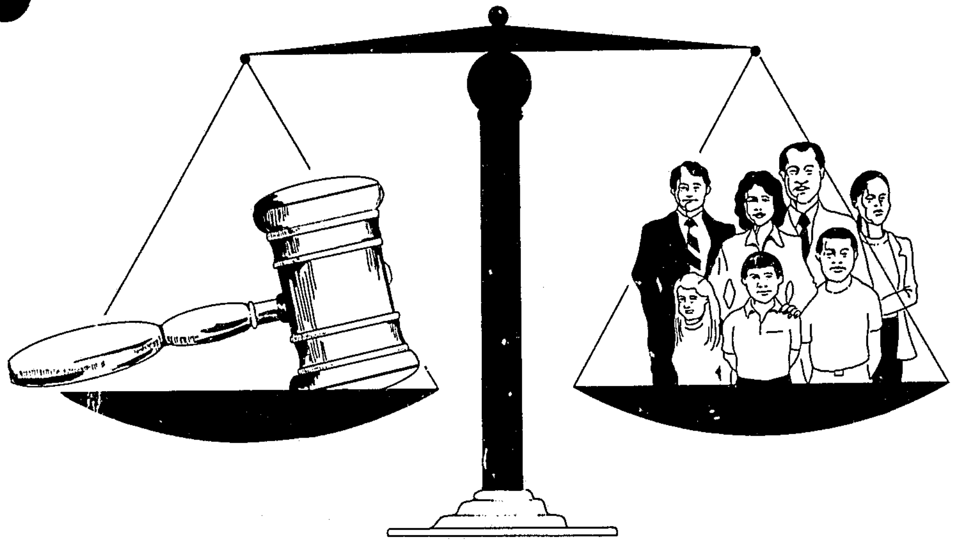
If you have issues viewing or accessing this file contact us at NCJRS.gov.

132403



School of Social Work
The University of Michigan

Florida Atlantic University
University Tower, Broward Campus

The Right to Counsel In Juvenile Court: Fulfilling *Gault*'s Promise

Barry C. Feld

NCJRS

JAN 25 1995

ACQUISITIONS

152405

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
Center for the Study of Youth Policy

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

This publication was made possible by a gift from the Annie E. Casey Foundation.

Additional copies may be obtained by contacting:
Center for the Study of Youth Policy
School of Social Work
The University of Michigan
1015 East Huron Street
Ann Arbor, Michigan 48104-1689
(313) 747-2556

Cover Illustration By: Jim Sanders

Cover Design By: First Impression Printing Co.
4115 Jackson Road
Ann Arbor, Michigan 48103

Printed: December, 1989

The University of Michigan Regents:

Deane Baker, Paul W. Brown, Neal D. Nielsen, Philip H. Power, Thomas A. Roach, Veronica Latta Smith, Nellie M. Varner, James L. Waters, James J. Duderstadt, President, ex officio

The University of Michigan, as an Equal Opportunity/Affirmative Action employer, complies with applicable federal and state laws prohibiting discrimination, including Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973. It is the policy of The University of Michigan that no person, on the basis of race, sex, color, religion, national origin or ancestry, age, marital status, handicap, or Vietnam-era veteran status, shall be discriminated against in employment, educational programs and activities, or admissions. Inquiries or complaints may be addressed to the University's Director of Affirmative Action, Title IX and Section 504 Compliance, 2012 Fleming Administration Building, Ann Arbor, Michigan 48109-1340, (313) 764-3423 (TDD 747-1388).

Florida Atlantic University: The State University, System of Florida, Charles Reed, Chancellor

JUDICIAL COUNCIL MEMBERS

Justice Rosemary Barkett
SUPREME COURT OF FLORIDA
Supreme Court Bldg.
Tallahassee, FL 32399

Judge Clarence Cooper
FULTON SUPERIOR COURT
3202 Kingsdale Dr., S.W.
Atlanta, GA 30311

Judge Gary L. Crippen
MINNESOTA COURT OF APPEALS
1300 Amhoist Tower
St. Paul, MN 55102

Judge Seymour Gelber
11th JUDICIAL CIRCUIT COURT
3300 N.W. 27th Avenue
Miami, FL 33142

Judge Lawrence Kaplan
COURT OF COMMON PLEAS
FAMILY DIVISION
605 City County Bldg.
Pittsburgh, PA 15219

Judge Paul Lawrence
GOFFSTOWN DISTRICT COURT
150 Myrtle
Manchester, NH 03104

Justice Thomas O. Marshall
SUPREME COURT OF GEORGIA
514 State Judicial Bldg.
Atlanta, GA 30334

Judge Sharon McCully
SECOND DISTRICT JUVENILE COURT
3522 South 700 West
Salt Lake City, UT 94119

Chief Justice Robert Murphy
MARYLAND COURT OF APPEALS
County Courthouse, 5th Floor
401 Bosley Avenue
Towson, MD 21204

Judge Frank A. Orlando (Ret.)
DIRECTOR
Center for the Study of Youth Policy
Florida Atlantic University
220 S.E. 2nd Avenue
Ft. Lauderdale, FL 3301

Judge Enrique Pena
327th DISTRICT COURT
City County Bldg.
500 E. San Antone
El Paso, TX 79901

Judge Luke Quinn
PROBATE COURT
919 Beach Street
Flint, MI 48502

Judge Stephen A. Schiller
CIRCUIT COURT OF COOK COUNTY
Richard J. Daley Center
Room 1610
Chicago, IL 60602

Justice Charles Z. Smith
WASHINGTON STATE SUPREME COURT
Temple of Justice
Mail Stop AV-11
Olympia, WA 98504-0511

Judge Susan Snow
CIRCUIT COURT OF COOK COUNTY
1802 Daley Center
Chicago, IL 60602

Table of Contents

Judicial Council Members iii

Forward vii

Preface x

The Right To Council In Juvenile Court:
Fulfilling *Gault's* Promise 1

Executive Summary 3

Introduction 5

References 27

Cases 29

Statutes 29

Notes 30

FOREWORD

Justice Abe Fortas is gone and nearly a quarter century has passed since he saw evidence of cause for concern that children in the juvenile court receive "the worst of both worlds," getting "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 556 (1966). Could there be such an anomaly in the American judicial system? Having been revealed, could it be perpetuated?

These questions get too little attention in legal circles, probably because judges, scholars and other lawyers have shelved the topic as a specialty field outside the real workings of the law. This is in spite of the mushrooming proportion of judicial activity on childhood and family issues. Fortunately, some have taken notice and tried to get an alarm sounded. Fortas was one, almost alone among appellate judges. In this generation, few have more persistently and carefully addressed these issues than criminal law scholar Barry Feld, a faculty member of the University of Minnesota Law School.

For over a decade, in more than a dozen important articles, Professor Feld has published information on the two worlds of the juvenile court, its original promise of solicitous care and its response to the more recent mandate for fair process. He documents continuing problems in both worlds, some of them worse than before and some simply hanging on stubbornly. It is time, he concludes, to wonder whether the separate juvenile court should be maintained.

In the world of a court meant to care, aims for a helpful, rehabilitative agency for children have collapsed further since 1966. In the generation of Justice Fortas, the problem was one of contrast between promises and practices, where concepts of treatment and service became euphemisms for the harsh reality of punitive sentences. Fifteen years later, Feld still saw the juvenile court as an institution of Orwellian "double-speak," consistently elevating custodial and punitive considerations over treatment and rehabilitative ones.

