1966 WL 100787 (U.S.) (Appellate Brief)
Supreme Court of the United States.

In the Matter of the Application of Paul L. GAULT and Marjorie Gault, father and mother of Gerald Francis Gault, a Minor.

No. 116.
October Term, 1966.
September 23, 1966.

On Appeal from the Supreme Court of the State of Arizona

**Brief for Appellants**

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***ii** APPENDIX:

  

TABLE OF AUTHORITIES

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***1 Opinions Below**

The opinion of the Supreme Court of Arizona (R. 83-97) is reported at 99 Ariz. 181, 407 P. 2d 760. The Superior Court of Maricopa County, Arizona, from which appeal was taken, wrote no opinion. The Juvenile Court of Gila County wrote no opinion; its decision is found in the order of commitment, dated June 15, 1964, contained in the Record as Exhibit 4 (R. 81-82).

**Jurisdiction**

Appellants filed a petition for a writ of habeas corpus in the Supreme Court of Arizona on August 3, 1964, pursuant to the provisions of Chapter 8 of the Criminal Code of the Arizona Revised Statutes (1956), Sections 13-20012027. The same day, the Supreme Court of Arizona ***2** ordered a hearing of the application in the Superior Court of Maricopa County. The hearing was held on August 17, 1964. The Superior Court dismissed the petition, discharged the writ, and remanded the juvenile to the State Industrial School.

The order of the Superior Court was affirmed on appeal by the Supreme Court of Arizona on November 10, 1965, and a timely application for rehearing was denied by that Court on December 16, 1965 (R. 99). Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Arizona on February 4, 1966 (R. 100). On March 21, 1966, Hon. Fred C. Struckmeyer, Chief Justice of the Supreme Court of Arizona, enlarged appellants' time to file the Jurisdictional Statement and to docket the appeal to May 5, 1966. The Jurisdictional Statement was filed on May 2, 1966 and probable jurisdiction was noted on June 20, 1966. Jurisdiction on appeal is conferred by 28 U.S.C. §1257(2).

**Statutes Involved**

Article 6, Section 15 of the Arizona Constitution, the Juvenile Code of Arizona, Sections 8-201 to 8-239, Arizona Revised Statutes, and Title 13, Sec. 377, Arizona Revised Statutes, are set forth in full in the Appendix to this brief.

***3** Question Presented

Whether the Juvenile Code of Arizona, Sections 8-201 to 8-239, Arizona Revised Statutes,: on its face or as construed and applied, is invalid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it authorizes a juvenile to be taken from the custody of his parents and to be committed to a state institution by a judicial proceeding which confers unlimited discretion upon the Juvenile Court and dispenses with the following procedural safeguards required by due process of law:

1. right to notice of the charges of delinquency;

2. right to counsel;

3. right to confrontation and cross-examination of adverse witnesses;

4. privilege against self-incrimination;

  

5. right to a transcript of the proceedings; and

6. right to appellate review of the juvenile court's decision.

***4** Statement of the Case [1]

Appellants are the parents of fifteen year old Gerald Francis Gault who was committed as a juvenile delinquent to the State Industrial School in Arizona after a juvenile proceeding in the Superior Court of Gila County, Globe, Arizona, on June 15, 1964. No transcript exists of the hearing before the juvenile court. [2]

On June 8, 1964, Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County as the result of a complaint by one Mrs. Cook, a neighbor of the boys, about lewd telephone calls made to her. Gerald was at this time on six months' probation following an incident in February, 1964 (R. 13). Probation officers Flagg and Henderson decided to detain the children (R. 48). Mr. Flagg interrogated Gerald at some length during the evening of June 8th and the morning of June 9th (R. 48).

No notice of the detention or charges was left at the Gault home. Mrs. Gault, who returned from work at 6:00 P.M., was informed by neighbors about the detention and went to the detention home. There she was told by probation officer Flagg why Gerald was detained and that a hearing would be held at 3 o'clock the following day, June 9th. ***5** No written notice of the hearing or of the charges was given to Mrs. Gault (R. 29-30).

A petition charging Gerald with juvenile delinquency was filed by probation officer Flagg with the Court on June 9, 1964, but Mrs. Gault had not received notice of it and did not see it until August 17, when the habeas corpus hearing was held (R. 33). A referral report charging Gerald with making "lewd phone calls" made by the Probation Department, filed on June 15, 1964, was also not brought to appellants' notice until August 17th, when introduced by appellants' attorney together with the above mentioned petition (R. 34).

On June 9th a hearing took place in the Juvenile Judge's chambers in the presence of Gerald, his mother, his older brother Louis, and Mr. Flagg and Mr. Henderson, the probation officers. Mr. Gault, Gerald's father, was in Grand Canyon at work (R. 20). No one was sworn at this hearing (R. 30). No transcript was made (R. 54).

Gerald testified at the June 9th hearing about the telephone call. There was a conflict at the habeas corpus hearing about this testimony. Mrs. Gault testified that Gerald said he only dialed Mrs. Cook's number and his friend talked to Mrs. Cook (R. 30), while Judge McGhee, the Juvenile Judge (R. 59), and Probation Officer Flagg testified that Gerald admitted having said some of the lewd words but not the more serious ones (R. 59). At the conclusion of the hearing, in answer to a question by Gerald or his mother if Gerald would be sent to Fort Grant, [3] Judge McGhee said: ***6** "No, I will think it over" (R. 31, 39). Gerald stayed in the detention home until June 12th when lie was released to his parents. At 5 o'clock that day, Mrs. Gault received a written note [4] signed by Officer Flagg which said: "Mrs. Gault, Judge McGhee has set Monday, June 15th, 1964 at 11:00 A.M. as the day and time for further hearings on Gerald's delinquency." (Exhibit 1, R. 8.)

At the hearing on June 15th, both appellants were present, Mr. Gault having returned home on June 12th (R. 21). Others present at this hearing before Judge McGhee were Ronald Lewis with his father, and probation officer Flagg.

  

Mrs. Cook, the person who had complained about the phone call, was not present or called as a witness. Probation officer Flagg had only talked to her over the phone on June 9th (R. 48) and Judge McGhee had not spoken to her at all (R. 76). When Mrs. Gault asked the judge during this hearing why Mrs. Cook was not present, and said that "she wanted Mrs. Cook present so she could see which boy had done the talking, the dirty talking over the phone" (R. 36), Judge McGhee answered, "she didn't have to be present at that hearing" (R. 36).

Conflict also exists about Gerald's testimony at this second hearing. Appellants (R. 35) and Mr. Flagg (R. 45) stated that Gerald did not admit having made any lewd remarks and only dialed the number. Judge McGhee testified that Gerald again admitted having made some of the obscene remarks but not the more serious ones (R. 61). ***7** There was no other evidence about Gerald's use of lewd language. Probation officer Flagg testified that Gerald had never admitted to him that he used any indecent language over the telephone (R. 57). Nevertheless, in the referral report by the probation department (Exhibit 2, R. 79) the charge against Gerald on June 8, 1964 was "lewd phone calls."

The June 9th petition filed by Mr. Flagg with the Superior Court, Gila County (Exhibit 3, R. 80) alleged that Gerald Gault was "a delinquent minor." Probation officer Flagg based this charge on the fact that "the phone calls were made, and when they were traced, they went to his home. And the fact that when I asked him to recite Mrs. Cook's phone number, he recited it like it was his own" (R. 50). Asked by appellants' attorney under which part of Section 8-201 Gerald had been charged with, Officer Flagg answered "we set no specific charge in it, other than delinquency" (R. 52).

There was no conflict in the testimony with regard to the following facts at both the June 9th and June 15th hearings: that the parents were not given a copy of the petition or written notice of the hearing date except Mr. Flagg's note concerning the hearing on June 15th; that the parents were not informed of the right to subpoena witnesses, to cross-examine witnesses, of the right to confrontation, or of the right to counsel (R. 35, 46-47, 59, 71); [5] that at no time during the juvenile proceeding was an investigation ***8** conducted to examine Gerald's home conditions or his behavior (R. 20, 34, 53). The only investigation claimed to have been made was apparently conducted in February, 1964, when Gerald had been put on probation on a previous delinquency charge (R. 53). No record exists of this previous charge or hearing other than a referral report made by the Probation Department (R. 13).

It is difficult, based on the Juvenile Judge's testimony, to know with certainty what the basis was for the finding of delinquency. The Juvenile Court Judge thought that the phone calls "amolunt[ed] to disturbing the peace" [6] (R. 61) but he also considered that Gerald was "habitually involved in immoral matters" (*Ibid.*). [7] He testified that there was "Probably another ground, too" (R. 73).

As stated by Judge McGhee, the finding of juvenile delinquency was based on "the boy's statements" (R. 76) and upon the admission of Gerald Gault (R. 65) as to the use of lewd language and on facts not contained in the juvenile file, i.e., a referral report in the probation file dated July 2, 1962, that Gerald had stolen a baseball glove. On this report Judge McGhee had based his finding that the boy was delinquent because "habitually involved in immoral matters" even though the report was never followed up, no accusation was made, and no hearing held "because of lack of material foundation" (R. 61, 62). The report, and the fact that the judge relied on it, was not brought to appellants' knowledge until August 17, 1964 at the habeas corpus hearing (R. 71-72).

***9** No warning about the possible consequences of the charges were given to appellants by the probation officer (R. 17, 35, 54). Judge McGhee stated that he gave the usual warning in February and "reminded" the parents of the February admonition on June 9th (R. 66).

  

Summary of Argument

I.

Juvenile courts developed out of a desire to treat wayward youths as a prudent parent treats his child-with concern for the individuality of each person, the causes of his acts, and the means to rehabilitate him to be a useful citizen. This concept of the "parens patriae" led, however, to a court system in which traditional legal safeguards were dispensed with in determining whether a child was delinquent. The barter of due process for individualized treatment has cost juveniles dearly, leading this Court recently to state that "there is evidence ... 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." *Kent v. United States,* 383 U.S. 541, 555-56 (1966).

II.

The Arizona Juvenile Code, and the proceedings taken under it in this case, lacked the fundamental procedural protections that comprise due process of law. This deprivation of rights cannot be justified. First, the "parens patriae" notion is no substitute for the fairness that the juvenile is entitled to when his vital interests are at stake. Further, there is no substance to any contention to the ***10** effect that a juvenile proceeding is "civil" and not "criminal" and dispenses "treatment" rather than "punishment". Apart from the fact that the rehabilitative ideal is equally present in the conventional criminal law, the accused juvenile delinquent stands to lose as much of his liberty, and sometimes more, than the adult charged with a comparable offense and prosecuted in the criminal courts. The interrelationship between Arizona juvenile court actions and criminal prosecutions further points up the weakness of the suggestion that juvenile proceedings need not provide due process of law. Impressed by these considerations, state and federal courts, draftsmen of modern juvenile court acts, and scholarly commentators all evince a growing recognition that there are compelling reasons of fairness to provide young people with basic procedural protections in juvenile court.

A.

The first essential of due process, where an individual's liberty is in jeopardy, is that he be clearly informed of the nature of the charge against him so that he can decide on a course of action and prepare his defense. Here Gerald Gault was not properly advised of his acts complained of, the statute or applicable rule of law such acts were alleged to violate, or the possible consequences of a finding against him. In these circumstances, the juvenile court's decision to deprive him of six years of liberty violated his constitutional rights.

