> The Court has, even under its own premises, asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.[23]

Accepting, then, that *Gault* did not settle the incorporation issue, the next step requires examination of statutes and judicial opinions written since *Gault* to detemine how the issue has been resolved in practice. Since the focus of our inquiry is on right to counsel, however, and specifically on right to counsel at police identification, it will be useful first to review the constitutional law on that subject as it has developed in adult criminal cases. The question will then be whether the law applicable to adults has been extended to juveniles.

III. The Right to Counsel at Police Identification

The leading cases on right to counsel at identification are *United States v. Wade*[24] and *Gilbert v. California*[25] (usually re-

22. *Id.* at 59, 61.
23. *Id.* at 74.
24. 388 U.S. 218 (1967).
25. 388 U.S. 263 (1967).

ferred to together as *Wade-Gilbert* because the working constitutional rule was derived from both); *Kirby v. Illinois*;[26] *United States v. Ash*;[27] and *Stovall v. Denno*.[28]

Two key points warrant emphasis at the outset of this discussion. First, these cases deal with the *sixth* amendment right to counsel, which should not be confused with the limited *fifth* amendment right to counsel created by the Court's decision in *Miranda v. Arizona*.[29] The *Miranda* right applies only during custodial interrogation, which means only where a confrontation between the police and the accused is both custodial and for testimonial purposes. Confrontation for purposes of identification is not testimonial and hence is not protected by the fifth amendment.[30] *Miranda*, with its limited right to counsel, is therefore not relevant.

Secondly, the timing of the identification cases is very important. Obviously, state cases follow the Supreme Court's mandates as understood at the time. When the Court's position evolves over a number of years, as it did here, state cases must be analyzed in terms of the Supreme Court law as determined at the time the case was decided.

Wade and *Gilbert* established that a confrontation with an accused party arranged by police for identification purposes, was a "critical stage" in the criminal prosecution, entitling the accused to sixth amendment representation by counsel. Presence of counsel was required to guard against police abuse of the identification process. If such abuse is attempted, counsel would have the background necessary to conduct a meaningful cross-examination at the trial to establish the prejudice created. Without such representation, a fair trial would not be possible. *Gilbert* developed this reasoning a step further, holding that evidence obtained at an uncounselled identification was *per se* inadmissible at the trial. The objective of this reasoning was to deter police from conducting lineups in the absence of counsel.

The *Wade* and *Gilbert* cases dealt with lineups conducted after the accused had been indicted. This was significant in two re-

26. 406 U.S. 682 (1972).
27. 413 U.S. 300 (1973).
28. 388 U.S. 293 (1967).
29. 384 U.S. 436 (1966).
30. *See* United States v. Dionisio, 410 U.S. 1 (1973); Schmerber v. California, 384 U.S. 757 (1966).

spects: both cases were based on the sixth amendment right to counsel and the Court, in *Massiah v. United States*,[31] had already established indictment as the point in a criminal prosecution at which the accused's sixth amendment right to counsel began. There was doubt following *Wade-Gilbert* as to whether the counsel requirement applied to pre-indictment as well as post-indictment lineups. Logic would seem to dictate that application, and many courts so held.[32] Line up is no less a critical stage, nor the potential prejudice to an accused less severe when it occurs before rather than after indictment. The Court settled this question in *Kirby v. United States*,[33] fixing the starting point of a sixth amendment right to counsel at the initiation of "adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,"[34] and holding that lineups or other identification procedures conducted *prior* to that point did *not* require presence of counsel.

The "critical stage" analysis of the sixth amendment right to counsel gave way in *Kirby*, to an analysis based on the formal commencement of the criminal prosecution. Prior to that commencement, the accused is not entitled to counsel despite the possibility that the absence of counsel might prejudice a fair trial. After the commencement of adversarial judicial criminal proceedings, counsel is now required at all confrontations between the defendant and the "prosecutorial forces of organized society" which meet the critical stage test. Lineups meet the test but fingerprinting, blood sampling, and other mechanical confrontations where prejudice to defendant is unlikely to result, do not.

Kirby did not, of course, mean that pre-indictment[35] lineups could be rigged by police with impunity. All it meant was that the presence of counsel was not constitutionally required at lineups to protect the accused against rigging. After *Kirby*, the accused must report police improprieties to his counsel and counsel must

31. 377 U.S. 201 (1964). Another 1964 case, Escobedo v. United States, 378 U.S. 478 (1964), seemed to put the beginning of the sixth amendment right at an earlier point in time, but *Escobedo* was later modified in *Kirby*, 406 U.S. at 689, to bring it under the fifth amendment. It should also be noted that in a 1970 case, Coleman v. Alabama, 399 U.S. 1 (1970), the sixth amendment right to counsel was held to vest at the preliminary hearing depending on the statutory procedures under which it is conducted. *Kirby* takes all these cases into consideration in establishing the current rule on right to counsel at lineup.

32. Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973), illustrates this position and the criticism generated when the Court did not follow it in *Kirby*.

33. 406 U.S. 682.

34. *Id.* at 689.

35. The phrase "pre-indictment" is used for convenience. Actually, according to *Kirby*, the terminology should be "pre-beginning of adversary judicial criminal proceedings." 406 U.S. at 688.

rely on impromptu cross-examination at the trial to establish prejudice. In *Stovall v. Denno*,[36] the Court held that in a situation where presence of counsel was not required, if the defendant could show that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law,"[37] the lineup identification would be excluded from evidence at the trial. *Stovall* was based on fourteenth amendment due process, not on the sixth amendment right to counsel. While it is not properly a right to counsel case, it provides backup protection against police rigging where counsel is not constitutionally required and is so closely related that it has become part of the right to counsel package.

Thus far, we have been considering out of court identification of the type wherein evidence relevant to identification offered at the trial originated in a police-initiated procedure. Frequently a witness is asked to make an in court identification of a defendant after he has participated in an improper out of court identification. It is likely that the in court identification will be based on the witness' recollections from the lineup rather than on his observations at the actual time and place of the offense. Such an identification is unreliable and the likelihood of misidentification is great. To protect against this, the Court has held that once an out of court identification has been excluded from evidence, for whatever reason, an in-court identification by the same witness is considered suspect. The burden is then on the prosecution to purge the taint by showing that the witness is basing his in-court identification on information other than that obtained at the prejudicial out of court procedure.[38]

United States v. Ash[39] dealt with photographic identifications arranged by police. Typically, in such identifications, a witness to an offense is shown a number of pictures including one of the suspect and then asked to identify him. Obviously, this practice is also subject to abuse by law enforcement officials. The Court in *Ash*, held that since identification from photographs involved no

36. 388 U.S. 293 (1967).