The system changed, as Feld subsequently reported, but not by altering its punitive practices. Especially for minor misconduct, long and confining "treatment" is prevalent. In addition, however, the promise of care and rehabilitation was expressly abandoned as to more serious wrongdoing. Explicit punishment aims were enacted. Decisions for incarceration are openly shaped on the basis of the offense committed and the prior record of a juvenile's offense.

Feld's study of juvenile dispositions culminated in a major piece of juvenile court literature, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes,* 68 B.U.L. Rev. 821 (1988). In an equally important companion piece, one year earlier, Feld completed a decade of study on offense-based reference of juvenile cases to adult court: *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes,* 78 J. Crim. L. & Criminology 471 (1987).

The meaning of the openly punitive juvenile court role was clear to Professor Feld:

> The historical justifications for the procedural deficiencies of the juvenile court are increasingly untenable in an institution that is explicitly punitive and offense-oriented. 68 B.U.L. Rev. at 909.

Thus, Feld turned to look at the other world of the juvenile court, its procedural fairness. It is clear, Feld found, that the 1971 United States Supreme Court rationale (*McKeiver v. State of Pennsylvania,* 403 U.S. 528) for depriving juveniles of the right for a jury trial had become obsolete. In addition, in remarkable studies, Feld found that the disparity of law and practice in juvenile court carried over to matters of process: 22 years after the Supreme Court's demand that juveniles have the right to counsel, it is evident that many courts frequently evade the right, even in a substantial proportion of cases where the child is subsequently placed in a secure institution. Absent mandatory representation, no mechanism has been found to protect the child from unknowing and unwise waiver of the right to counsel.

Feld's work on juvenile court procedure led to a major study focusing on Minnesota's latest formulation of juvenile court rules: *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court,* 69 Minn. L. Rev. 141. (1984). Five years later, Feld published his comprehensive study of Minnesota law and practice on the right to counsel: *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make,* 78 J. Crim. L. & Criminology 1185 (1989). Now, several months later, the Children, Families and Law Judicial Council makes available Feld's considered statement on implications of the child's constitutional right for effective assistance of counsel.

Will another generation see changes in judicial dealings with children, at least on representation by counsel? Feld makes it evident that changes cannot be postponed. In the article which follows, he observes: "The routine absence of counsel calls into question the very legitimacy of the juvenile court as a legal institution." More pointedly,

> [V]ery high rates of home removal and incarceration of unrepresented youths constitute an indictment of all the participants in the juvenile justice process — the juvenile court bench, the prosecuting attorneys, the organized bar, the legislature, and especially the state supreme courts that have supervisory and administrative responsibility for states' juvenile courts.

Founded as they are on solid evidence, these observations cannot be safely ignored.

A dozen years ago, six years before his death, Abe Fortas wrote of "America's commitment to the founders of its Constitution" that we have a mission to move "steadily, relentlessly and resourcefully," toward "elimination of the category of nonpersons." He spoke of children and others who have not been accorded the guarantees all are to have. It is evident Barry Feld senses this mission. It will be fitting for the nation's children if his words are heard and heeded.

Judge Gary Crippen
Minnesota Court of Appeals

PREFACE

Twenty-two years after the promises of *Gault*, the Children, Youth, and Families Judicial Council has chosen to publish this paper which thoughtfully examines the state of the promised right to legal representation for children charged with criminal offenses in Juvenile Courts.

The Children, Youth, and Families Judicial Council, whose members are listed herein, is part of the Key Decision Maker Project sponsored by the Annie E. Casey Foundation. The purpose of the Council is to bring to the public policy arena critical issues pertaining to children and families which have a direct impact on our courts.

The members of the Council were chosen because of their concern for issues pertaining to children and families, and for the esteemed reputation they enjoy in their chosen areas of judicial responsibility. All members of the Council may not totally share the opinions or conclusions of the author, Professor Barry Feld, but all members endorse the concept of publishing scholarly papers that we hope will generate public policy discussions and enlightenment.

Professor Barry Feld is a noted law teacher, researcher, and writer in the field of juvenile justice. The Council is fortunate to have the opportunity to publish this very timely and thought provoking article.

Judge Frank A. Orlando (Ret.)
Director
Florida Atlantic University
Center for the Study of Youth Policy

The Right To Counsel In Juvenile Court: Fulfilling *Gault*'s Promise

Barry C. Feld
Professor of Law
University of Minnesota

Prepared for
Children, Families and Law Judicial Council

Executive Summary

More than twenty years ago in *In re Gault,* the United States Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. On the basis of the available data, it appears that *Gault's* promise of counsel remains unrealized. In many states, less than half of all juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled including many youths who are removed from their homes or confined in juvenile correctional institutions. Moreover, juveniles with lawyers appear to receive more severe sentences than do their unrepresented counterparts.

The high rates of non-representation implicate several legal issues: the validity of waivers of counsel by unrepresented juveniles; the incarceration of unrepresented youths; and the use of prior, uncounselled juvenile convictions to enhance the subsequent sentences of both juvenile and adult defendants. The United States Supreme Court has condemned both incarceration without representation and enhancements of penalties for unrepresented adult defendants. Thus, the questionable validity of many juveniles' waiver of their constitutional right to counsel has enormous consequences for the quality of procedural justice in juvenile courts.

The recent research on the delivery and effectiveness of legal services in juvenile courts indicates that changes in legislative and judicial policies are necessary. Instead of relying upon discretionary review of the "totality of the circumstances" to assess the validity of a youth's waiver of counsel, legislation or judicial rules of procedure should mandate the automatic and non-waivable appointment of counsel at the earliest stage in a delinquency proceedings. Short of mandatory and non-waivable counsel, a prohibition on waivers of counsel without prior consultation with and the concurrence of counsel would provide greater assurance than does the current practice that any eventual waiver was truly "knowing, intelligent, and voluntary". Either automatic appointment or a requirement of consultation with counsel prior to waiver would assure the

development of legal services delivery systems that would facilitate the routine representation of juveniles. It would also preclude collateral attacks on dispositions or subsequent enhanced sentences on the grounds that the juvenile lacked representation at the time of the original delinquency adjudication. Finally, only the presence of counsel can assure the quality of procedural justice in juvenile courts and fulfill *Gault's* promise. In light of the high rates of unrepresentation and the absence of data in most jurisdictions, many states need to modify their juvenile justice information systems in order to facilitate the monitoring of the delivery of legal services.

Introduction

More than twenty years ago in *In re Gault*, the United States Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. The *Gault* Court mandated the right to counsel because "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution" (*Gault*, 1967:36). *Gault* also decided that juveniles were entitled to the privilege against self-incrimination and the right to confront and cross-examine their accusers at a hearing. Without the assistance of counsel, these other rights could be negated. "[T]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings. . . . The child 'requires the guiding hand of counsel at every step in the proceedings against him' " (*Gault*, 1967:36). In subsequent opinions, the Supreme Court has reiterated the crucial role of counsel in the juvenile justice process. In *Fare v. Michael C.*, the Court noted that "the lawyer occupies a critical position in our legal system. . . . Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts" (*Fare*, 1979:719).

The Implementation of *Gault*— Are the Lawyers There Yet?

In the two decades since *Gault*, the promise of counsel remains unrealized. Although national statistics are not available, surveys of representation by counsel in several jurisdictions suggest that "there is reason to think that lawyers still appear much less often than might have been expected" (Horowitz, 1977:185). On the basis of the available data, it appears that in many states less than half of all juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled (Feld, 1984; 1988; 1989).