B.

The denial of the right to counsel in this case also vitiated the proceedings. The decision below on this point flies in the face of principles painstakingly elaborated by this Court ***11** over many years. A juvenile proceeding involving a determination of delinquency carries with it sufficient social stigma and danger of deprivation of liberty so that there is no less need for the assistance of counsel there than in criminal cases, where it has been recognized as a fundamental constitutional right. *Powell v. Alabama,* 287 U.S. 45 (1932); *Gideon v. Wainwright,* 372 U.S. 335 (1963). Legal counsel is particularly vital in juvenile proceedings because of the immaturity of the accused delinquent, the uncertainty of the rights possessed by the accused, the fact that many juvenile judges are laymen or part-time, and the wide discretion of juvenile courts in dealing with young persons adjudged delinquent.

C.

This court has unanimously held that the Sixth Amendment guarantee of confrontation and cross-examination is an integral part of due process because without them there can be no fair or reliable determination of truth. Regardless

  

of whether juvenile proceedings are denominated criminal or civil, these rights must be available. Surely a juvenile proceeding in which the loss of liberty is at stake involves interests as great as those involved in adjudicatory administrative proceedings, where confrontation and cross-examination have been held to be constitutionally mandated. Here Gerald Gault was adjudged a delinquent without any consideration of the testimony of the woman alleged to have received the obscene telephone call. The confusing testimony of others concerning what actually happened and whether Gerald Gault was involved accentuates the error of the notion that an individual can be deprived of liberty without the trier of fact hearing the testimony of the alleged victim.

***12** D.

Gerald Gault was found to have committed a crime under the law of Arizona and his commitment by the court rested in part on that finding. There is no dispute that decisive admissions of elements of this offense were elicited from him by the juvenile court, which gave him no advice that he did not have to testify. Under familiar principles, the privilege against self-incrimination can be claimed "in any proceeding, be it criminal or civil, administrative or judicial, investigative or adjudicatory." *Murphy v. Waterfront Commission,* 378 U.S. 52, 94 (1964). The relevant inquiry is whether the witness may in any way incriminate himself by testifying or making a statement. Under the law of Arizona, Gerald Gault ran the risk when he testified of furnishing evidence which could be used against him in a criminal prosecution. In these circumstances, the State was required either to afford him the privilege against self-incrimination or grant him immunity commensurate with the risk. It did neither, in plain violation of the Constitution.

E.

The State's failure to provide a right of appellate review of the juvenile court decision or a right to a transcript of the proceedings in the juvenile court constitutes a departure from the requirements of due process of law. Although it has been said that a state is not required to provide appellate review of criminal actions, there can be no "license for arbitrary procedure." *Kent v. nited States,* 383 U.S. 541, 553 (1966). The Arizona statutory scheme grants to the juvenile judge practically unlimited discretion in the conduct of a hearing at which individual liberty is ***13** at stake. Such a proceeding cannot be squared with constitutional requirements of fundamental fairness unless there is opportunity for direct review, or at least collateral review on the basis of an official transcript.

## ARGUMENT

### I.

### The historical background of procedural deficiencies in Juvenile Courts.

This case presents the important constitutional question of the extent to which certain fundamental requirements of procedural fairness guaranteed by the Due Process Clause of the Fourteenth Amendment are applicable to juvenile court proceedings. The history of juvenile courts in this country is valuable in appreciating the background and dimensions of this question. It reveals both the high purposes of the movement that led to juvenile courts and how these purposes came to be perverted in the form of proceedings--as exemplified by this case from Arizona-that lack the most elemental protections of due process.

Before the enactment of juvenile court acts, criminal prosecutions against juveniles and adults were handled identically and included the same procedural safeguards.[8] At the turn of the century, insights acquired through the development of the behavioral sciences-penology, psychiatry, psychology and social work-led to popular and ***14** professional dissatisfaction with prosecutions against children. This led to the establishment of the first juvenile court in 1899 in Cook County, Illinois (Ill. Laws, 1899, at 131). Since then, all states have provided by statute that children who are accused

  

of acts which would violate the criminal law or who are alleged to be beyond the control of their parents-"incorrigible", "wayward", or "ungovernable"-are subject to proceedings in a juvenile or family court. [9]

Underlying all juvenile law is the concept of the state as the guardian of the child or "parens patriae". The principle is that the child who has acted wrongly should be treated by a court as a prudent parent treats his erring child, not as a criminal. In the words of an early study:
"[T]he state must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime.... It proposes a plan ***15** whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state, to receive practically the care, custody and discipline that are accorded the neglected and dependent child,' and which ... shall approximate as nearly as may be that which should be given by its parents." [10]

In brief, the early juvenile courts emphasized the individuality of the child, the causes of his act, and the means to help him to become a useful citizen. "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." Mack, *The Juvenile Court,* 23 Harv. L. Rev. 104, 119 (1909), quoted in *People v. Lewis,* 260 N. Y. 171, 177, 183 N. E. 353, 355 (1932).

It was a short step from the concept of individualized justice in the treatment or rehabilitative phase of a proceeding to a greater informality in the trial itself. It was feared that the fact-finding procedures of our accusatory, adversary system of criminal trials were inimical to the establishment of the relationship between court and child which was thought necessary to his proper treatment and rehabilitation.

The consequence of this "swapping" of due process for parens patriae was that many traditional legal safeguards of criminal proceedings were dispensed with, to the inevitable ***16** evitable detriment of individual rights. [11] Some courts even went so far as to insist flatly that constitutional safeguards of criminal procedure were not applicable to juvenile proceedings. *In re Holmes,* 379 Pa. 599, 603, 109 A. 2d 523, 525 (1954), cert. denied, 348 U. S. 973 (1955). In other courts the result was a host of questionable decisions. Vague allegations of anti-social behavior were sufficient to bring a child before some juvenile courts, [12] and the informality of the juvenile procedure was often used to accept uncorroborated admissions, hearsay testimony and the untested reports of social investigations. [13] The right to counsel and the right to notice of charges were sometimes dispensed with. [14] The protections against self-incrimination and double jeopardy also were rejected in some courts on ***17** the ground that the juvenile proceeding is a civil rehabilitative procedure and not a criminal proceeding. [15]

This is not to say that the juvenile court movement did not lead to advances in the *treatment* of juveniles. It is rather to emphasize that the net effect of developments over the past half century was that juvenile court proceedings, which were instituted to protect the young, led in many jurisdictions to *findings* of delinquency in proceedings that conspicuously failed to protect the child. See Horwitz, *The Problem of the Quid pro Quo,* 12 Buffalo L. Rev. 528 (1963). As stated by the dissenting Judge in *In re Holmes, supra,* 379 Pa. at 615, 109 A. 2d at 530.

> The concept that the State acts as *parens patriae* is being somewhat overdone. Even if the state assumes the parental role, this assumption does not prove that, by divine omniscience, it cannot be other than just. It is not impossible for a father, or even a mother, to be unreasonable with offspring. What a child charged with crime is entitled to, is *justice,* not a *parens patriae* which in time may become a little calloused, partially cynical and somewhat over-condescending. (Emphasis in original.)

  

The disturbing state of affairs regarding the quality of justice meted out to young people recently received the attention of this Court in *Kent v. United States,* 383 U. S. 541 (1966). There, with specific reference to the gap between ideal and reality, Mr. Justice Fortas said:

***18** "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 guaranties applicable to adults .... There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U. S. at 555-56.

The remainder of this brief will try to demonstrate that the petitioner in this case, like countless other juveniles in Arizona and other jurisdictions, has in fact been receiving the "worst of both worlds" in plain derogation of the requirements of the due process clause of the Fourteenth Amendment.

## II.

### The Arizona juvenile proceedings failed to provide Gerald Gault with fundamental procedural protections that are required by the due process clause of the Fourteenth Amendment.

As the history summarized under Point I indicates, young persons appearing before juvenile courts throughout the country are frequently denied many of the protections accorded adults who are accused of crime. In the instant case Gerald Gault was "tried" and committed to the State Industrial School in a proceeding conducted under the Arizona Code that sharply illustrates the "procedural arbitrariness" ***19** (*Kent v. United States, supra*383 U. S. at 555) that often characterizes juvenile courts,

The Arizona Code does not contain standards for the arrest of a child charged with a violation of law (§8-221) and, as interpreted by the Arizona Supreme Court, does not incorporate the general law of arrest (R. 96); the statute provides merely for an informal hearing in the judge's chambers (§8-229). No written transcript of the hearing is required, regardless whether the proceeding leads to a commitment or not; only a record of the name, age, place of birth of the child and names of his parents must be made. The statute does not impose any limitations on the judge with respect to the nature of evidence to be used; it does not contain a requirement for sworn testimony or cross examination of witnesses; it does not confer the privilege against self-incrimination upon the juvenile; it does not require that a transcript of the proceedings be made and makes no provision for appellate review. It also gives the judge authority to make any order for the commitment, custody or care of the child "as the child's welfare and the interest of the state require" (§8-231). No standards limit this wide discretion of the judge. He may commit a child until his majority, as in this case. He is not required to establish a relationship between the specific act of juvenile delinquency and the period of commitment; he does not have to show that the juvenile's parents are unfit to handle the child when taking a child from the custody of his parents (407 P. 2d at 769; R. 96).

The boundless discretion conferred upon the juvenile court by the Arizona Code was exercised in this case to deprive appellants of due process. This becomes clear by tracing the events that occurred prior to and during the hearing.

***20** Geral Gault was darrested by the sheriff, detained by probation officers without an order of court, and interrogated at length. His parents were neither notified of the arrest nor informed of its grounds. The only written notice they ever received was contained in a note Mrs. Gault received from officer Flagg on Friday, June 12th, about the continuance of Gerald's hearing "on his delinquency." The time allowed appellants to prepare their case was extremely short. The hearing itself consisted mainly of hearsay statements. No witnesses were sworn. The complainant was not called as a witness, even though appellants had requested her presence, because the judge decided that she was not necessary (R.

  

36). As conceded by Judge McGhee, his finding of delinquency was derived not only from the "boy's statements" as to the use of lewd language, but on his "habitual involvement in immoral matters," based on a referral report in the probation file which had never led to an accusation or hearing (R. 61). Appellants had no notice of this report and no opportunity to deny or defend against the charges.

In both juvenile hearings appellants appeared without counsel. They were neither informed of a right to counsel nor told that they would be furnished counsel in case of need (R. 35, 4647, 59). The order of commitment taking the child from his parents for up to six years was made without investigation of the conditions in his home and without any warning that such a draconian remedy might follow. Finally, there was no transcript kept of the proceeding and no provision for appellate review of possible procedural errors or the evidentiary basis for the decision.

***21** It is plain that in this case Arizona largely if not wholly dispensed with the basic procedural protections that are understood to comprise "due process of law." In attempting to justify this handling of Gerald Gault, the Supreme Court of Arizona adhered closely to the usual formulation (407 P. 2d at 765; R. 88-89):

> " ... [J]uvenile courts do not exist to punish children for their transgressions against society. The juvenile court stands in the position of a protecting parent rather than a prosecutor. It is an effort to substitute protection and guidance for punishment, to withdraw the child from criminal jurisdiction and use social sciences regarding the study of human behaviour which permit flexibilities within the procedures. The aim of the court is to provide individualized justice for children. Whatever the formulation, the purpose is to provide authoritative treatment for those who are no longer responding to the normal restraints the child should receive at the hands of his parents. The delinquent is the child of, rather than the enemy of society and their interests coincide...."