37. *Id.* at 301-02. For the Court's current position on this subject, *see* Manson v. Brathwaite, 432 U.S. 98 (1977).

38. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). *See also* Manson v. Brathwaite, 432 U.S. 98 (1972).

39. 413 U.S. 300 (1973).

confrontation between the accused and the prosecution, no sixth amendment right to counsel existed. This rule prevails whether or not the accused has been indicted. The due process safeguards of *Stovall* are available if the defense can show, by cross-examination or otherwise, that the police engaged in prejudicial conduct.

IV. State Statutes on Juvenile Right to Counsel at Identification

Generally, state statutes governing the right to counsel in juvenile proceedings are of three types. The first kind makes no reference to right to counsel, and in states following this approach there is no *statutory* right to counsel.[40] The result is to leave the matter of counsel up to the courts. State courts, applying their interpretations of *Gault* and the Supreme Court cases following it, will have worked out the particulars of a juvenile's right to counsel in their respective jurisdictions. The case law governs, and the incorporation of the Bill of Rights theory *versus* the due process model will have been a relevant issue to the courts making these decisions.

The second type of statute is illustrated by the new Juvenile Court Code of Indiana[41] which merely states that a child charged with delinquency is entitled to be represented by counsel. Other states guarantee the child's right to counsel at hearings.[42] Statutes of this kind are so general that it is again up to the courts to develop the detail necessary for their application in practice. One commentator discussing the new Indiana Code, put it as follows:

> As a general rule, a person is entitled to the assistance of counsel in a criminal proceeding only at the critical stages of the criminal process. The new code simply provides that a juvenile has the right to counsel with no attempt to set forth a list of the critical stages of the juvenile process. This may indicate a legislative intent to allow the courts to determine the critical stages on a case by case basis, or it may be interpreted to mean that a juvenile is entitled to counsel throughout the entire process.[43]

The third type of statute guarantees the juvenile a right to counsel at "all stages" or "every stage"[44] of the proceedings. The

40. *See* M. Levin & R. Sarri, Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States (1974). As of that date the authors listed eleven states in this category. There are fewer than this today.

41. *See* Ind. Code § 31-6-3-1(b) (Supp. 1978). *See also* Iowa Code Ann. § 232.28 (West 1969), for another example of this type of statute.

42. *See, e.g.*, N.Y. Fam. Ct. Act § 741(1) (McKinney 1975); R.I. Gen. Laws § 14-1-30 (1969); Va. Code § 16.1-266 (Michie 1975); Tex. Civ. Code Ann. tit. 7A § 2338-1-6(e) (Vernon 1971).

43. Kerr, *Foreword: Indiana New Juvenile Code*, 12 Ind. L. Rev. 1, 8 (1979).

44. Ala. Code 12 § 12-15-63 (1975); Colo. Rev. Stat. § 9-1-106(1)(a) (1978); Fla. Stat. § 39.071 (Supp. 1978); Ga. Code § 24A-2001(a) (1971); Me. Rev. Stat. 15 § 3306 (West Supp. 1967-1978); Neb. Rev. Stat. § 62.195 (1976); N.M. Stat. Ann. § 32-1-27

"all stages" form was adopted in the *Uniform Juvenile Court Act*[45] and in the *Legislative Guide for Drafting Family and Juvenile Court Acts* of the Children's Bureau, former U.S. Department of Health, Education and Welfare.[46] An earlier model, the *Standard Act* of the National Council on Crime and Delinquency, used the "every stage" terminology.[47] This language tracks that of *Gault*, but in practice, statutes of this kind provide little more legislative guidance than those of the preceding categories. If "all stages" is interpreted literally, then it would seem such statutes require presence of counsel at all lineups involving juveniles whether conducted before or after the juvenile criminal proceedings. A lineup is, after all, a stage in the overall proceeding. But, as established by the cases to be examined, this has not been the practice adopted by the courts. Instead, they have tended to read the statutory language in the light of the *Wade-Gilbert* line of cases and have interpreted "all stages" to conform with the Supreme Court case law. In so doing, the state courts, despite seemingly precise statutory language, have once again become the final arbiter of the juvenile's right to counsel.[48]

Under all three types of statutes we must look to the case law for information as to how *Gault* has been applied. The concern is whether the decisions have conformed to the theory recognizing the right as established by incorporation of the adult right into the juvenile justice system or to the due process model.

V. The State Rulings on Juvenile Right to Counsel at Identification

Review of the reported cases in search of a firm answer to the above question is disappointing because of the paucity of cases

(1975); N.D. Cent. Code § 27-20-26 (1974); Ohio Rev. Code Ann. § 2151.352 (Page 1976); Okla. Stat. tit. 10 § 1109 (Supp. 1978-1979); 42 Pa. Cons. Stat. § 6337 (1978), formerly 11 Pa. Const. Stat. § 50-317 (1972); Utah Code Ann. § 78-3a-35 (Supp. 1979); Wis. Stat. § 48.23 (1979); W. Va. Code § 49-5-9 (1976); Wyo. Stat. Ann. § 14-6-222 (1977). N.J. Rev. Stat. § 2A-4-59 (Supp. 1979) authorizes counsel "at every critical stage."

45. Uniform Juvenile Court Act § 26(a) (1969).

46. *Id.* § 25(a). This document was published in 1969.

47. *Id.* § 19 (sixth ed. 1959).

48. The willingness of the courts to do this is established by several of the cases to be discussed in the following section. For example, statutes in California, Colorado, and Maryland used the "every stage" language. The courts in all three states referred to the relevant Supreme Court cases for guidance in their application.

providing convincing basis for determining which procedure has been followed. This fact is of interest in light of Justice Harlan's argument in support of the due process model, asserting that letting the states establish the scope of particular rights on a case by case basis would encourage experimentation and eventually lead to development of optimum applications of the right.[49] This may be true, but without reports on how rights are being applied, how are other jurisdictions to learn from the experience?