When *Gault* was decided, an attorney's appearance in delinquency proceedings was a rare event, occurring in perhaps 5% of cases. Despite the formal legal changes, however, the actual delivery of legal services to juveniles lagged behind. In the immediate aftermath of *Gault*, Lefstein et al. (1969) examined institutional compliance with the decision and found that juveniles were neither

adequately advised of their right to counsel nor had counsel appointed for them. Ferster and Courtless' (1972:206-7) analysis of court records showed that 27% of juveniles were represented, that observations of 64 hearings included 37.5% in which juveniles had counsel at the adjudicatory stage, and that in 66.7% of those cases in which lawyers were present, they did not participate in any way.

In more recent evaluations of legal representation in North Carolina, Clarke and Koch (1980:297) found that the juvenile defender project represented only 22.3% of juveniles in Winston-Salem, N.C., and only 45.8% in Charlotte, N.C. Aday (1986) found rates of representation of 26.2% and 38.7% in the southeastern jurisdictions he studied. Walter and Ostrander (1982) observed that only 32% of the juveniles in a large north central city were represented by counsel. Bortner's (1982:139) evaluation of a large, midwestern county's juvenile court showed that "Over half (58.2 percent) [the juveniles] were not represented by an attorney." Evaluations of rates of representation in Minnesota also indicate that a majority of youths are unrepresented (Feld, 1984; 1988; 1989). Feld (1989) reported enormous county-by-county variations in rates of representation within Minnesota, ranging from a high of 100% to a low of less than 5%. A substantial minority of youths removed from their homes (30.7%) and those confined in state juvenile correctional institutions (26.5%) lacked representation at the time of their adjudication and disposition (Feld, 1989:1236-38). The most comprehensive study to date reports that in half of the six states surveyed, only 37.5%, 47.7%, and 52.7% of juveniles charged with delinquency were represented (Feld, 1988:401). In short, it appears that *Gault's* promise of counsel remains unkept for most juveniles in most states.

One pattern that emerges in all of the states is a direct relationship between the seriousness of the present offense and rates of representation. Juveniles charged with felonies — offenses against the person or property — and offenses against the person — felony or minor — generally have higher rates of representation than the overall rate (Feld, 1988:402; 1989:1237). In most jurisdictions, however, such offenses constitute only a small fraction of juvenile courts' dockets. Substantially higher proportions of juveniles charged with "kid stuff" — minor property offenses such as shoplifting or vandalism, other delinquency such as public disorder, probation violations or contempt, and status offenses—are unrepresented. These variations in rates of representation by offense

TABLE 1
Representation by Council (Private, Public Defender/Court Appointed)

	Calif.	Minn.	Neb.	N.Y.	N. Dakota	Penn.	Phil.
% Counsel	84.9#	47.7	52.7	95.9	37.5	86.4	95.2
Private	7.6	5.3	13.3	5.1	10.5	14.5	22.0
CA/PD*	77.3	42.3	39.4	90.8	27.1	71.9	73.2
Felony Offense Against Person	88.7	66.1	58.5	98.5	100.0	91.4	96.3
Private	11.2	9.9	14.7	4.3	—	22.0	29.9
CA/PD	77.5	56.3	44.1	94.2	100.0	69.4	66.4
Felony Offense Against Property	86.8	60.6	59.9	98.1	38.9	87.1	95.0
Private	9.0	6.2	14.4	8.3	12.2	15.1	20.5
CA/PD*	77.8	54.4	54.5	89.7	26.7	72.0	74.5
Minor Offense Against Person	86.7	73.5	41.3	99.0	47.8	89.3	96.1
Private	8.6	7.3	14.9	9.5	17.4	16.4	22.4
CA/PD	78.1	66.1	26.4	89.5	30.4	72.9	73.7
Minor Offense Against Property	83.8	46.8	49.6	96.2	38.3	85.5	94.7
Private	6.1	5.3	14.1	6.5	12.5	11.9	16.1
CA/PD	77.7	41.4	35.5	89.7	25.8	73.6	78.7
Other Delinquency	83.4	55.5	48.9	96.8	33.1	82.1	93.2
Private	6.4	5.9	16.0	8.0	10.2	10.8	12.3
CA/PD	77.0	49.6	32.8	88.7	22.3	71.4	80.9
Status Offense	71.4	30.7	56.6	93.8	37.2	N/A	N/A
Private	3.3	3.9	10.3	2.3	7.3		
CA/PD	70.8	26.9	46.3	91.6	29.9		

*Court Appointed, Public Defender
Source Feld, "*In re Gault* Revisited," (1988:401).

The California Bureau of Criminal Statistics and Special Services cautions that this rate may *understate* the actual rate of representation, i.e. that an even larger percentage of California's juveniles are represented. *See* text for explanation.

further reinforce the view that the decision to appoint counsel reflects deliberate judicial policies rather than differences in minors' competence to waive the assistance of lawyers.

There are a variety of possible explanations for why so many youths appear to be unrepresented: parental reluctance to retain an attorney; inadequate public-defender legal services in nonurban areas; a judicial encouragement of and readiness to find waivers of the right to counsel in order to ease administrative burdens on the courts; cursory and misleading judicial advisories of rights that

inadequately convey the importance of the right to counsel and suggest that the waiver litany is simply a meaningless technicality; a continuing judicial hostility to an advocacy role in a traditional, treatment-oriented court; or a judicial predetermination of dispositions with nonappointment of counsel where probation is the anticipated outcome (Feld, 1984: 190; 1989: 216-17; Bortner, 1982:136-147; Lefstein et al., 1969; Stapleton and Teitelbaum, 1972). In many instances, juveniles may plead guilty at their arraignment and have their disposition imposed at the same hearing without benefit of counsel. Whatever the reason and despite *Gault's* promise of counsel, many juveniles facing potentially coercive state action never see a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel, and face the prosecutorial power of the State alone and unaided.

Waiver of Counsel

The most commonly offered explanation of nonrepresentation is that juveniles waive their right to counsel. In most jurisdictions, the validity of relinquishing a constitutional right is determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances." (*Johnson*, 1938; *Fare*, 1979; Feld, 1984) The judicial position that a young minor can "knowingly and intelligently" waive constitutional rights unaided is consistent with most legislatures' judgment that a youth can make an informed waiver decision without parental concurrence or consultation with an attorney.

The right to waive counsel and appear as a *pro se* defendant follows from the United States Supreme Court's decisions in *Johnson v. Zerbst* (1938) and *Faretta v. California* (1975), where the Court held that an adult defendant in a state criminal trial had a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so. The Supreme Court has never ruled on the validity of a minor's waiver of the right to counsel in delinquency proceedings as such, although it upheld a minor's waiver of the *Miranda* right to counsel at the pretrial investigative stage under the "totality of the circumstances" (*Fare*, 1979).

The crucial issue for juveniles, as for adults, is whether such a waiver can occur "voluntarily and intelligently," particularly without prior consultation with counsel. The problem is particularly acute

when the judges giving the judicial advisories seek a predetermined result — the waiver of counsel — which influences both the information they convey and their interpretation of the juvenile's response. The "totality" approach to waivers of rights by juveniles has been criticized extensively (Feld, 1984; Grisso, 1980). Empirical research suggests that juveniles simply are not as competent as adults to waive their constitutional rights in a "knowing and intelligent" manner (Grisso, 1980; 1981). Professor Grisso reports that the problems of understanding and waiving rights were particularly acute for younger juveniles:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension. . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights (Grisso, 1980:1160).

Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, was inadequate (Grisso, 1980:1157). While several jurisdictions recognize this "developmental fact" and prohibit uncounselled waivers of the right to counsel or incarceration of unrepresented delinquents (Iowa, 1985; Wisconsin, 1983; Juvenile Justice Standards, 1980), the majority of states allow juveniles to waive their *Miranda* rights as well as their *Gault* right to counsel in delinquency proceedings without an attorney's assistance.

Uncounselled Convictions and Enhanced Sentences

The questionable validity of many juveniles' waivers of the right to counsel raises collateral legal issues as well. In *Argersinger v. Hamlin* (1972), the Court considered whether an indigent defendant who was charged with and imprisoned for a minor offense was entitled to the appointment of counsel. In *Scott v. Illinois* (1979), the Court held that in misdemeanor proceedings, whether the trial judge actually ordered a sentence of incarceration determined whether counsel must be appointed for the indigent. Thus, unless validly waived, counsel must be appointed for any juvenile charged with conduct that would be a felony if committed by an adult (*Gideon*, 1963; *Gault*, 1967), as well as for any juvenile who is re-

moved from her home or confined (*Scott*, 1979). However, basing the initial decision to appoint counsel on the eventual sentence that is imposed presents severe administrative problems since it requires a judge to predict the eventual sentence prior to knowing anything about the offender or the nature of the offense.

In light of *Gault, Gideon*, and *Scott*, the initial confinement of any unrepresented juvenile may be improper. Moreover, it may be improper to consider those prior uncounselled convictions for purposes of subsequent sentencing as well. In *Baldasar v. Illinois* (1980), the Supreme Court reversed Baldasar's felony conviction where the defendant received an enhanced sentence based upon a prior uncounselled misdemeanor conviction. *Baldasar* is consistent with earlier cases that held that an uncounselled felony conviction could not be used in a later trial to enhance punishments under recidivist statutes (*Tucker*, 1972; *Burgett*, 1967). In *Burgett v. Texas* (1967), the Supreme Court noted that because it was unconstitutional to convict a person for a felony without benefit of a lawyer or a valid waiver of that right,

> [t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right (*Burgett*, 1967:115).

Moreover, the principle of *Baldasar, Tucker*, and *Burgett* that prior convictions obtained without representation by counsel or a valid waiver should not be used to enhance subsequent sentences has been applied in several sentencing contexts involving uncounselled prior juvenile convictions.[1]

While juvenile court judges in most states neither follow formal sentencing guidelines nor numerically weigh a youth's prior record, their use of prior uncounselled adjudications when sentencing juveniles for a subsequent conviction implicate the same issues that *Baldasar* and *Burgett* condemned for adults. "It makes little difference whether an enhanced penalty provision mandates an increased term or imprisonment or whether a judge imposed it exercising his sentencing discretion. As long as the prior uncounselled conviction leads to the increased incarceration, the defendant is being deprived of his liberty because of that conviction (Rudstein,

1982:536)." Indeed, because of juvenile court judges' virtually unrestricted sentencing discretion, the *Baldasar* issues are especially acute when sentencing juveniles. If a juvenile who is convicted without counsel and placed on probation is subsequently adjudicated delinquent for a new offense and committed to an institution, is the latter sentence "enhanced" based on the prior, uncounselled conviction or does it simply reflect the judge's assessment of the juvenile's "treatment needs" including the subsequent delinquency.

Another variation of the *Baldasar* problem arises when status offenders are sentenced to secure detention facilities or institutions for violating conditions of their probation. Although the Juvenile Justice and Delinquency Prevention Act was intended to deinstitutionalize status offenders (Schwartz, 1989), 1980 amendments authorize the secure detention of status offenders found in contempt for violating a court order (Costello and Worthington, 1981). Several courts have approved the use of the criminal contempt power to "bootstrap" status offenders into delinquents who may then be incarcerated.[2] The *Baldasar* issue occurs because in many jurisdictions *Gault* is deemed to apply only to deliquency matters; status offenders are not provided with counsel at their initial adjudication (Feld, 1988). Although the initial status adjudication and not the later contempt proceeding is the "critical stage", courts have approved the initial denial of counsel as long as counsel is provided at the contempt proceeding that actually leads to confinement (*Walker*, 1972).

The Performance of Counsel in Juvenile Court

Even when juveniles are represented, attorneys may not be capable of or committed to representing their juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case", or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court (Stapleton and Teitelbaum, 1972; Lefstein et al., 1969; Fox, 1970; Platt and Friedman, 1968; Ferster et al., 1971; McMillian and McMurtry, 1970; Kay and Segal, 1973; Bortner, 1982; Clarke and Koch, 1980; Knitzer and Sobie, 1984; Blumberg, 1967). Institutional pressures to maintain stable, cooperative working relations with other personnel in the system may be inconsistent with effective adversarial advocacy (Lefstein et al., 1969; Stapleton and Teitelbaum, 1972; Bortner, 1982; Blumberg, 1967).

Counsel as an Aggravating Factor in Sentencing

Several studies have questioned whether lawyers can actually perform as advocates in a system rooted in *parens patriae* and benevolent rehabilitation (Stapleton and Teitelbau, 1972; Fox, 1970; Kay and Segal, 1973). Indeed, there are strong indications that juveniles who are represented by lawyers in more traditional "therapeutic" juvenile courts may actually be disadvantaged in adjudications or dispositions when compared with similarly situated unrepresented youths (Stapleton and Teitelbaum, 1972:63- 96; Clarke and Koch, 1980:304-6; Bortner, 1982). Duffee and Siegel 1971:548-53), Clarke and Koch (1980:304-6), Stapleton and Teitelbaum (1972), Hayeslip (1979), Feld (1988; 1989) and Bortner (1982) all reported that juveniles with counsel are more likely to be incarcerated than juveniles without counsel. Research on legal representation in Canadian juvenile courts also reports a negative impact of counsel on juveniles' sentences in some settings (Carrington and Moyer, 1988a; 1988b). Bortner (1982:139-40), for example, found that "[w]hen the possibility of receiving the most severe dispositions (placement outside the home in either group homes or institutions) is examined, those juveniles who were represented by attorneys were more likely to receive these dispositions than were juveniles not represented (35.8 percent compared to 9.6 percent). Further statistical analysis reveals that, regardless of the types of offenses with which they were charged, juveniles represented by attorneys receive more severe dispositions." Similarly, Feld's (1988:393) evaluation of the impact of counsel in six states' delinquency proceedings reported that:

> it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition. . . . In short, while the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

A second study by Feld (1989:1306) also concluded that while the relationships between the factors producing more severe dispositions and the factors influencing the appointment of counsel are complex, the presence of counsel appears to be an aggravating factor in the sentencing of jevenile offenders. The multiple regression equations reported in Table 2 indicate that the presence of an attorney increased

TABLE 2
Regression Model of Factors Influencing Out-Of Home Placement and Secure Confinement Dispositions
Minnesota, 1986

Independent Variables	Zero-Order r	Standardized Beta Coefficient	Multiple R	R^2
		Out-of-Home Placement		
Prior Home Removal Disposition	.422*	.357*	.422	.179
Detention	−.265*	−.175*	.467	.218
Attorney	.229*	.107	.483	.233
Offense Severity	.157*	.077*	.490	.240
Number of Offenses at Disposition	−.084*	−.060*	.494	.244
Age	.039*	.018**	.494	.244
Prior Record	−.282*	−.019***	.494	.244
Gender	.023**	−.014***	.494	.245
		Secure Confinement		
Prior Secure Confinement Disposition	.414*	.354*	.414	.171
Offense Severity	.191*	.120*	.445	.198
Detention	−1.94*	−.115*	.462	.214
Attorney	.197*	.081*	.469	.220
Number of Offenses at Dispositon	−.086*	−.050*	.471	.222
Prior Record	−.260*	−.040*	.473	.223
Age	−.023**	−.040***	.474	.224

* p ◄ .001
** p ◄ .01
*** p ◄ .05
Source, Feld, 1989:1306

the severity of a juvenile's disposition, accounting for about 1.5% of the variance in home removal and about .6% of the variance in secure confinement. While the overall explained variance is small, the beta coefficient indicates that the presence of an attorney has more influence on a youth's removal from home than does the seriousness of the offense. Thus, after controlling for the influence of the other variable, the presence of an attorney seems to be an additional aggravating factor at sentencing.