This statement reduces to two overlapping theories. The first is the "parens patriae" notion, already alluded to under Point I. The second is that the child is not involved in a criminal proceeding and is not receiving "punishment" but "treatment." Neither of these arguments, nor any other possible theory, can justify the refusal to accord Gerald Gault and other juveniles the protection of the Bill of Rights.

It has already been pointed out that although the parens patriae has roots in a genuine attempt to rehabilitate juvenile ***22** nile delinquents, what "a child charged with crime is entitled to, is *justice,* not a *parens patriae." In re Holmes, supra,* 379 Pa. at 615, 109 A. 2d at 530 (dissenting opinion). The failure to provide appellants with due process--i.e., "justice"- is the basis for the claim in this case, and it is submitted that the theoretical comforts of a surrogate parent are barren in the face of the hard realities of a proceeding in which the vital interests of a child are engaged.

These interests of the child are equally compelling in rejecting the mischievous notion that what is being meted out in juvenile proceedings is "treatment" and not "punishment." In the first place, modern criminology accords a high place to "rehabilitation" of criminals, thereby invalidating any purported distinction between juvenile and adult proceedings on this score. This Court has said

"Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams v. New York,* 337 U. S. 241, 248 (1949).

See also *Benson v. United States,* 332 F. 2d 288, 292 (5th Cir. 1964); Radzinowiez and Turner, A Study of Punishment I: Introductory Essay, 21 Canadian Bar Rev. 91-97 (1943); and Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. Crim. L. C. and P. S. 226 (1959).

Even apart from the failure of the "rehabilitation" theory to justify a failure to provide juveniles with procedural protection, the plain fact is that in this case and in countless others the juvenile is forcibly removed from his home

  

and family through the force of the state. He is confined, perhaps ***23** haps until his majority, "to a building with whitewashed walls, regimented routine and institutional hours". *Inre Holmes, supra,* 379 Pa. at 616, 109 A. 2d at 530 (dissenting opinion). That he is sent to a "home" or a "training school" rather than a prison does not in the least detract from the coerced loss of freedom. The child stands to lose every bit as much as an adult in a comparable situation. In fact, the child's situation may be drastically worse, as this very case demonstrates. While an adult accused of the "crime" of using obscene language over the telephone could be convicted in Arizona of a misdemeanor and sentenced to a maximum of two months imprisonment (Arizona Stats. §13-377), Gerald Gault was deprived of his liberty for up to six years (R. 82) for the very same act, even though he was not convicted of a "crime" and technically was not "punished."

The lack of substance to any purported distinction between the usual criminal prosecution and a juvenile proceeding is emphasized by the interrelationship between juvenile court actions and criminal prosecutions under the law of Arizona. As developed more fully below (pp. 51-54), the Arizona constitutional and statutory scheme for handling juveniles does not divest the criminal courts of jurisdiction. The Arizona system merely charges juvenile judges to decide in the first instance whether to "suspend criminal prosecution" or to allow such prosecutions to proceed. Not until there is an actual adjudication in the juvenile court is the young person suspected of action constituting a crime free from the possibility of prosecution.

In these circumstances, it is idle to suggest that the lax Arizona juvenile procedures relating to notice of charges, right to counsel, confrontation of witnesses, and ***24** the rest, can be justified on the ground that juvenile court actions are not "criminal." As stated by a California court, the fact that delinquency involves the possible deprivation of liberty makes the differentiation between adult criminal proceedings and juvenile civil proceedings "for all practical purposes ... a legal fiction presenting a challenge to credulity and doing violence to reason." *In re Contreras,* 109 Cal. App. 2d 787, 789, 241 P. 2d 631, 633 (1952).

As the *Contreras* case suggests, there is growing recognition that "there shall be no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child." *Application of Johnson,* 178 F. Supp. 155, 160 (D. N. J. 1957). An increasing number of cases have held that "a juvenile is entitled to fundamental due process of law". *State v. Naylor,* 207 A. 2d 1, 10 (Del. 1965). See *In re Alexander,* 152 Cal. App. 2d 458, 461, 313 P. 2d 182, 184 (1957); *Brewer v. Commonwealth,* 283 S. W. 2d 702, 703 (Ky. 1955); *United States v. Morales,* 233 F. Supp. 160, 167 (D. C., Mont., 1964); *In re Contreras, supra.* The underlying basis for these holdings has been set forth in *Trimble v. Stone,* 187 F. Supp. 483, 485-86 (D. D. C. 1960): "The fact that the proceedings are to be classified as civil instead of criminal, does not, however, necessarily lead to the conclusion that constitutional safeguards do not apply. It is often dangerous to carry any proposition to its logical extreme. These proceedings have many ramifications which cannot be disposed of by denominating the proceedings as civil. Basic human ***25** rights do not depend on nomenclature. What if the jurisdiction of the Juvenile Court were to be extended by an Act of Congress to the age of twenty-one or even twenty-five, or what if it were to be reduced to sixteen? Could it be properly said that the constitutional safeguards would be increased or diminished accordingly?

"Manifestly the Bill of Rights applies to every individual within the territorial jurisdiction of the United States, irrespective of age. The Constitution contains no age limits."

In short, there is growing recognition of the importance of providing juveniles with the protection of the Constitution. [16] As stated in *In re Poff,* 135 F. Supp. 224, 225, 227 (D. D. C. 1955), the original purpose of the juvenile court movement was "to afford the juvenile protections *in addition to those* he already possessed ... to enlarge, *not to diminish* those protections." (Emphasis in original.)

  

This Court in effect recognized the constitutional dimensions of the problem in ***26** *Kent v. United States,* 383 U. S. 541 (1966). Although the Court did not reach petitioner's specific constitutional claims, it stated with respect to the determination of waiver of juvenile court jurisdiction:
"[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony-without hearing, without effective assistance of counsel, without a statement of reasons." 383 U. S. at 554.

Due process for juveniles is particularly necessary in a time of an increasing juvenile population. With full appreciation of the high stakes in these proceedings both from the standpoint of the child himself and from that of society in preventing the permanent loss of a law abiding citizen, Judge Midonick of the New York Family Court said in *In re Ronny,* 40 Misc. 2d 194, 210; 242 N. Y. S. 2d 844, 860-61 (Family Ct. 1963):

> "I can think of few worse examples to set for our children than to visit upon children what would be, if they were older, unreasonable and unconstitutional invasions of their all-too-limited privacy and rights, merely because they are young.... We would do well to stand solidly in behalf of children before us to avoid contamination of the fact sources and to see to it that we brook no shabby practices in factfinding which do not comport with fair play. We must not only be fair; we must convince the child ... that the judge, a parent image, is careful to ensure those civilized standards of conduct toward the child which we expect of the child toward organized society. [17]

***27** Modern juvenile and family court acts have also been responsive to the fundamental unfairness of subjecting young people to proceedings in which their liberty is at stake without the procedural protections accorded adults in criminal trials. The Standard Juvenile Court Act, as well as the California Juvenile Court Law and the New York Family Court Act, incorporate basic due process requirements, such as the rights to counsel, a record of the proceeding and appeal. [18] The new 1966 Standards for Juvenile and Family Courts published by the Children's Bureau of the Department of Health, Education, and Welfare contain express minimum requirements "as an essential part of individualized justice" (p. 7) in juvenile courts with regard to the right to notice of charges, confrontation and cross-examination of witnesses, written findings of fact, to a record of the hearing, right to counsel and appeal. The HEW Standards state (p. 8):

"Certain procedural safeguards must be established for the protection of the rights of parents and children. Although patties in these proceedings may seldom make use of such safeguards, their availability is none the less important. They are required by due process ***28** of law and are important not only for the protection of rights but also to help insure that the decisions affecting the social planning for children are based on sound legal procedure and will not be disturbed at a later date on the basis that rights were denied."

There are, in sum, compelling reasons of fairness and authority to provide young people with fundamental procedural protections in juvenile court. Accordingly, this Court should rule that appellants were denied due process of law by the failure of Arizona to provide the basic elements of procedural fairness in this juvenile proceeding. [19] ***29** The specific guarantees of the Bill: of Rights denied appellants will now be considered with particularity.

### A. Notice of Charges and Hearing.

The first essential of due process, where an individual's liberty is in jeopardy, is that he be clearly informed of the nature of the charge against him so that he can prepare his defense. Further, he must be given adequate time and opportunity after notice of charges to decide on his course of action and to prepare that defense. *Cole v. Arkansas,* 333 U. S. 196 (1948). See also *Hovey v. Elliott,* 167 U. S. 409 (1897); *Powell v. Alabama,* 287 U. S. 45 (1932); *In re Oliver,* 333 U. S. 257 (1948); *In re Murchison,* 349 U. S. 133 (1955); *Williams v. New York,* 337 U. S. 241 (1949).

  

***30** In *Cole,* this Court spelled out the vital nature of notice:
"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge ... are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." 333 U. S. at 201.

Notice, to be fully effective, must contain at least three ingredients: (1) it must state what acts are complained of; (2) it must state what statute or applicable rule of law such acts violate; and (3) it must give some indication of the consequences of a finding against the accused. All of these were absent in the proceedings below.

No official notice of the nature of the imminent hearings was given to appellants. In the most casual fashion, and only after she requested the information, was Mrs. Gault orally informed by officer Flagg on the night of June 8th that Gerald had been detained that afternoon and that a hearing would be held the very next day (R. 29). The only written notice of any kind appellants ever received was contained in a handwritten note on blank paper addressed to Mrs. Gault and received from probation officer Flagg on Friday, June 12th. It merely stated that Judge McGhee had set Monday, June 15th, as the time "for further hearings on Gerald's delinquency" (R. 78).

No effective notice of the underlying basis for the charge of delinquency was given to appellants. This worked severely to appellants' prejudice. Judge McGhee testified that he based his adjudication of delinquency in part on a finding that Gerald had violated Ariz. Rev. Stats. §13-377, the obscene language provision of the Arizona Criminal ***31** Code [20] (R. 61-63). Yet this statute was never cited to appellants.

Indeed, the petition filed with the court on June 9th by probation officer Flagg recited only that he was informed and believed that "said minor is a delinquent minor and that it is necessary that some order be made by the Honorable Court for said minor's welfare" (R. 80). [21] But even this totally inadequate notice of the basis of the proceedings was not given to appellants. They never even saw the petition on which the adjudication of the delinquency of their son was based until after the decision had been made. [22]

Thus appellants' attention was never called to any statute or statutory language which might have given them ***32** some guidance as to what the charge of delinquency was based on, or how to prepare a legal defense to it, or even how to decide intelligently whether to contest it at all. Nothing brought home to them the advisability of consulting with or retaining counsel, or impressed on them the potential seriousness of the proceedings for their son as evidenced by the drastic sanction later imposed by the court.

Even the minimal standards required by the Arizona statute with regard to notice of delinquency charges as interpreted by the Arizona Court, i.e., that it is sufficient if the court advises the parents no later than the hearing itself about "the facts involved in the case" (407 P. 2d at 767; R. 92), were not satisfied in this case. As stated by Judge McGhee, his finding of juvenile delinquency was based not only on the boy's use of lewd language (R. 61), but also on the boy's "habitual involvement in immoral matters," based on a referral report in the probation file which had never led to an accusation or hearing (*Ibid.*). The parents never had notice of this report, even at the hearings held in this case, and had no opportunity to deny those charges or defend against them. As to this basis for the adjudication of delinquency, there was simply no notice and no opportunity to be heard at all.