It goes without contention that in-court identifications are occurring in juvenile delinquency cases throughout the country on a regular basis. The prosecution has to establish that the child accused is, in fact, the child who committed the alleged offense. At some point in the investigation of many cases, the police will have accomplished an out of court identification, probably by a show-up. Why then, have so few juvenile cases involving the right to counsel at identification reached the appellate courts? As previously suggested, the question has not been adequately resolved by statute. Conceivably, the "all stages" language, where applicable, is being taken literally and counsel is being provided at all out of court identifications staged by the police. More likely, however, counsel is not being provided, but the lack of counsel is not challenged because it is generally accepted that *Kirby* applies to juvenile cases[50] and counsel is thus not required during the police investigation phase. If this interpretation is accurate, then both the trial courts and defense counsel are applying adult criminal law interpretations of the sixth amendment right to counsel in juvenile cases without a knowing consideration of whether a different rule should apply. In this instance the incorporation of rights into the juvenile system would have occurred by default, or perhaps more accurately, it will have been assumed.

While analysis of the few reported cases will not justify a firm

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49. *See generally* Justice Harlan's dissent in Duncan v. Louisiana, 391 U.S. at 171-93. Justice Harlan cites dictum of Justice Brandeis that "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory . . . ." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting) (1932).

50. In juvenile cases the investigation phase, whether conducted by police or by juvenile authorities, will generally have been completed before a petition is filed or other action taken which would trigger a sixth amendment right to counsel under *Kirby*. Thus counsel would not be required.

The hypothesis that juvenile courts are assuming without discussion that *Kirby* applies is given credence by the number of pre-*Kirby* cases that made a similar assumption about *Wade-Gilbert*. The situation there was more visible since counsel was required in the investigation phase and uncounselled lineups and showups were frequently challenged. There is no basis for challenge under *Kirby*, unless adversarial judicial "criminal" proceedings have begun. Under the due process model, of course, a case could be made for counsel earlier in the juvenile process even though not constitutionally required for adults.

conclusion on how the majority of states are handling the sixth amendment right to counsel, a prevailing view[51] can be discerned which turns out to be fairly convincing because it is almost unanimous among the jurisdictions which have considered the question on appeal. The position is identical to the theory espousing the incorporation of the rights ensured by the Bill of Rights into the juvenile justice system. A few cases have dodged the issue, but as will be pointed out, even those are not inconsistent with incorporation inasmuch as they have not clearly rejected it, and some can be interpreted as tacitly approving it. Only one reported case appears to follow the due process model. No rationale is given in that case to support its position.

Before discussing the cases in detail, a summary of the outcome might be useful. Courts which have adopted the incorporation theory comprising what is referred to as the prevailing view, are located in Rhode Island, California, New York, Colorado, Missouri, and Pennsylvania. While it cannot be said that these states follow the theory on a statewide basis because some of the decisions are from inferior courts, classification by state is convenient and does have some validity. Depending upon the level of the court, such decisions should at least be influential, even though they are not binding throughout the state. Classified in the "not decided but not inconsistent" category are decisions from the District of Columbia, Minnesota, and Maryland. The decision seeming to favor the due process model without discussing it is a second case from Pennsylvania.

The case which perhaps best illustrates the theory of incorporation is the Rhode Island case of *In re Holley*.[52] Decided after *Wade* and *Gilbert*, but prior to *Kirby*, the *Holley* court first decided that the *per se* exclusionary rule of *Wade-Gilbert* covered pre- as well as post-indictment lineups. It then considered and affirmatively determined that *Wade-Gilbert* applied to the pre-indictment juvenile case before it. In reaching its decision, the *Holley* court cited *Gault* to the effect that the assistance of counsel is "essential for the determination of delinquency."[53] *In re Winship* was cited for the proposition that "the same considerations which demand extreme caution in fact finding to protect the

51. *See* S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 100-04 (1974) [hereinafter cited as DAVIS].
52. 107 R.I. 615, 268 A.2d 723 (1970).
53. 387 U.S. at 36-37.

innocent adult apply as well to the innocent child."[54] It then quoted as follows from *Wade*:

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pre-trial confrontation, with the state aligned against the accused, the witness, the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'[55]

That the court was incorporating the sixth amendment right to counsel into the Rhode Island juvenile justice system, suggested by its adoption of the *Wade* rationale, was made clear in its holding that "the lineup . . . wherein *Holley* was identified by the prosecutrix was a violation of his *sixth amendment* right to counsel . . . ."[56]

A California case in point, *In re Carl T.*,[57] is equally clear in its adoption of the incorporation theory. As in *Holley*, the court first dealt with the applicability of *Wade-Gilbert* to pre-indictment identifications arranged by the police. This was crucial since the identification in question would have been equated to the pre-indictment situation for an adult. Without deciding the issue pending before the California Supreme Court in another case,[58] the court assumed that *Wade-Gilbert* required counsel at pre-indictment lineups[59] and concluded that the adult rule applied to juvenile as well as adult proceedings. Two rationale were given. First, the California statute required that delinquency be proved by evidence "legally admissible in the trial of criminal cases."[60] Second, and independent of the statute, "juvenile proceedings of this character must meet the test of constitutional due process of law."[61] This reference to meeting the "test of constitutional due process of law" again raises the dual role played by the due process clause. The court was not using the term in the sense of the due process model where the scope of a juvenile procedural right is established individually on a balance of interest basis. Rather, the reference was to due process generally, in its role as a mediating element in the selective incorporation of the Bill of Rights into

54. 397 U.S. at 365.
55. 388 U.S. at 235-36.
56. 107 R.I. at 621, 268 A.2d at 728 (emphasis added).
57. 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (1969).
58. People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).
59. An assumption which turned out to be wrong according to *People v. Fowler*, and ultimately, the U.S. Supreme Court in *Kirby*. That the *per se* requirement for counsel at pre-indictment lineups attributed to *Wade-Gilbert* was later rejected does not affect the validity of conclusions drawn from the pre-*Kirby* cases on the issue of incorporation. The point is that the state courts were incorporating the sixth amendment constitutional law *as it then stood* into the juvenile justice system.
60. CAL. WELF. & INST. CODE § 701 (West Supp. 1979).
61. 1 Cal. App. 3d 344, 351, 81 Cal. Rptr. 655, 659.

state law and its further incorporation into juvenile court law. The court's reliance on *Wade-Gilbert* in prior juvenile cases establishes this fact.

While the *Carl T.* court stated its willingness to reverse the trial court because an uncounselled out of court identification was admitted, it did not actually do so because it found an independent basis for the victim's in court identification which rendered any error harmless. The court held that the *Stovall*[62] case applied to juvenile cases. The implications of this application will be discussed later.