The Quality of Representation

One possible explanation for the consistent findings that representation by counsel redounds to the disadvantage of a juvenile is that the lawyers who appear in juvenile courts are incompetent and prejudice their clients' cases (Feld, 1989:1345; Knitzer and Sobie, 1984). While systematic qualitative evaluations of the actual performance of counsel in juvenile courts are lacking, the available evidence suggests that even in jurisdictions where counsel are appointed routinely, there are grounds for concern about their effectiveness. Knitzer and Sobie (1984:8-9) reported a number of very disturbing findings:

> Using the most basic criteria of effectiveness — that the law guardian meet the client, be minimally prepared, have some knowledge of the law and of possible dispositions, and be active on behalf of his or her client — serious and widespread problems are evident.
>
> — Overall, 45% of the courtroom observations reflected either seriously inadequate or marginally adequate representation; 27% reflected acceptable representation, and 4% effective representation. . . . Specific problems center around lack of preparation and lack of contact with the children.
>
> — In 47% of the observations it appeared that the law guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all. . . . Further, in 35% of the cases, the law guardians did not talk

> to, or made only minimal contact with their clients during the court proceedings. . . . In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians.

Public defender offices in many jurisdictions often assign their least capable lawyers or newest staff attorneys to juvenile courts to get trial experience and these neophytes may receive less adequate supervision than their prosecutorial counterparts (Flicker, 1983:2). Similarly, court appointed counsel may be beholden to the judges who select them and more concerned with maintaining an ongoing relationship with the court than vigorously protecting the interests of their frequently changing young clients (Flicker, 1983:4). In either event, the conditions of employment in juvenile court are not conducive to quality representation and are unlikely to attract and retain the most competent attorneys. Long hours, low pay, inadequate resources, crushing caseloads, and difficult clients are likely to discourage all but the most dedicated lawyers from devoting their professional careers to advocacy on behalf of children.

Measuring defense attorney performance by dispositional outcomes raises additional questions about the meaning of effective assistance of counsel in a court system in which many of the participants — juvenile court judges, probation officers, and prosecutors — do not regard an acquittal as a "victory." What does it take to be an effective attorney in juvenile court? Why do fewer defense attorneys appear at the time of juveniles' sentencing even than do at adjudications (Feld, 1989; Knitzer and Sobie, 1983:10)? Since virtually all juveniles are convicted of some offense, thereby giving the court jurisdictional authority to intervene, how might attorneys for juveniles become more familiar with dispositional alternatives and more effective advocates for the substantive interests of their clients?

Discussion and Policy Recommendations: Eliminating Waivers of Counsel in Juvenile Court

Empirical evaluations of the impact of Supreme Court decisions on police and courtroom practices indicate that their influence often is limited and their policy goals frequently overridden by the organizational requirements of the affected agencies (Feld, 1989:1322).

Several contemporaneous observers reported the limited influence of *Gault* on the delivery and effectiveness of legal representation (Lefstein, et al., 1969; Duffee and Siegel, 1971). Nearly twenty years after *Gault* held that juveniles are constitutionally entitled to the assistance of counsel, half or more of all delinquent and status offenders in many states still do not have lawyers (Feld, 1988; 1989), including many who receive out of home placement and even secure confinement dispositions (Feld, 1988:403-07; 1989:1234-36). In Minnesota, for example, nearly one-third of all juveniles removed from their homes and more than one-quarter of those incarcerated in secure institutions *were not represented* (Feld, 1989:1254-56). In the sixty-eight of Minnesota's eighty-seven counties where only 19.3% of juveniles had lawyers, *more than half* of all the juveniles who were removed from their homes and who were incarcerated *were not represented* (Feld, 1989:1255). Since larger proportions of juveniles charged with serious offenses are represented, the primary impact of non-representation falls on the majority of juveniles who are charged with minor offenses. These very high rates of home removal and incarceration of unrepresented youths constitute an indictment all of the participants in the juvenile justice process — the juvenile court bench, the prosecuting attorneys, the organized bar, the legislature, and especially the state supreme courts that have supervisory and administrative responsibility for states' juvenile courts.

Eliminating Waivers of Counsel

The United States Supreme Court held in *Scott* (1979) that it was improper to incarcerate an adult offender, even one charged with a minor offense, without either the appointment of counsel or a valid waiver of counsel. Moreover, both state and the United States Supreme Courts have described the type of penetrating inquiry that must precede a "knowing, intelligent, and voluntary" waiver of the right to counsel (*Faretta*, 1975; *Fare*, 1979). Whether the typical *Miranda* advisory which is then followed by a waiver of rights under the "totality of the circumstances" is sufficient to assure a valid waiver of counsel by juveniles is highly questionable. Shortly after the *Gault* decision, commentators warned that simply importing adult waiver doctrines into delinquency proceedings was unrealistic and threatened the entire fabric of rights that the *Gault* decision granted. Lefstein, et al., (1969:537-46) cautioned that

> the concept of waiver of rights in juvenile delinquency proceedings is unrealistic. The Supreme Court in *Gault* assumed without discussion that the waiver doctrine could be imported to juvenile court hearings. . . . We submit that these special problems are extremely serious, and that a review of the appropriateness of this doctrine for juvenile courts is necessary.

Critics of the ease with which juvenile court judges often found waivers of rights by minors noted that

> considerable doubt remains as to whether a typical juvenile's waiver is, or even can be, "knowing, intelligent, and voluntary." Empirical studies evaluating juveniles' understanding of their *Miranda* [and *Gault*] rights indicate that most juveniles who receive the *Miranda* warning may not understand it well enough to waive their constitutional rights in a "knowing and intelligent" manner. Such lack of comprehension by minors raises questions about the adequacy of *Miranda* warnings [or *Gault*'s advisory of the right to counsel] as a safeguard. The *Miranda* warning was designed to inform and educate a defendant to assure that subsequent waivers would indeed be "knowing and intelligent." If most juveniles lack the capacity to understand the warning, however, its ritual recitation hardly accomplishes that purpose (Feld, 1984:174-75).

No doubt, many juvenile court judges concluded that the majority of unrepresented juveniles, including those removed from their homes or confined, waived their right to counsel in delinquency proceedings. Are the majority of the young juveniles in many states who waive their rights to counsel really that much more competent and legally sophisticated than the adult defendants for whom *Johnson* (1938) and *Faretta* (1975) pose a significant constraint on waivers of counsel? Continued judicial and legislative reliance on the "totality of the circumstances" test clearly is unwarranted and inappropriate in light of the multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations that make every case unique. These factors result in virtually unlimited and unreviewable judicial discretion to deprive juveniles of their most fundamental procedural safeguard — the right to counsel.