Finally, the time allowed to appellants to prepare their ease was extremely short. For the first hearing from 8 o'clock at night until 3 o'clock the next day; for the second hearing from Friday afternoon until Monday morning at 11 o'clock. The Arizona court contented itself with adopting the rule that "If the charges are denied, they [the infant and his parents] must be given a reasonable time to prepare" (407 P. 2d at 767; R. 92). The court failed to recognize that reasonable time is necessary not ***33** merely to prepare denials and defenses but to decide whether to deny or defend at all. It was unfair

  

in this case, in the scanty time afforded them before the hearings, to make an intelligent decision on how best to proceed in their son's interest, especially in the absence of the advice of counsel.

The Arizona court's interpretation of adequate notice does not satisfy due process. As long as the specific allegations on which the charges are based are not communicated to the infant and his parents in writing before the hearing, there is no possibility of determining intelligently whether to admit or contest the charges. A reasonable time to prepare and contest the charges is required after full notice and opportunity for appraisal of all facts.

This particular requirement of due process is especially vital in juvenile proceedings. In the words of one commentator, "As of constitutional right ... a child brought before a juvenile court is entitled to a clear statement of the nature and cause of the proceedings against him so that he can prepare his defense. Since many children will be unable to comprehend the accusation, this right must, of necessity, belong also to the child's parents or guardians." Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 395 (1961). [23]

***34 B. The Right to Counsel.**

In both juvenile hearings appellants and their son appeared without counsel. Neither appellants nor their son were informed that they had a right to counsel or that they would be provided with counsel in case of need. The Arizona court stated that "parents of an infant cannot be denied representation by counsel of their choosing" but nevertheless went on to hold that due process does not require "that an infant have a right to counsel" (407 P. 2d at 767; R. 92-93).

The denial of the right of counsel in this case is inconsistent with minimal standards of procedural fairness. It denies the most basic procedural right, without which all other procedures in juvenile courts and all other rights ostensibly given in such proceedings are unsubstantial and incapable of effective implementation.

The decision below on this point also flies in the face of principles painstakingly and deliberately elaborated by this Court over many years. *Powell v. Alabama,* 287 U. S. 45 (1932) and *Gideon v. Wainwright,* 372 U. S. 335 (1963), have established that the right to counsel in criminal proceedings is an essential part of the Fourteenth Amendment's due process clause. Together they also establish that no distinction may constitutionally be drawn between the right to appear by retained counsel and the right to have counsel appointed in criminal proceedings. ***35** " ... [I]n our adversary system of criminal justice," the Court said in *Gideon,* "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U. S. at 344.

Even if juvenile proceedings are denominated "civil" in nature, the fact that a juvenile may be deprived of his liberty through an adjudicatory process in which the aid of counsel would be indispensable to him requires the application of the *Powell and Gideon* principles in such proceedings.

Just last term in *Kent v. United States,* 383 U. S. 541 (1966), the Court held that assistance of counsel in the "critically important" determination of waiver of jurisdiction by a juvenile court is essential to the proper administration of justice. Indeed, this Court in *Kent,* explicitly approved *Black v. United States,* 355 F. 2d 104 (D. C. Cir. 1965), and *Shioutakon v. District of Columbia,* 236 F. 2d 666 (D. C. Cir. 1956), which had gone further and "held that effective assistance of counsel in juvenile court proceedings is essential." 383 U. S. at 558. Although these cases did not involve the Fourteenth Amendment directly, since they all arose in the District of Columbia, the considerations upon which they are based apply as well to juvenile proceedings in state courts. [24]

A juvenile proceeding involving a determination of delinquency carries with it sufficient social stigma and danger of deprivation of liberty that it must be considered ***36** a "critical stage" in the same sense as that term was used not only

in *Kent,* but also in *Hamilton v. Alabama,* 368 U. S. 52 (1961), and *White v. Maryland,* 373 U. S. 59 (1963), which required appointment of counsel in adult criminal proceedings prior to the trial itself. [25]

*White, Hamilton, and Miranda* related not to the trial stage but to stages in the criminal process prior to trial. By contrast, the issue in the case at bar is whether due process requires the assistance of counsel at the trial itself, a stage of the juvenile process, needless to say, which is not merely "critical," but its very essence. It is the central fact-finding inquiry, where the determination is made whether the accused juvenile committed the acts charged. The resolution of this inquiry determines whether the juvenile will be denominated a juvenile delinquent and possibly deprived of his liberty. [26]

The decision whether the due process clause of the Fourteenth Amendment requires the assistance of counsel in juvenile fact-finding proceedings requires essentially the same determination made in *Gideon* that counsel is required in an adult criminal trial-the proceeding whose purpose and function, i.e., to find the facts, is identical with the adjudicatory hearing stage in juvenile proceedings. [27]

***37** The decision in *Gideon* turned on the indispensable role performed by counsel in the fact-finding process. This Court quoted at length from *Powell v. Alabama,* 287 U. S. 45, 68-69 (1932), to describe that role:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

This Court has also recognized in other cases the critical role played by counsel. "[E]ven in the most routineappearing proceedings the assistance of able counsel may be of inestimable value." *Reynolds v. Cochran,* 365 U. S. 525, 532-533 (1961). "[T]he labyrinth of the law is, or may be too intricate for the layman to master." ***38** *Chewning v. Cunningham,* 368 U. S. 443, 446 (1962). See also *Williams v. Kaiser,* 323 U. S. 471 (1945). [28]

To say that the juvenile judge can fully protect the accused juvenile's interests is no more true in juvenile proceedings than in adult proceedings, no matter how deliberately the judge may discharge his duty as the embodiment of the *parens patriae.* As this Court said in *Powell v. Alabama, supra,* 287 U. S. at 61, although the judge may see to it that the accused "be dealt with justly and fairly," he cannot "investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." Indeed, there is far less warrant to rely on a judiciary, one-fifth of whose members are not even lawyers and more than half of whom devote less than one-fourth of their time to juvenile and family matters. [29]

***39** The majority of legal writers, [30] federal and state court decisions, [31] and modern juvenile codes, such as in California and New York, [32] have taken the position that the right of a child and his parents to the assistance of counsel in a juvenile proceeding is founded in due process. Following this trend, the Supreme Court of Mississippi, in *Interest of Long,* 184 So. 2d 861, 862 (1966) recently ruled:

"Where a minor is charged with being a delinquent and is subject to being deprived of his liberty, minor and parent should be advised by the court in delinquency proceedings that they are entitled to legal representation."

  

Mr. Schinitsky, *op. cit.* footnote 30, 17 The Record at p. 22, offers an example (drawn from a survey of the experience in the New York Children's Court prior to adoption of that state's new Family Court Act) of the tangible difficulties confronting a juvenile court judge where the juvenile is unrepresented by counsel:
"As already stated, in 92% of the Children's Court hearings, counsel is not present to participate in its proceedings. This means the judge must examine all witnesses. To the conscientious judge this is a physically ***40** and mentally exhausting task when it is repeated ten or fifteen times a day. Unfamiliar with the case until the hearing is commenced and with only the petition before it, the Court must grope and seek through its questioning a full and complete factual picture so that its decision can be right and just. Quite often the task is made more difficult by a language difficulty, the limited intelligence of witnesses or respondents and the reticence or fear of the children involved. One such judge remarked to the writer, after extensive questioning in a delinquency hearing and a dismissal of the petition, that it was sheer luck that she had asked the question which when answered placed an entirely different light on the case. Such a question would have most assuredly been propounded had there been an attorney-client relationship instead of the court-respondent one. The margin of error in an adjudication is enlarged when the judge is neither dedicated, patient nor an experienced examiner.

When a respondent denies the allegations in a petition, the only means of testing the truth of the petitioner's story is by subjecting it to the light of cross examination. Cross examination is not the haphazard pointless propounding of questions. To the experienced examiner it is a questioning based upon a foundation of facts obtained from consultation with his client.

To say that the Children's Court judge, dedicated or otherwise, can represent both petitioner and respondent in a disputed issue is unrealistic. The principal function of a presiding judge during the course of a trial is to conduct it in a fair and impartial manner. ***41** If compelled to take on the roles of prosecutor and defense attorney in addition, there may be the human tendency at times for him to overzealously associate himself with one of the added roles to the detriment of his impartiality."

To the argument made by some judges, social workers and lawyers that the introduction of lawyers into juvenile proceedings would make the proceedings legalistic, overtechnical and argumentative, would prolong the hearings, create a chaos of crowded dockets, and introduce dilatory tactics with dismissal of the charges uppermost in the defense lawyer's mind, Mr. Schinitsky replied (*Id.* at p. 24):

> "The desire for a smoothly operating court should not be used as an argument to deprive those accused of the right to determine for themselves their need for counsel. An essential function of the court is to establish an atmosphere of fairness in its dealings with those persons appearing before it. Vital to the creation of this atmosphere is that an accused parent or child, without funds, know they may have counsel to guide them through their difficulty."

The study made by the U. S. Department of Health, Education & Welfare in cooperation with the National Council on Crime and Delinquency and the National Council of Juvenile Court Judges has likewise concluded that:

"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 ***42** family is financially unable to employ counsel." U. S. Department of Health, Education and Welfare, Children's Bureau, Standards for Juvenile and Family Courts, *op. cit., supra,* p. 57.

The need for counsel in juvenile court proceedings such as those in the present case is accentuated because of the wide discretion of the juvenile courts of Arizona in dealing with juveniles they have adjudicated delinquent. The authority of the court over a delinquent child is to "make such order for the commitment, custody and care of the child as the child's

  

welfare and the interests of the state require." §8-231. The court has no less than 10 statutorily approved alternatives open to it for the disposition of delinquents. Ibid. The aid of a lawyer may be indispensable to child, parents, and court in determining the appropriate treatment of the child; indeed the Arizona court itself recognized this, but, paradoxically, concluded nonetheless that allowing the assistance of counsel to a child is a matter for judicial discretion, and not a due process right (407 P. 2d at 767; R. 93).

Finally, it goes almost without saying that if we are correct in our contentions that other traditional safeguards of the criminal law should be applicable in juvenile court proceedings, such as fair notice of charges and the rights of confrontation and cross-examination, the aid of counsel is also indispensable to effectuate those rights. Only an attorney can enable an accused juvenile to assert such other procedural rights as he may have. Conversely, even if it were to be held that juvenile court proceedings can constitutionally be conducted with a procedural informality impermissible in adult criminal proceedings, the assistance of counsel becomes all the more essential. It ***43** then may be the only way to keep the adjudicatory hearing in the juvenile court from becoming a sham and a mere rubber stamp for the charges made against the juvenile. [33]

**C. Confrontation and Cross-examination.**

In *Pointer v. Texas,* 380 U. S. 400 (1965), this Court unanimously held that the Sixth Amendment guarantee of ***44** confrontation and cross-examination applies in State prosecutions under the due process clause of the Fourteenth Amendment. In reaching that result, the Court recognized the indispensable role played by confrontation and cross-examination "in exposing falsehood and bringing out the truth." 380 U. S. at 404. Few rights are more central to the idea of fair judicial proceedings:
" ... [T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." 380 U. S. at 405.