In re Joseph S.,[63] another pre-*Kirby* case, a New York family court assumed that *Wade-Gilbert*, as well as *Stovall*, applied to juvenile court cases. On the facts presented, however, the court found that the stationhouse identification of the accused by the victims was the result of an inadvertent confrontation which had not been anticipated by the police. The accused was at the stationhouse as a witness and was not a suspect until identified. The motion to suppress the out of court identification for lack of counsel was denied since the sixth amendment right to counsel had not yet vested, even under the broad interpretation of *Wade*.

In another New York decision, *In re William D.*,[64] the Appellate Division returned a juvenile case to Family Court in part to ascertain that an in-court identification was not tainted by an improper show-up. The Court again cited *Wade* and *Gilbert*.

The Colorado Court of Appeals dealt with the juvenile's right to counsel at identification in *People in the Interest of M.B.*[65] This was a post-*Kirby*, pre-*Ash*[66] case involving a photographic identification. *Ash*, as noted earlier,[67] held that such an identification was not a confrontation and thus there was no constitutional right to counsel regardless of the stage in the prosecution at which the identification was made. The Colorado court, not anticipating the *Ash* ruling, decided the case under *Kirby*. Since the photographic identification had occurred prior to the time the accused had been taken into custody, the defendant's sixth amendment right to counsel had not yet begun and presence of counsel was

62. 388 U.S. 293.
63. 62 Misc. 2d 329, 308 N.Y.S.2d 943 (Fam. Ct. 1969).
64. 36 A.D.2d 970, 321 N.Y.S.2d 510 (App. Div. 1971).
65. 513 P.2d 230 (Colo. App. 1973).
66. 413 U.S. 300.
67. *See* text accompanying note 39 *supra*.

not required. The court viewed custody of the juvenile as the equivalent of the beginning of adversarial judicial criminal proceedings. The court also felt that the identification had not been conducted in an impermissibly suggestive manner. *M.B.* was clearly an application of sixth and fourteenth amendment adult law as then understood by the juvenile court. The court, without developing its rationale, drew the following conclusion: "Although proceedings under the Colorado Children's Code are civil in nature, a respondent child in such proceedings is entitled to the same constitutional protections as are afforded an adult defendant in a criminal case."[68] An earlier Colorado case had set forth a different rule in which the court stated that it knew "of no constitutional requirement that proceedings in juvenile cases shall be conducted according to the criminal law, or that the proceedings need take any particular form, so long as the essentials of due process and fair treatment are accorded."[69] The evolution of a rule in *M.B.* which conformed to the theory of incorporation of rights into the juvenile justice system from an earlier Colorado position favoring the due process model is not satisfactorily explained in the line of cases through which it occurred.[70]

Two Missouri cases which seem to support the concept of incorporation are, *State v. Richardson*[71] and *State v. Thompson*.[72] Both cases involved lineups conducted while the accused were in the custody of juvenile authorities and thus subject to juvenile law, although both were subsequently waived to criminal court for trial as adults. *Kirby* was applied in both cases and since the lineups were conducted prior to indictment, there was no constitutional requirement for the presence of counsel. Both lineups occurred within a few hours of the time when the accused were taken into custody and neither court found it necessary to define the stage in the juvenile system corresponding to the beginning of adversarial judicial criminal proceedings in adult cases for purposes of triggering the sixth amendment right to counsel.

There is doubt regarding the prevailing rule in Pennsylvania because of an apparent conflict. *Commonwealth v. Hodges*,[73] decided prior to *Kirby*, applied *Wade* in a juvenile case and, finding error in the use of an uncounselled lineup remanded the case to the trial court for hearing on the possible existence of an in-

68. 513 P.2d at 231.
69. *In re* J.A.M., 174 Colo. 245, 247, 483 P.2d 362, 364 (1971).
70. *In re* G.D.K., 30 Colo. App. 54, 491 P.2d 81 (1971); *In re* B.M.C., 32 Colo. App. 79, 506 P.2d 409 (1973).
71. 495 S.W.2d 435 (Mo. 1973).
72. 502 S.W.2d 359 (Mo. 1973).
73. 218 Pa. S. 245, 275 A.2d 884 (1971).

dependent basis which would support an in-court identification. *Wade* was cited, but no rationale was given for applying it in the juvenile system.

In re Stoutzenberger,[74] a later Pennsylvania case which excluded evidence of an uncounselled showup conducted shortly after the juvenile accused was taken into custody and thus under circumstances in which *Kirby* would not have required counsel, is the only known case in which the majority of the court seems to have adopted a due process stance on the right of a juvenile to counsel at an out of court identification. However, its position is not very convincing.[75] It does not cite *Hodges* and does not purport to overrule it. Nor does it cite *Wade* or *Kirby*. *Stoutzenberger* might be explained as a routine application of the *Hodges* rule requiring counsel wherever *Wade* would require it for adults, without accommodating the change affected by *Kirby* as to when the sixth amendment right to counsel begins. If so, one would expect *Hodges* to have been cited. There were other arguments for excluding the out of court identification in *Stoutzenberger* which may account for the decision. First, the court rejected the argument that the accused had been arrested without probable cause, and was in illegal detention at the time of the showup, tainting the identification and rendering it inadmissible. However, and more significantly, the defense successfully argued that the showup was impermissibly suggestive which, of course, made its result inadmissible at trial irrespective of the right to counsel issue. Yet the court included lack of counsel in the rationale for its decision, where it was stated that, "[w]e are convinced that the absence of counsel coupled with the suggestiveness of the confrontation requires the suppression of the out of court identification."[76]

Since *Stoutzenberger* was a post-*Kirby* case and the showup occurred shortly after the illegal arrest but before formal charges were made, no sixth amendment right to counsel was invoked. To require counsel, as the court seemed to be doing, would either have to be according to the due process model, or on an "incorporation plus" theory. The "incorporation plus" theory states that

74. 235 Pa. S. 500, 344 A.2d 668 (1975).

75. *Davis*, *supra* note 51, at 52, reaches the conclusion that the Court assumed, without discussion, the applicability of *Wade*, *Gilbert* and *Stovall* to juvenile cases. Davis, however, does not discuss *Kirby*.

76. 235 Pa. S. at 503, 344 A.2d at 671.

juveniles are not only entitled to full application of *selected* adult rights, but that fundamental fairness requires they be given *greater* rights than adults in some situations.[77]

Another possible explanation of *Stoutzenberger*, since the Pennsylvania statute is one of the "all stages" variety,[78] would be to view the decision as based entirely on statute. If it was simply a matter of statutory interpretation, we would have to say that Pennsylvania was not relying on incorporation as a guide in this respect.