Only the cynical or myopic can contend that immature and impressionable young juveniles can waive their right to counsel alone and unaided. Can so many young juveniles be so mature and sophisticated as to make "knowing, intelligent, and voluntary" waivers of their constitutional rights alone and unaided in a frightening and alien courtroom environment (Flicker, 1983:ii)?

One alternative to using a "totality of the circumstances" test to evaluate the validity of a juvenile's waiver of *Miranda* rights or the *Gault* right to counsel is to require the presence and concurrence of a parent or other interested adult before any waiver can be valid (Feld, 1984:177-83). Proponents of a parental presence requirement believe that it can reduce the sense of isolation or coercion to waive that a juvenile may feel, and that they can provide legal advice that might not otherwise be available to the juvenile. However, parents' potential conflict of interest with the child, their emotional reactions to their child's involvement in the justice process, or their own intellectual or social disabilities may make them unable to play the envisioned supportive role for the child (Grisso, 1980:1142; Feld, 1984:181). Parental presence may constitute an additional coercive pressure for a child to waive her rights (Grisso, 1981:187-200); even well-intentioned parents lack the legal training necessary to assist their child with the problems faced.

There are direct legislative and judicial policy implications of the recent research on the delivery of legal services in juvenile courts (Feld, 1988; 1989). Instead of relying on a discretionary review of the "totality of the circumstances" or on the advice of parents, legislation or judicial rules of procedure should mandate the automatic and non- waivable appointment of counsel at the earliest stage in a delinquency proceeding (Iowa, 1985:232.11; New Mexico, 19 — :22(d); Rubin, 1977:12).

> In view of the inability of most juveniles to protect themselves from the consequences of the waiver of rights, or from the forces impelling them to effect a waiver, and because of the difficulties in placing substantial reliance on parental assistance, it may be argued that a minor should not, except in the most unusual circumstances [such as prior consultation with counsel], be held to a waiver of the right to counsel, nor an uncounseled minor to a waiver of the rights to silence, confrontation, and cross examination (Lefstein, et al, 1969:553).

As long as it is possible for a juvenile to waive the right to counsel, juvenile court judges will continue to find such waivers on a discretionary basis under the "totality of the circumstances." The very fact that it is legally possible for a juvenile to waive counsel itself may discourage some youths from exercising their right if asserting it may be construed as an affront to the presiding judge. Handler notes that

> if the program of rights is to be effective, it must deal with the problem of waiver — waiver by those who do not understand and waiver by those who, rightly or wrongly, think, or have been coerced into thinking that they have more to gain by playing ball or by manipulation. Waiver under either circumstance should not be allowed. . . . [T]he community's interest here is greater than that which the adolescent or the parent thinks his best interests are. Furthermore, if these rights are to serve the important function of testing and questioning the juvenile process, allowing waiver should increase coercive tactics by the officials who are going to be questioned. Paradoxically, then, for "rights" to be effective, they must be made mandatory (Handler, 1965:33).

The A.B.A. – I.J.A. Juvenile Justice Standards recommend that "[t]he right to counsel should attach as soon as the juvenile is taken into custody. . . , when a petition is filed. . . , or when the juvenile appears personally at an intake conference, whichever occurs first (Juvenile Justice Standards, 1980:89)." In addition, "[the juvenile] should have 'the effective assistance of counsel at all stages of the proceeding' " and this right to counsel is mandatory and nonwaivable (Juvenile Justice Standards, 1980:89). Indeed, because of the importance of counsel in implementing other procedural safeguards, "[p]roviding accused juveniles with a non-waivable right-to-counsel is probably the most fundamental of the hundreds of standards in juvenile justice . . . (Flicker, 1983:i)." Mandatory, nonwaivable representation by counsel not only protects the rights of the juvenile, but also helps the courts by assisting in the efficient handling of cases and assuring that any waiver that the juvenile is entitled to make are in fact made knowingly and intelligently.

Some may question the utility of mandatory, nonwaivable counsel if many of the consequences of representation are negative. Obviously, full representation of all juveniles would eliminate any variations in sentencing or processing associated with the presence

of attorneys. Full representation would "wash out" the apparently negative effects of representation. Clearly, a full representation model is quite compatible with contemporary juvenile justice administration as evidenced by the experiences in California, Pennsylvania, and New York, as well as in several counties in Minnesota (Feld, 1988; 1989). The experiences there indicate that juvenile justice administration does not grind to a halt if juveniles are routinely represented. The systematic introduction of defense counsel would provide the mechanism for creating trial records which could be used on appeal and which could provide an additional safeguard to assure that juvenile court judges adhere more closely to the formal procedures that are now required. Moreover, eliminating waivers of counsel would lead to greater numbers of public defenders in juvenile justice cases. An increased cadre of juvenile defenders would get education, support and encouragement from statewide association with one another similar to the post-*Gideon* revolution in criminal justice that resulted from the creation of statewide defender systems.

More fundamentally, however, since the *Gault* decision, the juvenile court is first and foremost a legal entity engaged in social control and not simply a social welfare agency. As a legal institution exercising substantial coercive powers over young people and their families, safeguards against state intervention and mechanisms to implement those safeguards are necessary. The *Gault* Court was unwilling to rely solely upon the benevolence of juvenile court judges or social workers to safeguard the interests of young people. Instead, it imposed the familiar adversarial model of proof which recognizes the likely conflict of interests between the juvenile and the state. A basic premise of procedural justice is that all citizens have a stake in the orderly administration of the justice process and that only lawyers possess the technical skills to assure that occurs. In an adversarial process, only lawyers can invoke effectively the procedural safeguards that are the right of every person, including children, as a condition precedent to unsolicited state intervention. The routine absence of counsel calls into question the very legitimacy of the juvenile court as a legal institution and fosters an appearance, if not a reality, of injustice. The presence of counsel functioning as an independent check on coercive state intervention could legitimate and assure the accuracy of delinquency adjudications and dispel the image of a "kangaroo court" (*Gault*, 1967).

A rule or law mandating nonwaivable assistance of counsel for juveniles appearing in juvenile court might impose substantial burdens on the delivery of legal services in rural areas (Juvenile Justice Standards, 1980:93; Feld, 1989). Presumably, however, rural counties already provide adult defendants with representation and stand-by counsel in criminal proceedings so the organizational mechanisms for delivering legal services to juveniles already exist. Moreover, despite any possible fiscal or administrative concerns, every juvenile is already entitled by *Gault* to the assistance of counsel at every critical stage in the process and only an attorney can redress the imbalance between a vulnerable youth and the state. As the Supreme Court said in *Gault*, "the condition of being a boy does not justify a kangaroo court (*Gault*, 1967:28)", especially if the justification proferred for such a proceeding is simply the state's fiscal convenience. The issue is not one of entitlement, since all are entitled to representation, but rather the ease or difficulty with which waivers of counsel are found, which in turn has enormous implications for the entire administration of juvenile justice.

Short of mandatory and non-waivable counsel, a prohibition on waivers of counsel without prior consultation and the concurrence of counsel would provide greater assurance than the current practice that any eventual waiver was truly "knowing, intelligent, and voluntary." Since waivers of rights, including the right to counsel, involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any less stringent alternative could be as effective. A *per se* requirement of consultation with counsel prior to a waiver takes account of the immaturity of youths and their lack of experience in law enforcement situations. In addition, it recognizes that only attorneys possess the skills and training necessary to assist the child in the adversarial process. Moreover, a requirement of consultation with counsel prior to waiver would assure the development of legal services delivery systems that would then facilitate the routine representation of juveniles.