The requirement of confrontation and cross-examination is one of the most vital and lasting contributions of AngloAmerican law to the attainment of a reliable fact-finding proceeding. See McKay, The Right of Confrontation, 1959 Wash. U. L. Q. 122, 123-25. As Professor Wigmore has said:
"[T]hat the judge shall have the *power* to commit to long detention any person without giving the person *any opportunity to hear the substance of the testimony against him,* is fundamentally unsound and practically dangerous." 5 Wigmore, Evidence §1400 at 145 (3d ed., 1940). (Emphasis in original.)

In Wigmore's famous statement:
"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction ***45** that no statement (except by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience ... *[I]t is beyond doubt the greatest legal engine ever invented for the discovery of truth."* 5 Wigmore, Evidence §1367 at 28-29 (3d ed. 1940). (Emphasis added.)

The rule is clear: absent confrontation and cross-examination there can be no fair or reliable determination of truth sufficient to comply with the requirements of due process.

It cannot seriously be contended that the right of confrontation and cross-examination is applicable only in a criminal proceeding as traditionally defined. Regardless of whether juvenile proceedings are denominated criminal or civil in nature, the result must be the same, for this Court has clearly held that the right of confrontation and cross-examination

  

applies not only in criminal cases, but to adjudicatory administrative proceedings as well. *Greene v. McElroy,* 360 U. S. 474 (1959); *Willner v. Committee on Character & Fitness,* 373 U. S. 96 (1963); *Williams v. Zuckert,* 371 U. S. 531 (1963) (certiorari dismissed on grounds that petitioner failed to comply with procedure for exercising right to confront witnesses). The rationale of *Greene* demonstrates the necessity for broad application of the confrontation and cross-examination rule:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case ***46** must be disclosed to the individual so that he has an opportunity to show that it is untrue.... We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.... This Court has been zealous to protect these rights from erosion ... not only in criminal cases ... but also in all types of cases where administrative and regulatory actions were under scrutiny." 360 U. S. at 496-97 (citations omitted).

Furthermore, since the right to confront and cross-examine is essential to the fairness of any judicial proceeding, such right should be available even in a proceeding deemed to be civil in nature. See McKay, *supra* at 129. Surely a judicial order which causes the deprivation of personal liberty is at least the equivalent of governmental action which "seriously injures an individual," and results in harm at least as grievous as arbitrary denial or termination of employment.

The right of the child in juvenile proceedings to confront and cross-examine those who bear witness against him is being increasingly recognized. Numerous courts have held that this constitutional requirement is applicable and essential. *People v. James,* 9 N. Y. 2d 82, 211 N. Y. S. 2d 170, 172 N. E. 2d 552 (1961) ; *In Re Mantell,* 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122 (1954); *Ballard v. State,* 192 S. W. 2d 329 (Tex.Civ.App. 1946); *Green v. State,* 123 Ind. App. 81, 108 N. E. 2d 647 (1952). In *People v. James,* the New York Court of Appeals ruled that,

"Elementary principles of justice would seem to require that in this situation the testimony of the mother [in this case an adversary of the child] should have been ***47** tested by some form of cross-examination before the defendant minor was deprived of his liberty." 9 N. Y. 2d at 87, 211 N. Y. S. 2d at 174, 172 N. E. 2d at 555.

Moreover, officials who must deal daily with the problems of juvenile courts and procedures have similarly urged that the right of the child to confront and cross-examine the witnesses be accorded. See National Council on Crime and Delinquency, Standard Family Court Act, Comments to §19 (1959); Department of Health, Education and Welfare, Standards for Juvenile and Family Courts, *supra* at 7 (1966).

As the facts of this case demonstrate, the determination of delinquency in a juvenile court proceeding is of critical consequence and the need for procedures guaranteeing its reliability substantial.

The adjudication of Gerald Gault's delinquency on the basis of his alleged participation in an allegedly obscene telephone call was made without any consideration of the testimony of the recipient of the call, the complaining witness Mrs. Cook. The request of appellants for Mrs. Cook's appearance at the hearings was denied by Judge McGhee because he "didn't feel it was necessary" (R. 65-66). Indeed, Judge McGhee, the trier of fact in this case, did not even elicit Mrs. Cook's version of what had happened either in or out of the presence of appellants (R. 49, 76). It is an extraordinary procedural notion that an adjudication that a person can be deprived of his liberty without the trier of fact even hearing the testimony of the alleged victim, especially when the victim is readily amenable ***48** nable to the processes of the court. [34] Cf. *Pointer v. Texas,* 380 U. S. 400 (1965). Furthermore, in the light of the testimony of probation officer Flagg to the effect that Gerald Gault had not admitted to him making any lewd or indecent remarks over the telephone but said the other boy engaged in the conversation (R. 59), the testimony of the complaining witness Mrs. Cook became even more essential. Had she been called as a witness, appellants could have attempted to show that Gerald had not used

  

any offensive language toward her. Indeed, the court would have had a proper basis for ascertaining the exact nature of the entire incident, what in fact was said and who said it.

The following passage aptly describes the vital elements of due process which were denied to appellant:
"In a society that long ago deliberately rejected the inquisitorial method and freely chose the alternative of confrontation and cross-examination by adversary counsel in its search for the truth, *there is neither justification nor excuse for the deprivation of liberty to a single child when supported only by the utterances not under oath of persons never subjected to courtroom confrontation and cross examination....* [A] youth must be given the right to confront and cross- ***49** examine those who would prove him a delinquent." Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 403 (1961). (Emphasis added.)

The Arizona Court, however, took the curious view that "the relevancy of confrontation only arises where the charges are denied." (407 P. 2d at 768; R. 93.) Similarly, Judge McGhee explained that no adult witnesses were heard or sworn and he did not talk to Mrs. Cook personally, since he had the "admissions" of the boys to go on (R. 65).

This attitude turns topsy-turvy the concept of the juvenile hearing as an adjudicatory proceeding to determine the facts based on evidence. It in effect treats the hearing as an inquisition of the accused to determine whether, without hearing any of the evidence against him and without the advice of counsel, he will relieve the persons who made the charges against him of any obligation to support them by testimony. The purposes served by the right of confrontation and cross-examination-so important to the proper performance of the court's fact-finding functionsare thereby thwarted. [35]

"This court always took the view that it should take as much evidence to adjudicate a child or delinquent as it would to convict a child in a criminal court. The court was of the opinion that police agencies should present just as much evidence in a juvenile court as they do in the adult court, *if it becomes necessary to do so. But this writer saw no point in spending valuable public funds in long and tedious hearings if the child admitted that verified police reports were correct." Molloy, Juvenile Court-A Labyrinth of Confusion for the Lawyer,* 4 Ariz. L. Rev. 1, 9, 14 (1962) (emphasis supplied).

***50** As we show in the next section of this Brief, this attitude also resulted in this case in the violation of Gerald Gault's privilege against self-incrimination.

**D. The Privilege Against Self-Incrimination.**

Gerald Gault was found to have committed a crime under the law of Arizona, a violation of Section 13-377 of the Arizona Statutes (R. 62) [36] and his commitment by the court rested in part on that finding (Ibid.).

There can be no dispute that admissions of the elements of this offense were elicited from him under questioning by the court at the hearings of June 9 and June 15. Indeed, his own statements were decisive in the court's decision to commit him. Judge McGhee described in detail his questioning of Gerald Gault at these hearings (R. 5660). He further testified: "Q. Were any adult witnesses sworn and/or heard against the boy Gerald Gault? A. No. It was all, in my mind, done upon the admissions of Gerald Gault" (R. 65; see also R. 76).

No advice was given by the court to Gerald that he did not have to testify or make a statement unless he chose to ***51** do so. The Supreme Court of Arizona upheld this procedure, holding that the juvenile court is not required to advise a juvenile of the privilege against self-incrimination. (407 P. 2d at 767-68; R. 93.)

  

Under familiar principles governing the privilege against self-incrimination, this course of proceedings violated Gerald Gault's Fourteenth Amendment rights. [37] With respect to the privilege it is entirely immaterial once again whether a juvenile court proceeding is labeled criminal, civil, in the nature of *"parens patriae,"* or anything else. The law has long been settled that:

"The privilege can be claimed in *any proceeding,* be it criminal or civil, administrative or judicial, investigatory or adjudicatory ... it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used."* *Murphy v. Waterfront Commission, supra,* 378 U. S. at 94 (concurring opinion of Mr. Justice White) (emphasis supplied).

See also *Malloy v. Hogan, supra,* 378 U. S. at 11; *McCarthy v. Arndstein,* 266 U. S. 34, 40 (1924).

The relevant inquiry in determining the applicability of the privilege therefore is not the nature of the proceeding, but whether the witness may in any way incriminate himself by testifying or malting a statement. Under the law of Arizona, the interrelationship between juvenile proceedings and criminal prosecution is such that at the time he ***52** made his statements to the juvenile court, Gerald Gault ran the risk of furnishing evidence which could be used against him in a criminal prosecution for violation of Section 13-377.

Under these circumstances and the applicable decisions of this Court, the state was required either to afford him the privilege or grant him immunity commensurate with the risk. It did neither. [38]

The point is readily demonstrated by reference to the Arizona law governing the relationship of juvenile proceedings and criminal prosecutions. Article 6, Section 15, of the Arizona Constitution provides:
"The superior court shall have exclusive original jurisdiction in all proceedings and matters affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of eighteen years. The judges shall hold examinations in chambers for all such children concerning whom proceedings are brought, in advance of any criminal prosecution of such children, and may, in their discretion, suspend criminal prosecution of such children. The powers of the judges to control such children shall be as provided by law." (See also Ariz. Rev. Stats. §§8-202; 8-228.)

It is apparent that the Arizona system for handling juveniles does not exempt them from the criminal law or divest them of legal capacity to commit crimes. The criminal law remains in full force and effect in its application ***53** to their conduct. The constitutional and statutory scheme simply provides that judges of the superior courts, sitting as juvenile court judges, shall consider cases involving juveniles accused of crime in the first instance, to decide whether to "suspend criminal prosecution" or to allow criminal prosecution to proceed. And the Arizona courts have so held. [39]

The decision whether to suspend criminal prosecution is placed in the discretion of the juvenile courts and no standards for its exercise are prescribed by law. *Application of Vigileos,* 84 Ariz. 404, 300 P. 2d 116 (1958); *Burrows v. State,* 38 Ariz. 99, 111, 297 Pac. 1029 (1931). The court may refuse to suspend criminal prosecution whether the conduct charged constitutes a felony or a misdemeanor. See *Flynn v. Superior Court,* 414 P. 2d 438, 442 (Ariz. Ct. App. 1966).