There were fourteenth amendment[79] issues involved in some of the cases considered above which were not brought out in the discussion because the courts took firm positions on sixth amendment incorporation. Other courts have avoided the sixth amendment issue entirely, even where the sixth amendment may have been violated, by finding that an in court identification had an independent basis which rendered harmless any sixth amendment violation in connection with the out of court identification. A similar fact situation was found in cases decided in the District of Columbia[80] and Minnesota[81] which gave rise to their classification above as "not decided but not inconsistent" with the incorporation theory. That the sixth amendment incorporation issue was *not* being decided was categorically stated in both opinions.

As we have seen, however, the fourteenth amendment rules on "impermissible suggestion" developed as a handmaiden to the development of constitutional law on the right to counsel at identification.[82] A considerable body of fourteenth amendment "identification" law has been the result. The application of this law to juvenile cases, while technically a juvenile version of the traditional incorporation theory inasmuch as fourteenth amendment applies directly to the states is very similar to it. Adult constitutional decisions on impermissible suggestion have been incorporated into the juvenile justice system by the very courts which have refused to decide the incorporation issue with respect to *Wade-Gilbert-Kirby*.[83] A constitutional interpretation of a right

77. *See* J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 9 (1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 569, 570 (1978).

78. *See* 42 PA. CONS. STAT. ANN. § 6337 (Purdon 1978), (a 1978 reenactment of 11 PA. CONS. STAT. ANN. § 50-317 (Purdon 1972) which was in effect at the time).

79. *See* text accompanying note 37 *supra*.

80. *In re* McKelvin, 258 A.2d 452 (D.C. 1969).

81. *In re Welfare of* Spencer, 288 Minn. 119, 179 N.W.2d 95 (1970).

82. It is significant that *Wade* (sixth amendment right to counsel) and *Stovall* (fourteenth amendment impermissible suggestion) were decided by the Supreme Court on the same day.

83. The *McKelvin* Court states:

> One could hardly dispute that a juvenile suspect is as much entitled as an adult to fundamentally fair identification procedures. If it appeared here

developed by the Supreme Court for application to adults has been applied with equal force to juveniles. That is the essence of the second level of incorporation, applying the rights articulated in the Bill of Rights to juvenile law cases.

The most interesting of the "undecided" group of cases is *Jackson v. State*, a case resolved in Maryland.[84] In this case, the court incorporated the *Kirby* test for determining the beginning point of the right to counsel in criminal cases so as to rule out the application of *Kirby* to juvenile cases. According to the *Jackson* court:

> Even if the proceedings in the Juvenile Court be deemed 'an adversary judicial criminal proceeding' within the contemplation of *Kirby*, *which we expressly do not now decide*, such proceedings postdated the lineup. Therefore, Jackson had no constitutional right to the assistance of counsel at the lineup, and, as he was not entitled to counsel as of right, the absence of counsel did not violate the Sixth and Fourteenth Amendment.[85]

In a footnote to the above passage, it is pointed out that "juvenile proceedings are not criminal proceedings."[86] The implication is that *Kirby* ought not to apply because juvenile proceedings are not criminal proceedings and at no point can become adversarial judicial criminal proceedings. Thus, *Kirby* is being incorporated despite the court's disclaimer. This is given credibility by the fact the court devoted over half of its opinion to criticizing the change *Kirby* had made in *Wade-Gilbert*, which would hardly have been appropriate in a juvenile case unless the court was incorporating the sixth amendment law governing the right to counsel at identification.

Aside from the criticism that Jackson applies *Kirby* to justify not applying it, basing the decision on a criminal-civil distinction violates the admonition against using a "wooden" approach decried by the Supreme Court.[87]

The court suggested another ground for not requiring counsel, however. The lineup was held two days after Jackson was arrested and three days before the petition was filed in juvenile

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> that the in court identification had no independent basis and might have been polluted by suggestive precinct identification procedures without counsel present we would have the serious question of whether the holdings of the Supreme Court in *Wade* and *Gilbert*, as illuminated by its prior holdings in *Gault* . . . , should not logically be just as binding in a juvenile court proceeding as in a criminal trial.

258 A.2d at 454-55.

84. 17 Md. App. 167, 300 A.2d 430 (1973).
85. *Id.* at 172, 300 A.2d at 435 (emphasis added).
86. *Id.* at 172 n.5, 300 A.2d at 435 n.5.
87. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. at 541.

court. Thus, the lineup would almost certainly be considered to have occurred prior to the beginning of adversarial judicial proceedings, even in the juvenile system. Yet, if this were the basis for the decision, the court would be applying *Kirby* which it said it was not willing to do.

In summary, the undecided cases suggest that even when the courts have declined to decide the issue of incorporation versus the due process theory, they have, at least to some degree, espoused the incorporation concept.

The only clear expression favoring the due process model in the reported cases is contained in a dissent by Justice Donnelly in *State v. Richardson*,[88] a Missouri case already cited as supporting incorporation. Justice Donnelly would admit evidence of lineup identifications in juvenile court trials, presumably applying the *Wade-Gilbert-Kirby-Stovall* rules. He would not, however, under any circumstances, allow an out of court identification made in the juvenile system to be used in a subsequent criminal proceeding. This position, of course, contemplates a case in which the juvenile court has waived its jurisdiction to the adult court as was done in the *Richardson* case. Justice Donnelly eschewed a narrow interpretation of a Missouri statute which excluded some kinds of evidence developed in the juvenile system from use in criminal courts but did not mention identification evidence and thus arguably authorized it. He relied on the *McKeiver* principle that "the applicable due process standard in juvenile proceedings, as developed in *Gault* and *Winship*, is fundamental fairness."[89]

Justice Donnelly is proposing a special due process formulation of right to counsel applicable only to juveniles and designed to meet the particularized needs of the juvenile justice system. The *Richardson* dissent represents the kind of innovation which was undoubtedly contemplated by Justice Harlan in advocating the due process model.

VI. Other Applications of Right to Counsel

The prevailing, then, view regarding the right to counsel for a juvenile alleged to be delinquent is that the sixth amendment has been incorporated into the juvenile justice system. This would seem to support the early commentators who interpreted *Gault* in terms of selective incorporation. As has been shown, however, not all of the courts which have dealt with the question agree. Some have specifically reserved this question. Furthermore, there are juvenile court applications of right to counsel other than

88. 495 S.W.2d at 441.
89. 403 U.S. at 543.

at identification which seem to run counter to the theory of incorporation. There is also language in some of the post-*Gault* Supreme Court cases which, while not dealing with right to counsel, bears on the general issue of incorporation and should be considered.

