The Missed Opportunity in *Gault*

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A century ago, states established a separate system of juvenile courts with a radical new mission. The aim of these courts was to help juvenile offenders rather than punish them, in a context stripped of the formalities of adult criminal court. By the middle of the century, however, these courts were widely perceived as failures that offered neither substantive nor procedural benefits to children. In 1967, the Supreme Court declared the procedural failings unconstitutional in the landmark case of *In re Gault*.[1]

While *Gault* should be celebrated for its recognition that children, too, have constitutional rights, it should be mourned for its limited vision of those rights. In assuming that children's due process rights would, at best, match those of adults, the Court foreclosed any thoughtful consideration of the changes required to make the juvenile justice system fair to children. The direct product of *Gault* is a set of rights ill-tailored to serve either the aims of the juvenile justice system or the interests of the children who hold those rights. More broadly, *Gault*'s error helped establish a pattern of analysis which has stunted the development of children's constitutional rights overall.[2]

I. THE VISION AND REALITY OF JUVENILE COURT

In 1899, Illinois enacted the first Juvenile Court Act,[3] and other states quickly followed suit.[4] These new juvenile courts had interrelated substantive and procedural aims: The substantive aim was to respond to juvenile offending with rehabilitative treatment rather than retributive punishment.[5] The procedural aim was to replace the for-

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1 387 US 1 (1967).

2 For a broader discussion of the Court's mishandling of children's constitutional rights, see Emily Buss, *Children's Rights on Children's Terms* (draft 2002) (on file with author).

3 Illinois Juvenile Court Act, 1899 Ill Laws 131.

4 See Robert M. Mennel, *Thorns and Thistles: Juvenile Delinquents in the United States, 1825–1940* 132 (New Hampshire 1973) (reporting that by 1925, all but two states had separate juvenile courts).

5 Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in Thomas Grisso and Robert G. Schwartz, eds, *Youth on Trial: A Developmental Perspective on Juvenile Justice* 291, 294 (Chicago 2000) ("The new juvenile court was grounded in a commitment to the rehabilitation of young offenders and a rejection of retribution as a legiti-

malities of criminal court with "care and solicitude," intended to facilitate achievement of the juvenile courts' rehabilitative goals.[6] Both procedural and substantive reforms were inspired by a conception of children as different: Children were perceived as less responsible for their own actions and more amenable to state-engineered correction.[7]

Both substantive and procedural aims, however, proved elusive. Recidivism data collected mid-century suggested that the courts were failing to rehabilitate offenders, and the harshness of many dispositions made clear that the courts continued to pursue a punitive approach.[8] Moreover, the formal procedures of adult court were replaced, not with caring solicitude, but with administrative neglect. Judges were left free to adopt whatever approach and impose whatever disposition they pleased, but the crush of their dockets and the lack of legal and social service support translated that freedom into inattention.[9] The end result was a system the Court aptly described as "the worst of both worlds," a system in which children received "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[10] The overall unfairness

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mate purpose of state intervention.") (citation omitted). See also Julian W. Mack, *The Juvenile Court*, 23 Harv L Rev 104, 119–20 (1909):

> 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.

Frank Zimring has divided this substantive aim in two, suggesting that the reformer's interest in shielding children from the adult criminal justice system should be treated as a separate justification for the juvenile court and a separate standard against which to measure its success. Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in Margaret K. Rosenheim, et al, eds, *A Century of Juvenile Justice* 142, 144–45 (Chicago 2002) (describing this "diversionary rationale" for separate juvenile courts as "an argument that the new court could do good by doing less harm" than the adult criminal system).

6 Mack, 23 Harv L Rev at 120 (cited in note 5) (directing the juvenile court judge to sit next to the juvenile, put his arm around him, and otherwise demonstrate that the juvenile is the "object of [the court's] care and solicitude"). See also Sol Rubin, *Protecting the Child in the Juvenile Court*, 43 J Crim L, Criminol & Police Sci 425, 435 (1952) (describing the informality of juvenile court procedures and the aim of creating a "gentler," "less threatening" atmosphere).