Furthermore, even when a juvenile court holds hearings on a juvenile accused of conduct constituting a crime, as it did in the present case, its assertion of jurisdiction over the juvenile is not final until it actually makes an adjudication ***54** of delinquency. The filing of a petition alleging that the juvenile is delinquent, under Arizona Stat. §8-222, merely invokes the juvenile court's powers for the purpose of inquiry and investigation into how to handle the offender. But "[J]urisdiction in the Juvenile Court does not attach until there has been an adjudication based upon evidence that the child is dependent, neglected, incorrigible or delinquent." *Caruso v. Superior Court,* 100 Ariz. 167, 412 P. 2d 463, 467

  

(1966). Refusal to suspend criminal prosecution thus remains a possible outcome of the juvenile court's inquiry into the juvenile's conduct. See Molloy, *Juvenile Court-A Labyrinth of Confusion for the Lawyer,* 4 Ariz.. L Rev. 1, 11 (1962). [40]

***55** It is clear from these authorities that Gerald Gault ran the risk of self-incrimination when he was questioned at the hearings of June 9 and June 15. He was accused of conduct constituting a crime, the statements elicited from him could have led to his conviction of that crime, and he had no assurance that he was safe from criminal prosecution based on his statements.

The state did not protect him from the danger which its juvenile court procedures created. Its only gesture in that direction is Section 8-228, which provides:

> "B. The disposition of a child or of evidence given in the juvenile court shall not be admissible as evidence against the child in any proceeding in another court...."

This provision is inadequate to uphold the state's disallowance of the privilege. It is too little and too late. It does not immunize the juvenile from criminal prosecution based on the matters about which he makes a statement. It does not prevent the searching out and use of other evidence obtained as a result of his statements.

All it prevents is the admission of the statements themselves in a criminal prosecution. Since *Counselman v. Hitchcock,* 142 U. S. 547 (1892), it has been settled that this is not a sufficient grant of immunity to justify denying the privilege. [41] As this Court said recently, "a grant ***56** of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination." *Murphy v. Waterfront Commission,* 378 U. S. 52, 54 (1964).

Gerald Gault's privilege against self-incrimination was therefore violated by the juvenile court. This Court should make it clear that if a state allows the risk of self-incrimination to arise in its juvenile proceedings, it must afford the privilege to the juvenile. [42]

***57** Contrary to the reasoning of the court below, recognition of the privilege does not impair "the necessary flexibility for individualized treatment." (407 P. 2d at 767.) There is ample scope for individualized treatment when the court comes to decide the proper disposition of a juvenile it has adjudged delinquent. But the adjudicatory process in juvenile court cannot be allowed to serve, however inadvertently, as a means of compelled self-incrimination. [43]

***58 E. Right to Appellate Review and to a Transcript of the Proceedings.**

The Arizona statute's failure to provide a right of appellate review of juvenile court orders or a right to a transcript of the proceedings in the juvenile court constitutes a departure from the requirements of due process of law. [44]

Although it has been said that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," *Griffin v. Illinois,* 351 U. S. 12, 18 (1956), this fact does not "authorize the imposition of conditions that offend the deepest presuppositions of our society." *Id.* at 22 (Frankfurter, *J.,* concurring). It can hardly be doubted that one of the "deepest presuppositions" of American law is that unbridled and absolute discretion shall rest in no judicial official. Yet the State of Arizona lodges practically unlimited discretion in the juvenile court judge, and permits him to conduct his proceedings with virtually total informality. Thus the right to review by appeal the decisions of such a juvenile court becomes extremely important. Even in a State where review ***59** of juvenile court proceedings is provided for, one judge was moved to comment:
"Absolute power in the hands of a careful and just man may be a benefit, but most of. our Constitutions have been adopted out of experience, with human nature as it is, and is apt to be in the future. We must minimize the chance of

  

abuse and place limitations even upon those who have the best of purposes and the most benevolent dispositions." *People v. Lewis, supra,* 260 N. Y. at 182, 183 N. E. at 357 (Crane, J. dissenting).

Just last Term, this Court emphasized that the special concerns and interests sought to be furthered by juvenile court statutes do not justify placing the procedures employed by these courts beyond the scope of appellate scrutiny:
"But this latitude [to determine waiver of jurisdiction] is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement ..." *Kent v. United States, supra,* 383 U. S. at 553.

Moreover, although a statute may confer on a juvenile court a "substantial degree of discretion," it cannot grant '57F a license for arbitrary procedure." *Ibid.* The fact that the juvenile court functions as *parens patriae* is in no way "an invitation to procedural arbitrariness." Yet how can such prohibited exercises of discretion in the juvenile courts be corrected when the state makes no provision for ***60** appellate review?[45] Forcing appellant to resort to the ancillary procedure afforded by habeas corpus, as in this case, is an inadequate method of meeting the problems posed by the power vested in juvenile court.[46]

This Court does not have to rule on the issue whether the right to appeal *per se* is required by the Fourteenth Amendment's due process clause in order to find that a Juvenile Code, such as Arizona's, which grants to the juvenile judge practically unlimited discretion in the conduct of a hearing constitutes "an invitation to procedural arbitrariness" if review by appeal is not provided. Since "a fair trial in a fair tribunal is a basic requirement of due process," *In re Mwrchison,* 349 U. S. 133, 136 (1955), the right to challenge the fairness of a juvenile court decision, i.e., the right to review on the merits, is required by due process. Absent such right, no effective examination of the arbitrariness of the decisions by the juvenile judge is possible.

***61** The absence of an official transcript of the original hearings, one of the basic shortcomings of this case which confronted appellants in obtaining judicial review, would also be remedied by allowing review by appeal. This is apparent from the fact that the Supreme Court of Arizona in this case justified the failure to provide for a transcript mainly by the absence of a right to appeal, reasoning that one of the main purposes of a transcript is to support an appeal. (407 P. 2d at 768, R. 94.)

Whether review of juvenile court proceedings is by appeal or habeas corpus, a transcript is indispensable. Even if this Court rules that due process does not require the right to appellate review of juvenile court proceedings as a method of controlling unchecked discretion, parties in juvenile court proceedings will nevertheless continue to be able to resort to the habeas corpus method, as did appellants here, to test the legality of the deprivation of liberty. Without an official transcript or record of the proceedings in the juvenile court, even the questionable efficacy of the habeas corpus remedy will be minimal.[47] Among the severe difficulties with such a system is the obvious problem of establishing whether there is *any* evidence justifying the finding of delinquency and the loss of personal freedom that this frequently entails. Cf. *Thompson v. City of Louisville,* 362 U. S. 199 (1960).

" ... no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." *In re Murchison,* 349 U. S. 133, 136 (1955).

The juvenile court judge, the legality of whose judicial judgment is being challenged in that very proceeding, should not be called upon to recount what transpired in the juvenile hearing over which he presided. The danger of transforming him into a witness is manifest since his own conduct and orders are in question and he may unavoidably be tempted to try to assure that his decisions are not declared void and illegal. This latent possibility of prejudice and threat to the

  

reliability of the habeas corpus proceeding as a method of review could be easily overcome by requiring records of the juvenile hearings which would then furnish an objective basis for the determination of the habeas corpus petition.

This Court has recognized the vital nature of having a transcript in order to contest the judgment rendered. See *Griffin v. Illinois, supra; Draper v. Washington,* 372 U. S. 487 (1963). The essence of the injury to the petitioners in those cases was that a reviewing court's ruling "was made without benefit of a reference to any portion of a stenographic transcript of the july trial." ***63** 372 U. S. at 493. We now submit that the most elemental notions of due process require that a transcript of the juvenile court proceedings be made, in order to provide an adequate basis for whatever mode of review is deemed appropriate.

## CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed with instructions to grant a writ of habeas corpus ordering the release from custody of Gerald Francis Gault.

**Appendix not available.**

Footnotes

1 The statement of facts is based on the habeas corpus hearing held on August 17, 1964 in the Superior Court of Maricopa County after a petition for a writ of habeas corpus had been filed by appellants on August 3, 1964 in the Supreme Court of Arizona to secure the release of the child. The record of that hearing is part of the record on appeal.

2 The Arizona statute does not require a record to be made of juvenile hearings but only of the age, place of birth and name of the child and his parents (§8-229).

3 The State Industrial School.

4 There was a conflict in the testimony as to when Gerald was released and when Mrs. Gault received this note. Probation officer Flagg, without having made a record about these events, testified that both occurred on Thursday, June 11th.

5 Though appellants testified that they knew of their right to call witnesses and to retain an attorney (R. 19, 40), both Mr. Flagg and the Juvenile Judge acknowledged that they never advised the Gaults of their right to counsel, their right to subpoena witnesses or their right to cross-examine (R. 46, 59, 71).

6 Thereby bringing the boy within §8-201(6) (a).

7 Thereby bringing the boy within §8-201(6) (d).

8 See Welch, Delinquency Proceedings-Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 Minn. L. Rev. 653, 654-55 (1966); *In Re Poff,* 135 F. Supp. 224, 225 (D. D. C. 1955). See generally Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387 (1961).

9 State code provisions are compiled and compared in: Institute of Judicial Administration, Juvenile Courts-Jurisdiction (1961); Sussman, Law of Juvenile Delinquency (Rev. ed. 1959); Tompkins, In the Interest of a Child (1959) (prepared for the California Special Study Commission on Juvenile Justice); Illinois Legislative Council, Juvenile Court Proceedings in Delinquency Cases (1958) (12 selected states).

Model and Uniform legislation and standards appear in: National Probation and Parole Association (NPPA) (now the National Council on Crime and Delinquency, NCCD), Standard Juvenile Court Act (Rev. 1959), 5 NPPAJ 323 (1959); NCCD Standard Family Court Act (1959); Children's Bureau, U. S. Dept. of Health, Education and Welfare, Standards for Juvenile and Family Courts (1966); NPPA, Guides for Juvenile Court Judges (1957); see also The Interstate Compact on Juveniles: Development and Operation, 8 J. of Pub. Law 524 (1959). A recent study of the operation of these courts is contained in Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775 (1966).

10 Report of the Committee of the Chicago Bar, 1899, quoted in Glueck, Some "Unfinished Business" in the Management of Juvenile Delinquency, 15 Syracuse L. Rev. 628, n. 2 (1964).

11 Glueck, Some "Unfinished Business" in the Management of Juvenile Delinquency, 15 Syracuse L. Rev. 628, 629 (1964). See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387 (1961); Note, Juvenile Courts: Applicability of Constitutional Safeguards and Rules of Evidence to Proceedings, 41 Cornell L. Q. 147 (1955); Paulsen, Fairness to the Juvenile Offender, 41 Minn. 547 (1957).

  

12 *In re Bentley (Harry v. State),* 246 Wise. 69, 16 N. W. 2d 390 (1944); *State ex rel. Radduc v. Superior Court,* 106 Wash. 619, 180 P. 875 (1919).

13 Uncorroborated Admissions: *In the Matter of Gonzalez,* 328 S. W. 2d 475 (Tex. Ct. App. 1959); *Matter of McDonald,* 153 A. 2d 651 (D. C. Munic. Ct. App. 1959). Hearsay: *In re Holmes,* 379 Pa. 599, 109 A. 2d 523 (1954), cert. denied, 348 U. S. 973 (1955); *State ex rel. Christensen v. Christensen,* 119 Utah 361, 227 P. 2d 760 (1951); *Sylvester v. Commonwealth,* 253 Mass. 244, 148 N. E. 449 (1925).

14 Notice of charges: *In re Duncan,* 107 N. E. 2d 256 (1951); *In re Bentley,* 246 Wis. 69, 16 N. W. 2d 390 (1944). Right to counsel: *People v. Dotson,* 46 Cal. 2d 891, 299 P. 2d 875 (1956); *Akers v. State,* 114 Ind. App. 195, 51 N. E. 2d 91 (1943); *In Interest of T. W. P.,* 184 So. 2d 507 (Fla. Ct. of App. 1966).