One of the other sixth amendment issues which has arisen in juvenile cases questions whether the effectiveness of counsel is to be measured by adult sixth amendment standards, or whether special rules apply for juveniles. Popkin, Lippert and Keiter[90] found the answer to this question unclear in 1972 because the role of counsel in juvenile court was still in an "evolutionary state." A case decided by the California Supreme Court in 1974,[91] however, took a due process approach to one facet of the effectiveness issue—the right of counsel to make a closing argument in a delinquency case. The court found that there was such a right, that it was part of the "guiding hand of counsel" guaranteed by *Gault* and essential to achieving fundamental fairness for juveniles. In stating its rationale, the court said:

> The right of counsel in juvenile proceedings is predicated on due process concepts of fairness and is not necessarily as broad as the right to counsel in criminal proceedings. . . . [W]e deem it unnecessary to decide whether that same result [right to closing argument] can be achieved by first determining that a similar right is constitutionally compelled in adult criminal proceedings and, by an incorporating process . . . resolve that such right must also be extended to juvenile proceedings.[92]

The 1969 case, *In re Carl T.*,[93] in which the California court had favored the theory of incorporation of rights of juveniles was not mentioned in the opinion. The court relied primarily on the Supreme Court's dictum in *McKeiver v. Pennsylvania*,[94] to the effect that the "applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness."[95] It is true that fundamental fairness *is* the standard, but a reading of *McKeiver* against the long constitutional history of selective incorporation again brings out the dual role of due process. There are two levels at which due process comes into play using the fundamental fairness standard. It is important to

90. *Another Look at the Role of Due Process in Juvenile Court*, 6 FAM. L.Q. 233 at 246-47 (1972).

91. *In re* F., 11 Cal. 3d 249, 520 P.2d 986, 113 Cal. Rptr. 170 (1974). *See also* E.V.R. v. State, 342 So.2d 93 (Fla. 1977).

92. 11 Cal. 3d at 254, 520 P.2d at 988, 113 Cal. Rptr. at 172.

93. *See* note 57 *supra*.

94. 403 U.S. 528.

95. *Id.* at 543.

distinguish the two levels in evaluating *McKeiver*.[96]

Another phase of sixth amendment right to counsel into which this theory might not seem to fit comfortably is that of *pro se* representation. Does a juvenile have the same sixth amendment right to conduct his own defense in a delinquency proceeding that an adult has in a criminal case?[97] Obviously, there are important differences between children and adults which would make such a rule questionable if applied in the juvenile justice system. The *parens patriae* idea is not dead—children require protection and to extend this particular adult rule to juveniles would seem prejudicial.

The need for special treatment of children with respect to waiver of counsel has been recognized by various authorities and by state legislatures. For example, the President's Commission on Law Enforcement and the Administration of Justice in 1967, as noted in *Gault*, made the following recommendation: "Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[98] The Georgia Juvenile Court Act of 1971, like the Uniform Juvenile Court Act, includes a requirement that: "Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them."[99] The IJA/ABA Juvenile Justice Standards Project, also takes a position favoring mandatory counsel in juvenile delinquency cases. The commentary points out, however, that "it is not intended to foreclose absolutely the possibility of *pro se* representation by a juvenile."[100]

Would statutes based on special recognition of the needs of children be unconstitutional now that the Supreme Court has decided the *pro se* representation issue for adults? Under the due process model there would, of course, be no probem. On the other hand, the theory of incorporation, if followed to a logical end, would seem to rule out an exception to the adult rule being made for children even in this situation. However, incorporation need not be carried to such lengths. It can accommodate differ-

96. *See* text accompanying note 103 *infra*.

97. *See* Faretta v. California, 422 U.S. 806 (1975). The Court in *Faretta* said: "The Sixth Amendment does not provide merely that a defense shall be made for accused; it grants to the accused personally the right to make his defense." *Id.* at 819.

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

99. Georgia Juvenile Act of 1971, GA. CODE ANN. § 24 A-2001.

100. JA/ABA JUVENILE JUSTICE STANDARDS PROJECT, *Standards Relating to Pretrial Court Proceedings*, Part V, at 92 (Tent. Draft 1977).

ences between adult and juvenile procedures where an overriding need exists. In the first place, uncorporation requires that the juvenile system must, at a minimum, grant the same rights to children as to adults. That is to say that if state authorities wish to allow juveniles more rights than adults, there is no constitutional bar to doing so. This idea has been referred to as "incorporation plus."[101] Accommodation is not so easy where, as in the case of *pro se* representation, the state rule would offer a lesser version on the adult right. This, too, would be possible, although in the final analysis each exception might require ultimate approval by the Supreme Court. The mode of achieving recognition for such an exception would be through showing a substantial basis for treating juveniles differently as a class than adults, with respect to the practice in question. The equal protection clause of the fourteenth amendment permits differential treatment to this extent.

VII. THE POST-*GAULT* SUPREME COURT CASES

McKeiver dealt with the sixth amendment right to jury trial, and whether a jury trial was constitutionally required in juvenile delinquency cases. The Court held that there was no such right, reasoning that a jury trial was not the only effective method of factfinding and thus not essential. In addition, the Court found that the introduction of juries into juvenile proceedings would tend to destroy the informal atmosphere of the juvenile court which was deemed a value to be preserved.

The *McKeiver* decision was the product of a balancing of interests by the Court, a process closely identified with the due process model. However, the decision is not inconsistent with the theory advocating that adult rights have been incorporated into the juvenile justice system. Jury trial was selectively incorporated for application to the states in *Duncan v. Louisiana*,[102] but was not further incorporated into the juvenile justice system in *McKeiver*. As previously indicated, the rationale of whether to select an adult right for incorporation into the juvenile system depends upon the fourteenth amendment due process clause, the same clause relied upon by advocates of the due process model in the case by case development of the precise scope of juvenile

101. *See* text accompanying note 77 *supra*.
102. 391 U.S. 145 (1968).

rights. In the view of those advocates, since juvenile rights are not the product of incorporation, they are not necessarily the same as their adult counterparts. *McKeiver* was concerned with the incorporation, into the juvenile justice system, of a right from among those guaranteed to adults by the Bill of Rights—the right of jury trial. If jury trial had been selected for incorporation into the juvenile system, a second level of inquiry would have been presented: whether the constitutional gloss developed in the adult decisions on jury trial[103] should also apply in juvenile court, or whether the states would have been free to work out their own implementing rules for juvenile court juries according to the due process model. Inasmuch as the right to a jury trial was not selectively incorporated, *McKeiver* did not reach this second level of inquiry and its discussion of due process was relevant only to the first level.