7 See Scott, *Criminal Responsibility* at 294 (cited in note 5) (stating that reformers described children's criminal conduct as "reflect[ing] youthful immaturity and poor parental guidance" and that rehabilitation-focused measures gained support "because juveniles were immature and malleable").

8 See, for example, President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 7 (GPO 1967) (concluding that the juvenile court "has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender").

9 See id (reporting that juvenile court hearings were frequently "little more than attenuated interviews of 10 or 15 minutes' duration"). See also *Kent v United States*, 383 US 541, 555–56 (1966) (citing "much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity").

10 *Kent*, 383 US at 556.

of this system set the stage for the Supreme Court's intervention on constitutional grounds.

II. THE COURT'S BOTCHED RESCUE IN *GAULT*

The case of Gerald Gault well illustrates both of these procedural and substantive shortcomings. For making a single obscene phone call of an "irritatingly offensive, adolescent, sex variety,"[11] fifteen-year-old Gerald was removed from home without notice to his parents, brought before a Juvenile Court without notice of the charges against him, and convicted and sentenced without any professional assistance and without any real hearing on the relevant facts. Based on the thin representations of a complaining witness who didn't even come to court, and without even identifying which law Gerald had broken, the judge ordered Gerald confined to a prison-like state industrial school for up to six years.[12]

In the face of these facts, the Supreme Court concluded that Gerald's treatment in Juvenile Court violated his due process rights. A proceeding that produced such a substantial deprivation of liberty with such scant procedural protections failed, in the Court's estimation, to meet the due process standard of fundamental fairness. The Court went on, more affirmatively, to list a number of procedural protections to which children were entitled. Drawing on the adult list of criminal procedural protections, the Court declared that children in juvenile court were entitled to written notice, counsel, adult-style protection against self-incrimination, and the opportunity to confront and cross-examine sworn witnesses.[13]

That the state's treatment of Gerald Gault was fundamentally unfair was clearly right. Less clear, however, were the changes required to make the juvenile justice system fair for children. By simply limiting its consideration to those procedural protections afforded adults, the Court avoided giving this second question any serious attention.[14] Focused exclusively on adult-derived rights, the Court produced a ju-

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11 *Gault*, 387 US at 4.

12 See id at 4–9.

13 See id at 31–34 (right to notice of charges); id at 34–42 (right to counsel); id at 42–57 (right against self-incrimination); id at 56–57 (right to cross-examine witnesses). The Court's reference to enumerated adult rights in determining what fairness required, for children, parallels the Court's shift of focus from fundamental fairness to the incorporation of the Bill of Rights in its application of the Due Process Clause to state criminal proceedings. See Tracey L. Meares, *What's Wrong with* Gideon, 70 U Chi L Rev 215, 216 (2003).

14 This narrow vision was not limited to the opinion of the Court. While Justices Black, White, Harlan, and Stewart took issue with some or all of the majority's approach, they all shared the majority's assumption that children's due process rights would, at most, match those of adults. See *Gault*, 387 US at 59 (Black concurring); id at 64 (White concurring); id at 65 (Harlan concurring in part and dissenting in part); id at 78 (Stewart dissenting).

venile justice system whose procedures are poorly designed to meet its goals and out of step with childhood.

In finding Gerald Gault's treatment unconstitutional, the Court neither challenged the substantive goals of the juvenile justice system nor argued for its abolition. To the contrary, the Court acknowledged the system's value and its distinct "substantive benefits."[15] But it dismissed concerns that importing adult procedural protections into the system would undermine these goals. This was, the Court explained, both because these criminal procedural rights, "intelligently and not ruthlessly administered,"[16] were compatible with the goals of the juvenile justice system and because these goals were not being achieved without these rights.[17] It is this second argument that seems to have had more force for the Court: Because a world with no procedural rights had failed to produce a fair system for children, affording children adult rights would surely be an improvement.[18]

What the Court failed to consider was whether children's due process rights could be tailored actually to advance, rather than simply not undermine, the laudable substantive and procedural goals of the juvenile justice system. The procedural vision for the juvenile court contemplated a meaningful engagement between decisionmaker and child, an engagement that the child would experience as a conversation rather than as litigation, and that would communicate the concern and interest the state took in the child. Through this process, it was envisioned that decisionmaker and child could develop a plan that would assist the child in whatever ways were required to help him avoid repeating his criminal conduct. There is no reason to think that such a process, if actually achieved, would be unfair. Moreover, it seems likely that such a process, if actually achieved, would enhance the court's chances of affording children real assistance with their lives.