15 Self-incrimination: *In re Holmes, supra; People v. Lewis,* 260 N. Y. 171, 183 N. E. 353 (1932); *In re Santillanes,* 47 N. M. 140, 138 P. 2d 503 (1943). Double Jeopardy: *People v. Silverstein,* 121 Gal. App. 2d 140, 262 P. 2d 656 (1953). *In re Santillanes, supra.* See generally Sussman, Juvenile Delinquency, pp. 11-16 (1955).

16 Dembitz, Ferment, and Experiment in New York: Juvenile Cases in The New Family Court, 48 Cornell L. Q. 499 (1963); Ketcham, Legal Renaissance in the Juvenile Court, 60 Nw. U. L. Rev. 585 (1965); Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q., 387 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Rubin, Protecting the Child in the Juvenile Court, 43 J. Crim. L. C. and P. S. 425 (1952); Welch, Delinquency Proceedings-Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 Minn. L. Rev. 653 (1966); Beemsterboer, The Juvenile Court-Benevolence in the Star Chamber, 50 J. Crim. L. C. and P. S. 464 (1960); Skoler, Juvenile Courts and Young Lawyers, 10 The Student Law. J. 5 (Dec. 1964); Quick, Constitutional Rights in the Juvenile Court, 13 How. L. J. 76 (1966).

17 This view has been supported by other judges with long experience in juvenile courts. "The example of a juvenile court that operates under the restraint of due process of law ... may renew in our children the respect for law courts and the judicial process which is said to be on the decline." Ketcham, Legal Renaissance in the Juvenile Court, 60 Nw. U. L. Rev. 585, 595 (1965).

18 NPPA, Standard Juvenile Court Act (Rev. 1959); Cal. Welfare and Institutions Code §§500-914, 1961; N. Y. Family Court Act, 1962. §711 of the N. Y. Family Court Act provides:

> "The purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged a juvenile delinquent or in need of supervision."

19 Absence of procedural safeguards affects not only the reliability of juvenile proceedings but permits arbitrary disposition of young people who will not "cooperate" or who are involved in unpopular social movements. Juveniles, for example, have comprised a large proportion of those who in the past decade have peacefully demonstrated for their civil rights and have been unlawfully arrested for asserting constitutionally protected rights. The treatment accorded these minor Negroes in juvenile courts demonstrates the capacity of juvenile courts to punish for reasons totally unrelated to their individual welfare. In one of the few studies of the subject, the United States Civil Rights Commission concluded that " ... local authorities used the broad definition afforded them by the absence of safeguards [in juvenile proceedings] to impose excessively harsh treatment on juveniles." U. S. Comm'n on Civil Rights Report, Law Enforcement, 1965, pp. 80-83.

The place the Commission studied was Americus, Georgia where:

"Approximately 125 juveniles were arrested during the Americus demonstrations, and their cases disposed of in a unique manner. Some of them were released from jail upon payment of a jail fee of $23.50, plus $2 per day for food. These fees were paid by parents who agreed to send their children to relatives living in the country. No court hearing was held in these cases; of those juveniles who appeared in court (approximately 75% of those arrested) about 50 were sentenced to the State Juvenile Detention Home and placed on probation on the condition that they would not associate with certain leaders of civil rights organizations in Americus.

"Many juveniles arrested in Americus were detained for long periods of time without bail or hearing. The juvenile court judge explained the reason for this in Federal court: "If one is bad enough to keep locked up, they're not entitled to bail; and if they're not bad enough, there's no use to make them make bond." *Id.* at pp. 81-82.

See also Meltsner, "Southern Appellate Courts: A Dead End" in Friedman (ed.), Southern Justice 152 (1965).

Although the reported decisions are few, petitions to adjudge minors delinquent because of peaceful and lawful civil rights activity has been a common response in southern states. Ten minor Negroes were arrested in Montgomery, Alabama on April 15, 1965, as they were peacefully picketing a store in downtown Montgomery and objecting to its discriminatory hiring practices. They were prosecuted under an ordinance which stated that "not more than six persons shall demonstrate at any one time before the same place of business or public facility." Although their conduct was orderly in every respect attempts were made to declare the children delinquents. A federal district judge found that they were merely exercising a constitutionally protected right of free speech and assembly and dismissed the charges. *In re Wright,* 251 F. Supp. 880 (M. D. Ala. 1965).

  

See also *Florence v. Meyers,* 9 Race Rel. L. R. 44 (M. D. Fla. 1964) (order to arrest juveniles on sight unlawful; injunction granted); *Griffin v. Hay,* 10 Race Rel. L. Re. 111 (E. D. Va, 1965) (order that juveniles refrain from protected activity unlawful; injunction granted). See generally Starrs, A Sense of Irony in Juvenile Courts, 1 Harv. Civil Rights-Civil Liberties L. Rev. 129 (1966).

20 Section 13-377 provides: "A person who, in the presence or hearing of any woman or child, or in a public place, uses vulgar, abusive or obscene language, is guilty of a misdemeanor punishable by a fine of not less than five nor more than fifty dollars, or by imprisonment in the county jail for not more than two months."

21 The petition gave no indication that an adjudication of delinquency was sought under Section 8-201-6 (a) of the Arizona Statutes, which defines "delinquent child" as a "child who has violated a law of the state or an ordinance or regulation of a political subdivision thereof." Nevertheless, Judge McGhee testified that this provision formed part of the bases for his decision; The Arizona statute (§8-222) provides that such a petition, containing a general allegation of delinquency (without stating the facts supporting the allegations), is sufficient, but the clear trend of current legislation is to require specificity in such pleadings which are jurisdictional prerequisites to juvenile court action. Of. N. Y. Family Ct. Act, Sec. 731; Cal. Welfare and Institutions Code, Sees. 653, 656; Natl. Probation and Parole Assoc., Standard Juvenile Court Act, Sec. 12.

22 The Arizona court appears to have held that *in the future,* a copy of this petition must be given to the infant and his parents (407 P. 2d at 767; R. 92). The failure even to serve the conclusory petition in this ease on appellants points up the procedural unfairness to which they were subjected.

23 See also Paulsen, *op. cit.* at 557; Guidebook for Judges, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency, p. 10 and Standards for Juvenile and Family Courts, prepared by the U. S. Department of Health, Education and Welfare, 1966; *Application of Johnson,* 178 F. Supp. 155 (D. N. J. 1957); *In re Florance,* 47 Cal. 2d 25, 300 P. 2d 825 (1956); *In re Creely,* 70 Cal. App. 2d 186, 190, 160 P. 2d 870, 872 (1945); *In re Coyle,* 122 Ind. App. 217, 101 N. E. 2d 192 (1951); *Petition of O'Lcary,* 325 Mass. 179, 182, 89 N. E. 2d 769, 771 (1950); *State ex rel. Cave v. Tincher,* 258 Mo. 1, 166 S. W. 1028 (1914); *State v. Andersen,* 159 Neb. 601, 68 N. W. 2d 146 (1955); *In re Roth,* 158 Neb. 789, 64 N. W. 2d 799 (1954); *In re Poulin,* 100 N. H. 458, 459, 125 A. 2d 672, 673 (1957); *Matter of Solberg,* 52 N. D. 518, 203 N. W. 898 (1925); *Pettit v. Engelking,* 260 S. W. 2d 613 (Tex.Civ.App. 1953).

24 In *Kent,* the Court did not involve itself only in a problem of statutory construction. The decision explicitly addressed itself to "the basic requirements of *due process* and fairness, as well as compliance with the statutory requirement of a 'full investigation.' " 383 U. S. at 553.

25 Similarly, in *Miranda v. Arizona,* 384 U. S. 436 (1966), the right to counsel was recognized in the stage of custodial interrogation in order to insure the protection of the Fifth Amendment privilege against self-incrimination. 384 U. S. at 467.

26 Since an adjudication of delinquency can also, as it did in this case, deprive parents of the custody of their child, the familial relationship suffers impairment. That relationship too is a substantial interest of the person which deserves the protection against arbitrary abridgement afforded by the right to counsel.

27 The fact that the finder of facts may be a jury in one case, and a judge in the other, is of course irrelevant. Waiver of a jury trial in adult criminal proceedings has no bearing whatever on the right to counsel requirement, any more than it does on the other due process requirements of a fair trial such as fair notice, confrontation and cross-examination, and the right to the protection of the privilege against self-incrimination.

28 As previously pointed out, the adjudication of Gerald Gault's delinquency rested in part on the finding that he had violated a section of the Arizona Criminal Code, §13-377, and was thus a "delinquent child" under §8-201-6(a) as having violated a law of the state. Some difficult and debatable problems arose in this case, as they commonly do in criminal prosecutions-for example, was the language allegedly used by the boys "obscene" within the meaning of the Arizona obscene language statute, and could Gerald Gault be found to be an aider and abettor of the other boy, who apparently spoke all or the greater part of the words in question ? These are hardly questions with which a layman, much less a fifteen-year old juvenile, can be expected to grapple unassisted. That they never actually were raised during Gerald's hearings--although they are obvious on the face of the record--is plainly attributable to the absence of counsel.

29 Biographical Data Survey of Juvenile Court Judges, George Washington University, Center of Behavioral Sciences, 10, 21 (1964). McCune & Skoler, Juvenile Court Judges in the United States, 11 Crime and Delinquency 121 (1965), puts the figure as one quarter non-lawyers.

30 Ketcham, Legal Renaissance in the Juvenile Court, 60 Nw. U. L. Rev. 585, 589, 593; Paulsen, *op. cit.* at 568; Antieau, *op. cit.* at 404; Schinitsky, The Role of the Lawyer in Children's Court, The Record (The Association of the Bar of the City of New York), Vol. 17, No. 1, January 1962, pp. 10-26.

31 *In re Poff,* 135 F. Supp. 224 (D. D. C. 1955); *Shioutakon v. District of Columbia, supra; Black v. United States, supra.*

  

32 Cal. Welf. and Inst. Code, Sec. 679; N. Y. Family Ct. Act, Sec. 241, 741; Nat. Prob. and Parole Assoc., Standard Juvenile Court Act, Sec. 19.

33 Mrs. Gault's statement in the habeas corpus proceeding that she knew that she could have appeared with counsel at the juvenile hearing (R. 40) for a number of reasons cannot be considered an intelligent waiver of either the child's or appellants' own constitutional right to counsel under *Carnley v. Cochran,* 369 U. S. 506 (1962), and *Fay v. Noia,* 372 U. S. 391 (1963): (1) The Arizona court merely found that the Gaults "knew of their right to counsel." 407 P. 2d at 763 (R. 85). At most, therefore, the Gaults could have waived only their right to appear by retained counsel. But we are contending that there is also a due process right to appointed counsel in these proceedings. This right could not have been waived, since the Gaults were never told they had it and indeed the Arizona court held that it does not recognize such a right. Therefore there could be "no intentional relinquishment or abandonment of a known right" by appellants, *Joknson v. Zerbst,* 304 U. S. 458, 464 (1938). (2) As we have shown, appellants had not received notice of the nature and the breadth of the charges against their son which apparently included, besides the allegedly obscene telephone call, being "habitually involved in immoral matters"; they had no way to evaluate their need for an attorney; (3) the judge's favorable comments about appellants' son (R. 66) and his inconclusive answer after the first hearing to the question whether Gerald would be committed (R. 31) gave them a false sense of security prior to the second hearing and the judge's decision to commit their son to the State Industrial School without further warning or investigation of their home situation; (4) since appellants had been told by Judge McGhee that they had no right to have the complaining witness Mrs. Cook present to testify at the hearings (R. 65-66), it was understandably difficult for them to appreciate how an attorney might assist them; if, as we contend, the right of confrontation and cross-examination should have been afforded them, they would be entitled to consider their need for an attorney on the basis of full knowledge of their legal rights and could not be held to have waived an attorney's assistance without such knowledge. Of. *Von Moltke v. Gillies,* 332 U. S. 708 (1948).