The language of *McKeiver* bears out this analysis.

> Some of the constitutional requirements attendant upon the state criminal trial have *equal application* to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination. Included, also, is the standard of proof beyond a reasonable doubt.
>
> . . . .
>
> The Court, however, has not yet said that all rights constitutionally assured to an adult accused of crime are also to be enforced or made available to the juvenile in his delinquency proceeding. Indeed, the Court has specifically refrained from going that far.[104]

The term "all rights" in the above quotation refers to the basic rights enumerated in the Bill of Rights, not all of which have been incorporated into the juvenile justice system, and does not refer to the Supreme Court case law interpreting the rights and defining their scope in adult cases. That the latter is understood by the Court to accompany the right if selected for incorporation into the juvenile system is indicated by the Court's statement that such rights, once incorporated, have equal application in the two systems. *McKeiver*, although often cited in support of the due process model,[105] is thus not inconsistent with the theory advocat-

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103. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) (verdict need not be unanimous); Williams v. Florida, 399 U.S. 78 (1970) (minimum number of jurors constitutionally required).

104. 403 U.S. at 533 (emphasis added).

105. *See, e.g.*, Popkin, Lippert and Keiter, *Another Look at the Role of Due Process in Juvenile Court*, 6 FAM. L.Q. 233, 278 (1972) stating:

> The Supreme Court is encouraging each state to experiment with its juvenile justice system, to provide both due process rights and rehabilitation. McKeiver presents an opportunity for not only all variations on this new juvenile justice concept, but also a juvenile court complete with all the due process rights. Then it should be possible to decide from actual experience what difference due process rights make both to individual juveniles and juvenile court systems.

ing incorporation of rights into the juvenile justice system.

The other juvenile cases which the Court has decided since *Gault*, are, similarly, not inconsistent with the theory of incorporation. The most important of these cases were *In re Winship*[106] and *Breed v. Jones*.[107] These cases need not be dealt with at length. *Winship* read a requirement into the Bill of Rights that criminal guilt must be proven beyond a reasonable doubt. Having established this as a guaranteed right (it was not expressly mentioned in the Bill of Rights itself) and incorporated it through the fourteenth amendment for application to the states, the Court then extended it to the adjudication of delinquency in the juvenile system. As previously noted, the Court pointed out that "[t]he same considerations which demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child."[108] It compared the right to proof beyond a reasonable doubt to the rights afforded juveniles in *Gault* and characterized it as "as much required."[109] To the extent that this comment is interpreted as bringing in the rationale of *Gault* by reference, *Winship* contributed little to resolution of the incorporation versus due process issue. It merely continued the uncertainty engendered by *Gault.*

Breed v. Jones was a double jeopardy case which held that a juvenile delinquency adjudicatory proceeding constituted jeopardy once evidence had been introduced, and under the fifth amendment double jeopardy clause, the state was barred at that point from subsequently trying a child as an adult. The Court's classification of juvenile delinquency adjudications as the functional equivalent of criminal prosecutions leaves little room for argument—the adult law of double jeopardy has been incorporated into the juvenile system. This was confirmed by the Court's opinion in *Swisher v. Brady*[110] in which a host of adult double jeopardy cases were applied in resolving the question of whether a master's hearing provided by the Maryland Rules of Procedure constituted jeopardy which would bar a Juvenile Court Judge from rehearing the case. The Court held that it did not.

106. 397 U.S. 358 (1970).
107. 421 U.S. 519 (1975).
108. 397 U.S. at 365.
109. *Id.* at 368.
110. 438 U.S. 204 (1978).

VIII. CONCLUSION

It thus appears that the Supreme Court has yet to take a firm position on whether the adult rights it has incorporated into the juvenile justice system have been "incorporated" in the fullest sense of that term some of the Bill of Rights guarantees have generally become regarded as being fully incorporated,[111] while others, including the right to counsel, have not been clearly resolved.

In view of this uncertainty, it may be appropriate in closing to consider the question from a broader viewpoint, putting aside the state statutes and case law on the subject. The question to be resolved is whether the Bill of Rights guarantees, where they have been extended to juveniles, should be fully and completely incorporated into the juvenile system and applied there in all respects as they are in the criminal system.

In light of our discussion about the incorporation of adult rights into the juvenile justice system and its consequences in terms of the constitutional definition of procedures to be applied by juvenile courts in delinquency cases, it may be possible to read new meaning into some of the language of *Gault*. This is particularly true of the overall philosophy expressed as background for the decision. Justice Fortas, in the majority opinion, cited three of the Court's earlier cases involving juveniles and made the significant statement that these cases "unmistakably indicate that whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[112]

If this is a true expression of the underlying constitutional philosophy, then children *are* persons under the Constitution[113] and under the equal protection clause of the fourteenth amendment, they should be afforded the same rights as other persons when faced with the loss of freedom.[114] The term "same rights," in this context, should mean something very close to identical rights, not merely similar rights, the specifics of which are to be worked out in diverse applications by state and local authorities throughout the nation.

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111. For example the fifth amendment protection against compulsory self-incrimination and the fourth amendment protection against unreasonable search and seizure.

112. 387 U.S. at 13.

113. *See* Foster and Freed, *A Bill of Rights For Children*, 6 FAM. L.Q. 343, 345, 352, 353 (1972).

114. *See* Baxtrom v. Herold, 383 U.S. 107 (1966), a mental health case which deals with equal protection in a procedural context. On equal protection in the juvenile justice system generally, *see* McGoldrick, *Juvenile Justice and The Equal Protection Clause: First Class, Tourist, or Luxury Coach*, 6 PEPPERDINE L. REV. 697 (1979).