At the very least, court rules or legislation should prohibit the removal from home or incarceration of any juvenile who was neither represented by counsel nor provided with stand-by counsel. Such a limitation on disposition is already the law for adult criminal defendants (*Gideon*, 1963; *Scott*, 1979), for juveniles in some jurisdictions (Feld, 1984:187), and the operational practice in jurisdictions such as New York and Pennsylvania, where virtually no unrepresented juveniles are removed or confined (Feld, 1988).

Explaining the Negative Effect of Representation

There is a separate issue, however, as to why representation by counsel appears to be a negative factor in the sentencing of juveniles. While legal variables such as the seriousness of the present offense, the length of the prior record, and pretrial detention status enhance the probabilities of representation, the fact of representation appears to have an additional, independent effect on the severity of dispositions (Feld, 1988; 1989). Several earlier, less systematic studies, as well as contemporaneous research in Canada also have alluded to this phenomenon (Bortner, 1982; Clarke and Koch, 1980; Carrington and Moyer, 1988a; 1988b).

Although the quality of lawyers appearing routinely in juvenile court may provide a partial explanation for their negative impact, the apparent relationship between the presence of counsel and the increased severity of disposition may be spurious. It may be that early in a proceeding, a juvenile court judge's familiarity with a case alerts him or her to the eventual disposition that will be imposed if the child is convicted and counsel may be appointed in anticipation of more severe consequences (Aday, 1986; Feld, 1989:347). In many states and counties, the same judge who presides at a youth's arraignment and detention hearing will later decide the case on the merits and then impose a sentence (Feld, 1984:240-241). Perhaps, the initial decision to appoint counsel is based upon the evidence developed at those earlier stages which also influences later dispositions. In short, perhaps judges attempt to conform to the dictates of *Argersinger* and *Scott*, try to predict, albeit imperfectly, when more severe dispositions will be imposed and then appoint counsel in such cases. Even if this explains somewhat the greater severity of sentences of represented juveniles than unrepresented ones, it remains the case that the requirements of *Scott* are not being fulfilled since many unrepresented juveniles are removed from their homes and incarcerated as well. A fundamental dilemma posed by *Scott* is how to obtain the information necessary to determine, before the fact, whether the eventual sentence will result in incarceration and thus will require the appointment of counsel without simultaneously prejudging the case and prejudicing the interests of the defendant.

Another possible explanation for the aggravating effect of lawyers on sentences is that juvenile court judges may treat more formally and severely juveniles who appear with counsel than

those without. Within statutory limits, judges may feel less constrained when sentencing a youth who is represented. Adherence to the form of due process may insulate sentences from appellate reversal. Such may be the price of formal procedures. While not explicitly punishing juveniles who are represented because they appear with counsel, judges may be more lenient toward those youths who appear unaided and "throw themselves on the mercy of the court." Such an interpretation of data obtained in several jurisdictions, however, raises in a different guise the question of continuing judicial hostility toward adversarial litigants. Why should the fact that a youth avails himself of an elementary, constitutional procedural safeguards result in an aggravated sentence compared to that of an unrepresented juvenile? Does the representation/sentencing disparity in juvenile courts reflect the same judicial hostility to procedural formality that characterizes the jury trial/guilty plea sentencing disparity that occurs in adult criminal proceedings?

At the very least, further research on the right to counsel and role of counsel in juvenile court is needed. The right to and role of counsel entails a two-step process. The first is simply assuring the presence of counsel at all. In many jurisdictions, simply getting an attorney into juvenile court remains problematic. Although most states have the computer capability of monitoring rates of representation, in many jurisdictions the information simply is not collected routinely (Feld, 1988). County and state court administrators should modify the juvenile court judicial information systems in order to collect information on a host of important legal and socio-demographic variables. Because this information is already included in most juveniles' social services records or court files, expanding the judicial information code forms to incorporate data summaries would entail minor additional administrative burdens but would greatly increase the information available for policy analysis.

Qualitative studies of the processes of initial appointment and performance of counsel in several jurisdictions are necessary to determine what attorneys actually do in juvenile court proceedings. Once an attorney is actually present, the role he or she adopts is often fraught with difficulties. A number of commentators have questioned whether attorneys can function as adversaries in juvenile courts and, yet, whether there is any utility to their presence in any other role (Ferster, et al., 1971; Platt & Friedman, 1968; Lefstein, et al., 1969; Kay & Segal, 1973; McMillian & McMurtry, 1970). The

reluctance of many attorneys to simply apply the role of counsel established in adult criminal courts to juvenile proceedings stems from the perceived differences in sentencing policies and the more "therapeutic" orientation of juvenile courts. Thus, many commentators prescribe different roles for counsel during the fact-finding adjudicative stage than during the dispositional process. Whether there are sufficient differences between punishment in criminal courts and treatment in juvenile courts to sustain differences in the role of counsel is certainly open to question. At the very least, however, many more observational studies of attorneys' actual performance must precede efforts to prescribe appropriate roles.

Excluding Prior Uncounselled Convictions

Some states include juvenile delinquency convictions in the criminal history score of their adult sentencing guidelines (Feld, 1989). Many unrepresented juveniles who are later tried as adults have their prior, uncounselled juvenile convictions included in their adult criminal history scores. Many judges who sentence on a discretionary basis in either juvenile or criminal courts also consider previous delinquency adjudications and dispositions when imposing the present sentence. Finally, judges who sentence juveniles for violating a valid court order or condition of probation often base their finding on a prior, uncounselled adjudication as a status offender. Whenever judges sentence juvenile or adult offenders, whether on the basis of guidelines or discretion, and also consider juveniles' prior adjudications of delinquency, additional important legal issues arise. *Baldasar, Tucker,* and *Burgett* condemned the enhancement of a defendant's current sentence on the basis of prior convictions where the defendant was unrepresented. The enhancement of sentences occurs both formally by statute or guideline and informally as an exercise of judicial discretion. Not only are many unrepresented juveniles routinely adjudicated delinquent and removed from their homes or incarcerated, but their earlier dispositions substantially influence later ones (Feld, 1988; 1989; Henretta, et al., 1986).

Having decided to consider juveniles' prior records for sentencing both as juveniles and as adults, sentencing authorities must now confront the reality of the quality of procedural justice in juvenile courts. If juvenile adjudications are to be used to enhance sentences for juveniles or adults, then a mechanism must be developed to assure that only constitutionally obtained prior convictions are

considered. Again, automatic and mandatory appointment of counsel in all cases is the obvious device to assure the validity of prior convictions. Anything less will subject a juvenile or young adult's sentence to direct or collateral attack, produce additional appeals, and impose a wasteful and time-consuming burden on the prosecution to establish the validity of prior convictions.

Until provisions for the mandatory appointment of counsel are implemented, jurisdictions where juveniles are not routinely represented should create a presumption that all prior juvenile convictions were obtained *without* the assistance of counsel with the burden on the prosecution to establish that such prior convictions were obtained validly. This takes cognizance of the fact that many juvenile convictions are obtained without counsel, increases the prosecutor's institutional interest in juvenile justice administration, and provides a non-judicial mechanism to assure that juveniles are represented and that any waivers of counsel are adequately documented on the record.

References

Aday, David P. Jr. 1986. "Court Structure, Defense Attorney Use, and Juvenile Court Decisions." *Sociological Quarterly* 27:107-119.

Blumberg, Abraham. 1967. "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession." *Law and Society Review* 1:15-30.