34 The subpoena power over Mrs. Cook was available under §8-224, although appellants were never advised of it by the court. In view of their request for Mrs. Cook's appearance and the fact that they were unrepresented by counsel at the hearings, they obviously cannot be held to have waived their right of confrontation and cross-examination in this case.

35 Confrontation and cross-examination would rarely become "relevant" in the sense used by the Arizona Court under such a system. And it appears that this attitude in fact has the dangerous consequence of reducing the adjudicatory hearing to an insubstantial stage in the juvenile court process. As a former Arizona juvenile court judge has written:

> "In the usual juvenile hearing, the phase devoted to determining whether an act of delinquency has occurred (any violation of criminal law or ordinance) takes the minor portion of the hearing. By reason of the pre-hearing investigation, and the frank, or semi-frank attitude of the boy and his parents the essence of the law violation involved is usually quickly grasped by all present."

36 Section 13-377, which is set forth in the Appendix, is part of the "Criminal Code" of Arizona and appears in the "Disorderly Conduct" portion of the Code in a chapter entitled "Crimes of a Common Law Nature." See also the definition of "crime" in Seetion 13-101.

37 The applicability and scope of the privilege are the same in state as in federal courts. *Malloy v. Hogan,* 378 U. S. 1 (1964); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964); *Griffin v. State,* 380 U. S. 609 (1965).

38 Gerald Gault's failure to claim the privilege specifically at his hearings cannot be a basis for depriving him of it, since he was without counsel throughout the proceedings. Nor can he be held to have waived his privilege, since he was never advised that he had it.

39 *Application of Gault,* 99 Ariz. 181, 407 P. 2d 760 (1965); *Application of Vigileos,* 84 Ariz. 404, 330 P. 2d 116 (1958). As the Supreme Court of Arizona has said, the Arizona juvenile court act "affects the *treatment* and not the *capacity* of the offender." *Burrows v. State,* 38 Ariz. 99, 110, 297 Pac. 1029, 1034 (1931) (emphasis in original).

Chief Judge Prettyman has described the operation of a juvenile court system like that of Arizona:

"The original-and-exclusive jurisdiction clause, coupled with the waiver clause, is merely a procedural device for putting child offenders within the remedial treatment of the Juvenile Court if it appears after investigation that such investigation is in the interest of the public and of the child. *The two courses of justice are not separate and independent systems. They are correlated parts of a single system. The Juvenile Court system is an adjunct to the general system of criminal justice." Briggs v. United States,* 96 U.S. App. D. C. 392, 393, 226 P. 2d 350, 351 (1955) (emphasis supplied).

40 The author, who served for several years as judge of the juvenile court for Pima County, Arizona, writes that the juvenile's cooperation with the court at the hearing by admitting his involvement may be decisive in whether the court treats him as a delinquent or refuses to suspend criminal prosecution. Judge Molloy states:

*"The attitude of the boy involved is always a factor in determining the order of the court. If the boy leaves the court, scornful of its processes, openly defiant of authority, and without having made a clean breast of his involvements, the court knows the boy*

  

*will soon be back.* The court also knows that delinquency rubs off on others of the same age, and a boy of this type is very apt to cause some of his acquaintances to be delinquent who in turn will infect others. *Because of this the attitude of the boy might be the final factor influencing the court to institutionalize the child, or to remand the child for criminal prosecution for the offense charged." Id.* at 11. (Emphasis supplied.)

Procedures which allow so critical a determination to turn on the juvenile's willingness to make admissions of criminal conduct to the court are open to the gravest constitutional objection. Cf. *Kent v. United States,* 383 U. S. 541, 553-555 (1966). The pressure on the juvenile to make such admissions, whatever the truth of the matter, is greatly increased by the availability of the sanction of criminal prosecution for noncooperation. Recognition of the privilege is essential to prevent the application of this kind of pressure, with its resulting danger of distortion of the fact-finding processes of the juvenile court.

41 The statute which this Court held inadequate to grant immunity in *Counselman* is virtually the same as the Arizona provision. It is clear that the Arizona statute does not grant the requisite immunity. When its lawmakers wanted to grant the complete immunity necessary to compel testimony, they knew how to do so. See, e.g., Arizona, Constitution, Article 2, Section 19; Ariz. Rev. Stats. §§44-1660, 4-245. See *State v. Chitwood,* 73 Ariz. 161, 239 P. 2d 353 (1951), on rehearing, 73 Ariz. 314, 240 P. 2d 1202 (1952).

The same statutory provision, which appears in the juvenile court act of Texas, was held not to grant the requisite immunity in *Dandy v. Wilson,* 179 S. W. 2d 269 (Tex. Sup. Ct. 1944). See also *Ex parte Tahbel,* 46 Cal. App. 755, 758-59, 189 Pac. 804, 806 (1920).

42 In view of the framework of state law, it is unnecessary for this Court in this case to decide the question of the applicability of the privilege in a juvenile proceeding where there is no possibility of criminal prosecution of the juvenile, either because the delinquent conduct charged does not constitute a crime or because complete immunity from criminal prosecution has been given him. Even commentators who argue against allowance of the privilege in juvenile proceedings agree that if criminal prosecution is a possibility, the privilege must be recognized. See, *e.g.,* Paulsen, *Fairness to the Juvenile Offender,* 41 Minn. L. Rev. 547, 562 (1957):

"One matter should be made clear: the propriety of freely receiving a child's testimony in a delinquency case assumes that he may not be criminally prosecuted for offenses revealed by his statements. If the youth can be turned over to the criminal courts for punishment, or if he can be punished *after* his treatment by the juvenile authorities, his privilege against self-incrimination must be carefully guarded. The common statutory provision forbidding the use of a juvenile's testimony in another proceeding is not a sufficient guarantee. The youngster must be protected against prosecution for any offense revealed by his testimony before it is fair to strip him of the right given the worst criminals." (Emphasis in original.)

Since this was a clear violation of Gerald Gault's privilege at the hearings, it is also unnecessary for this Court to decide whether the continuing process of extrajudicial interrogation of him also abridged his privilege. Suffice it to say that the record is clear that the admissions elicited in court were part and parcel of a continuing interrogation by probation officers using investigative techniques familiar in the criminal law, *e.g.,* interrogating Gerald Gault and his co-defendant in sequence seeking "a change of stories" and capitalizing on the boys' evident desire to shift primary responsibility by implicating each other. (See R. 47, 49, 51.)

43 State courts have divided on the applicability of the privilege in juvenile court proceedings. Compare *Dendy v. Wilson, supra; Ex parte Tahbel, supra; In re Sadleir,* 97 Utah 291, 85 P. 2d 810 (1938), on rehearing, 97 Utah 313, 94 P. 2d 161 (1939) (allowing privilege), with *In re Santillanes,* 47 N. M. 140, 138 P. 2d 503 (1943); *In re Holmes,* 379 Pa. 599, 109 A. 2d 523 (1954); *State v. Shardell,* 107 Ohio App. 338, 153 N. E. 2d 510 (1958) (disallowing privilege). Cases denying the applicability of the privilege, however, have almost invariably followed the theory that the juvenile proceeding is not criminal in nature, without consideration of the crucial question of the interrelationship of the juvenile and criminal proceedings.

The privilege is recognized in adjudicatory hearings in the Juvenile Court of the District of Columbia, see *United States v. Dickerson,* 168 F. Supp. 899, 902 (D. C. 1958), *rev'd on other grounds,* 106 U. S. App. D. C. 221, 271 F. 2d 487 (1959); *In re Davis,* 83 A. 2d 590, 593 (Mun. Ct. Apps. D. C. 1951) and in juvenile proceedings in England, see Watson, The Child and the Magistrate (1965).

The trend of current scholarship and study in the field is clearly in favor of recognizing the privilege in juvenile proceedings. See *e.g.,* U. S. Department of Health, Education and Welfare, Children's Bureau, *Standards for Juvenile and Family Courts,* 49, 72 and authorities cited therein (1966); Antieau, *Constitutional Rights in Juvenile Courts,* 46 Corn. L.Q. 387, 407 (1961). New York expressly provides in its new Family Court Act that a juvenile shall be advised at the commencement of any adjudicatory hearing in the Family Court that he has a right to remain silent. N. Y. Family Court Act 741(a). In effect, New York thereby has overruled by statute the holding of *People v. Lewis,* 260 N. Y. 171, 183 N. E. 353 (1932), that a juvenile could be required to testify in a juvenile court proceeding. *People v. Lewis* has been a prop on which state courts disallowing the privilege have commonly relied.

  

44 The Arizona Supreme Court held flatly that "there is no right of appeal from a juvenile court order." (407 P. 2d at 764; R. 94.) The Court also held that since there is no right to an appeal, there is no right to a transcript. It left the matter of the taking of a transcript of juvenile court hearings entirely to the discretion of the juvenile courts. (*Ibid.*)

45 Those who have prepared "model" juvenile court statutes or have formulated standards in this area have provided for appellate review as a matter of course, as well as the transcribing of the hearing. See National Council on Crime and Delinquency, Standard Family Court Act, §19, §28 (1959); Children's Bureau, Department of Health, Education and Welfare, Standards for Juvenile and Family Courts, 76, 78-79 (1966).

46 The court in the habeas corpus hearing in the present case took the view that habeas corpus is only available in Arizona to test "jurisdictional" defects in the juvenile court proceedings. Whatever the definition of "jurisdictional" defect, is is plain from the record in the habeas corpus hearing that the scope of review is not coextensive with the errors that can be asserted on appeal. This is the usual rule. *E.g., State v. Logan,* 87 Fla. 348, 100 So. 173 (1924); *Harris v. Norris,* 188 Ga. 610, 4 S. E. 2d 840 (1939); *People ex rel. Solemon v. Slattery,* 39 N. Y. S. 2d 43 (Sup. Ct. 1942).

47 For example, there was sharp dispute at the habeas corpus hearing about whether Gerald Gault, at either of the two delinquency hearings, had admitted speaking any of the allegedly lewd words over the telephone. Mrs. Gault said that her son, at the first hearing said he had only dialed (R. 30), but Probation Officer Flagg and the Judge testified that Gerald admitted saying some of the words (R. 47, 59). On the other hand, Mrs. Gault and Mr. Flagg agreed that at the second hearing Gerald had admitted only having dialed (R. 35, 45) but the Judge insisted that Gerald had admitted making some of the allegedly obscene remarks (R. 61). ***62** What results from a failure of the State to transcribe juvenile proceedings is the unseemly spectacle of the juvenile court judge testifying in the habeas corpus hearings to what transpired before him in the delinquency hearing, as happened here. In a similar context, this Court has ruled that:

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