In opposition to this position, it might be argued that differences between children and adults as classes justify different treatment under the equal protection clause. The immediate answer is that the Supreme Court, as we have seen, has analyzed the problem of procedural rights in terms of the due process clause rather than the equal protection clause. However, the use of the due process rationale does not dispel the preference for equal treatment which emanates from the equal protection clause. That preference, unless countered by an overall showing of state interests which outweigh the interests of the disadvantaged class as was done in *McKeiver* with respect to nonincorporation of jury trial augurs for equality of procedural rights. The theory of incorporation of rights into the juvenile justice system fosters the prinicple of equality whereas the due process model does not. If this incorporation theory were the prevailing rule, equal protection would allow for exceptions to the adult rules where a substantial need of juveniles as a class can be shown to warrant specialized application of a procedural rule. Such cases would be *exceptions* to the incorporation theory, and would characterize a much different theoretical approach than would be found in the due process model. In practice, the latter would start with exceptions and work toward eventual development of optimum rules for juveniles.

The merits of a centralized, and thus, standardized, approach to procedural rule-making in juvenile justice should not be overlooked. Such an approach would, and to a large extent, has already resulted from the application of the incorporation concept.

Some further thoughts about changes which seem to be occurring in the underlying philosophy of juvenile justice itself are relevant and should be noted. The conviction has prevailed through all of the Supreme Court decisions involving juvenile law that, although treated for some purposes like alternative versions of the criminal courts, juvenile courts are *not* criminal courts. The Court has found it useful to maintain a separate, specialized body of law for juveniles with special courts to administer it. Procedures like those developed in the adult system to assure accuracy and impartiality in the factfinding process and to protect the rights of individuals accused of violating the law have been found to be necessary. But the Court has resisted the wholesale importation of criminal procedures into juvenile law. The Court has insisted on selecting procedural rights from among the Bill of

Rights guarantees and on adopting them only after thorough study of the impact on the special needs of the juvenile system.

The need for a specialized system to deal with errant children has been largely the product of three underlying concepts which profoundly influenced the development of juvenile law. The first of these concepts asserts that juveniles are generally thought not to be responsible for their acts in the same way as adults. If not blameworthy, juveniles should not be punished for their misconduct, but instead, should be rehabilitated. Rehabilitation became the guiding star of juvenile justice.

The second concept is also related to age and has contributed to development of the rehabilitative goal of the juvenile system. In essence, this concept posits the thought that children, being in their formative years, are more readily rehabilitated than adults. This theoretical promise of successful rehabilitation provided a powerful impetus to the development of a system based on that objective.

Finally, the strong urge to protect children and the idea of confining youthful indiscretions to separate files and separate courtrooms to safeguard the delinquent child's future has been thought to justify deviation from the adult rules. This attitude has been strongest with first offenders and with juveniles charged with having committed only very minor offenses.

These concepts have had a role in the Supreme Court's initial selection of rights from the Bill of Rights for application to the juvenile system. They are also relevant in determining whether the due process model or the incorporation theory should govern once a right has been selected. These concepts might generally seem to support the due process model because the inherent flexibility of the balancing approach would be conducive to fashioning procedures for the juvenile court which would best accommodate the special rehabilitative needs of juveniles by achieving a fine balance between juvenile and community interests with respect to *each* application of *each* right. By comparison, they might seem to augur against the less precise balance of interests which could be expected to result from incorporating the adult procedures, with all their ramifications, into the juvenile system.

Two recent trends are discernible, however, which tend to undermine the conceptual foundation on which the separate, specialized juvenile court structure has been based. The first of these is a growing pressure toward the *diversion* of troubled juveniles from the jurisdiction of the juvenile court. The second is a realization that rehabilitation does not work, even with

juveniles, and that a more reasonable balance between community interests and those of delinquent children would result if the rehabilitative standard were discarded or at least relaxed in favor of greater emphasis on retribution with its inevitable component of deterrence.

These trends are evident in recent literature[115] and have begun to be reflected in legislation.[116] They will not be discussed here from the standpoint of establishing their existence or potency. Rather, given (or more modestly, assuming), that such trends are real, the point to be made in the present context concerns the impact they will have on the issue of due process *versus* the incorporation theory.

If first offenders and children accused of minor offenses, along with status offenders, are to be processed outside the juvenile court, this would leave only the more serious and hardcore offenders subject to whatever procedures the juvenile court might employ, and only this group would be affected by the scope accorded a procedural right selected for application to juveniles. Among juveniles, this group would have the most in common with the adult criminal element.

If there is a shift in emphasis from rehabilitation to retribution and deterrence as the dominant objective of the juvenile system, there would be little left of the characteristics distinguishing the adult and juvenile systems upon which so much of the argument for specialized juvenile procedures has been based.

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115. *Re* diversion: *see* IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, *Standards Relating to Non-Criminal Behavior* (Tent. Draft 1977); Hellum, *Juvenile Justice: The Second Revolution*, 25 CRIME AND DELINQ. 299 (1979); Scharf, *Towards a Philosophy for the Diversion of Juvenile Offenders*, J. OF JUV. & FAM. CTS., Feb., 1978, at 13.

Re change of philosophy from rehabilitation to retribution: Bay, *Juvenile Justice in California: Changing Concepts*, 7 AM. JUR. OF CRIM. L. 171 (1979); Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST. 2 (1974); Rubin, *Retain The Juvenile Court?*, 25 CRIME AND DELINQ. 281 (1979); IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT: *Standards Relating to Juvenile Delinquency and Sanctions* (Tent. Draft 1977). Clark, *Legal Policy and the Rehabilitative Reality*, 2 OHIO N.L. REV. 231 (1974).

116. *Re* diversion: *see* Juvenile Justice and Delinquency Prevention Act of 1974, tit. II, 88 Stat. 1109-43 (codified in scattered sections of Titles 18, 42 U.S.C.).

Re change of philosophy from rehabilitation to retribution: *See* CAL. WELF. & INST. CODE, § 202 (1977) (1975 addition of § 202(b) and 1977 version of § 202(a)). *See also Juvenile Justice Act of 1977*, WASH. REV. CODE ANN. § 13.40.010 (Supp. 1978). Senate Bill 489, enacted by the 1980 Georgia General Assembly, establishes a class of "Designated Felony Acts" for which restrictive dispositions for fixed periods of time are authorized. GA. CODE § 24A-23A (Supp. 1980).

There is no argument with the *selective* feature of selective incorporation. It is good that the special needs of the juvenile system be considered at this point, as was done on the issue of jury trial. The argument is with the continuing reluctance to recognize that rights, once selected, are the same rights in juvenile as in adult cases, serve the same functions, and should apply in the same ways. As the two systems become more alike in clientele and objective, whatever basis that may once have existed for disparate application of rights incorporated into the juvenile system loses its force.