Bortner, M. A. 1982. *Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice.* New York: New York University Press.

Carrington, Peter J. and Sharon Moyer. 1988a. "Legal Representation and Workload in Canadian Juvenile Courts," (Ottawa: Department of Justice, Canada).

Carrington, Peter J. and Sharon Moyer. 1988b. "Legal Representation and Dispositions in Canadian Juvenile Courts," (Ottawa: Department of Justice, Canada).

Clarke, Stevens H. and Gary G. Koch. 1980. "Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?", *Law and Society Review* 14:263-308.

Costello, Jan and Nancy Worthington. 1981. "Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act," 16 *Harv. C.R.-C.L. L.Rev.* 41.

Duffee, David and Larry Siegel. 1971. "The Organization Man: Legal Counsel in the Juvenile Court." *Criminal Law Bulletin* 7:544-553.

Feld, Barry C. 1984. "Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court." *Minnesota Law Review* 69:141-276.

Feld, Barry C. 1988. "*In re Gault* Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court," 34 *Crime & Delinquency* 393-424.

Feld, Barry C. 1989. "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make," 79 *J. Criminal L. & Criminology* 1185-1346.

Ferster, Elyce Zenoff, and Thomas F. Courtless. 1972. "Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court," 7 *Law & Society Rev.* 195-222.

Ferster, Elyce Zenoff, Thomas F. Courtless and Edith Nash Snethen. 1971. "The Juvenile Justice System: In Search of the Role of Counsel." *Fordham Law Review* 39:375-391.

Flicker, Barbara. 1983. *Providing Counsel for Accused Juveniles* (New York: Institute of Judicial Administration).

Fox, Sanford J. 1970. "Juvenile Justice Reform: An Historical Perspective." *Stanford Law Review* 1187-1239.

Grisso, Thomas. 1980. "Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis," 68 *Calif. L. Rev.* 1134.

Grisso, Thomas. 1981. *Juveniles' Waiver of Rights: Legal and Psychological Competence.*

Handler, Joel. 1965. "Juvenile Court and the Adversary System: Problems of Form and Function," 1965 *Wisconsin Law Review* 7.

Hayeslip, David. 1979. "The Impact of defense attorney presence on juvenile court dispositions." *Juvenile and Family Court Journal* 30:9-15.

Henretta, John C., Charles E. Frazier, and Donna M. Bishop. 1986. "The Effects of Prior Case Outcomes on Juvenile Justice Decision-Making," *Social Forces* 65:554-562.

Horowitz, David. 1977. *The Courts and Social Policy.* New York: Juvenile Justice Standards Project. 1980. *Standards Relating to Pretrial Court Proceedings* (Cambridge, MA: Ballinger Publ.)

Kay, Richard and Daniel Segal. 1973. "The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach." *Georgetown Law Journal* 61:1401-1424.

Knitzer, Jane and Merrill Sobie. 1984. *Law Guardians in New York State: A Study of the Legal Representation of Children.*

Lefstein, Norman, Vaughan Stapleton, and Lee Teitelbaum. 1969. "In Search of Juvenile Justice: *Gault* and Its Implementation." *Law and Society Review* 3:491-562.

McMillian, Theodore and Dorothy Lear McMurtry. 1970. "The Role of the Defense Lawyer in the Juvenile Court — Advocate or Social Worker?" *St. Louis University Law Journal* 14:561-603.

Platt, Anthony and Ruth Friedman. 1968. "The Limits of Advocacy: Occupational Hazards in Juvenile Court," *University of Pennsylvania Law Review* 116:1156-1184.

Rubin, H. Ted. 1977. "The Juvenile Court's Search for Identity and Responsibility," 23 *Crime & Delinq. 1.*

Rudstein, 1982. "The Collateral Use of Uncounselled Misdemeanor Convictions after Scott and Baldasar, 34 *U. Fla. L. Rev.* 517.

Schartz, Ira. 1989. *(In)Justice for Juveniles: Rethinking the Best Interests of the Child.*

Stapleton, W. Vaughan and Lee E. Teitelbaum. 1972. *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts.* New York: Russell Sage.

Walter, James D. and Susan A. Ostrander. 1982. "An Observational Study of a Juvenile Court," *Juvenile & Family Court J.* 53 (August, 1982).

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972).
Baldasar v. Illinois, 446 U.S. 222 (1980).
Burgett v. Texas, 389 U.S. 109, 114 (1967).
Fare v. Michael C., 442 U.S. 707 (1979).
Faretta v. California, 422 U.S. 806 (1975).
In re Gault, 387 U.S. 1 (1967).
In re Walker, 191 S.E.2d 702 (N.C., 1972)
Gideon v. Wainwright, 372 U.S. 335 (1963).
Johnson v. Zerbst, 304 U.S. 458 (1938).
Scott v. Illinois, 440 U.S. 367 (1979).
United States v. Tucker, 404 U.S. 443 (1972).

Statutes

Iowa Code Ann. §232.11 (West Supp. 1985).
New Mexico Children's Court Rule 22(d)
Wisconsin Stat. Ann. §48.23 (West 1983).

Notes

[1]In *Stockwell v. State,* 59 Wis. 2d 21, 207 N.W.2d 883 (Wisc. 1973), the Wisconsin Supreme Court applied *Tucker* to *Gault* and held that juvenile adjudications in which the juvenile was denied the right to counsel could not be considered in subsequent sentencing proceedings. Similarly, in *Majchszak v. Ralston,* 454 F. Supp. 1137)1978), where the defendant was denied parole released based on a salient factor score which included prior uncounselled delinquency adjudications, the Court remanded for resentencing. *See also, Wren v. United States Parole Board,* 389 F. Supp. 938 (N.D. Ga. 1975); *United States v. Lufman,* 457 F.2d 165 (7th Cir. 1972). In *Commonwealth v. Bivens,* 486 A.2d 984, 986 (Pa. 1985), the court reversed the defendant's sentence when the sentencing judge used juvenile convictions obtained without the assistance of counsel in computing his adult criminal history score. And, in *Rizzo v. United States,* 821 F. 2d 1271 (7th Cir. 1987), the Court remanded for resentencing an adult defendant whose sentence was based, at least in part, on prior uncounselled juvenile adjudications.

[2]*See e.g. L.A.M. v. State,* 547 P. 2d 827 (Alaska, 1976); *R.M.P. V. Jones,* 419 So. 2d. 618 (Fla, 1982); *L.E.A. v. Hammergren,* 294 N.W.2d 705 (Minn., 1980); *In re Mary D.,* 95 Cal. App. 3d 34, 156 Cal.Rptr. 829 (1979); *In re D.L.D.,* 110 Wis. 2d 168, 327 N.W.2d 682 (Wis. 1983); *In re Darlene C.,* 278 S.C. 664, 301 W.E.2d 136 (1983); *In re M.S.,* 73 N.J. 238, 374 A.2d 445 (1977).

But see contra, In re Bellanger, 357 So. 2d 634 (La. App. 1978); *C.A.H. v. Strickler,* 162 W.Va. 535, 251 S.E.2d 222 (1979); *In re Tasseing H.,* 281 Pa. Super. 400, 422 A.2d 530 (1980); *In re Dina N.,* 455 A.2d 318 (R.I. 1983).

The University of Michigan
School of Social Work
1015 East Huron Street
Ann Arbor, Michigan 48104-1689

Florida Atlantic University
University Tower, Broward Campus
220 S. E. Second Avenue
Fort Lauderdale, Florida 33301