A fundamentally fair juvenile justice proceeding might well look very different from a fundamentally fair criminal justice proceeding, and the effect of the Due Process Clause should be to guarantee both. The fault of the juvenile justice system's design, then, was not in its rejection of the admittedly ill-fitting adult set of procedures, but in its failure to replace those procedural requirements with others more

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15 Id at 21–22.

16 Id at 21.

17 Id at 21–22.

18 Compare *Kent v United States*, 383 US 541, 555 (1966):

> 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.

true to the juvenile justice vision. The fault of the Court, in turn, was to assume that the only solution to this procedural deficit was to reimpose the very sort of protections the reformers had rejected. In this way, *Gault* established the false dichotomy between the juvenile justice system's lofty aims on the one hand and the Constitution's concern for fairness on the other, which the Court claimed to balance against each other in subsequent cases.[19]

In failing to consider what procedural adaptations were demanded by the special context of juvenile court, *Gault* reduced the analysis of children's due process rights to the simple-minded question of adult rights or no rights. And in the many cases considering accused juveniles' due process rights since *Gault*, the Court has adhered to this narrow and nonsensical framing. Because neither adult rights nor no rights are well designed to secure fairness for children, the Court has waffled between the two, creating a patchwork better understood as an attempt to split the difference than to develop a coherent set of due process rights for children.

In *Gault*, impressed by the alarming carelessness with which the juvenile court had consigned Gerald to a potentially lengthy period of confinement, the Court awarded children a long list of adult rights including the right to notice and to counsel, the right of confrontation, and the right against self-incrimination. Close on *Gault*'s heels came *In re Winship*,[20] in which the Court added the "beyond a reasonable doubt" standard to the adult rights side of the balance without taking serious account of how the distinct aims of the juvenile justice system might affect the appropriateness of that standard.[21] Then came *McKeiver v Pennsylvania*,[22] in which the Court denied juveniles the right to jury trials on the ground that affording them this right would be too destructive to the achievement of the juvenile justice system's goals.[23]

While *McKeiver* was the Court's first "no rights" decision since *Gault* was decided, the Court made no attempt to explain how its

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19 See, for example, *Schall v Martin*, 467 US 253, 263 (1984) (characterizing the Court's analysis as an attempt to "strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings . . . and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause").

20 397 US 358 (1970).

21 See Franklin E. Zimring, *The Changing Legal World of Adolescence* 80 (Free Press 1982) ("But if the mission of the juvenile court is to help delinquents, is it better that ten kids who need help are rejected by the system than that one kid who doesn't need help receives 'care and custody'?").

22 403 US 528 (1971).

23 See id at 545 ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.").

grants and denials of adult rights fit together into a coherent account of fairness to children. Instead, it offered a catalog of the rights-granting cases as an apparent counterweight to its no rights approach to juries. There was enough, the Court seemed to suggest, on the adult rights side of the balance to call for a rebalancing toward no rights, which could be well accomplished by denying children juries.[24] After *McKeiver* came *Breed v Jones*[25] (affording adult double jeopardy protection to juvenile proceedings)[26] and, many years later, *Schall v Martin*[27] (denying children due process protection against a preventive detention scheme).[28]

While all these cases reflect an adult rights or no rights approach, at least part of the blame for this approach can be laid at the feet of the litigants who pressed their due process claims in these terms. In *Fare v Michael C.*,[29] however, the Court made plain its own unwillingness to depart from the adult script in expounding the due process rights of children. Here, the minor expressly pushed for such a departure and was denied. More troubling than the outcome is the Court's analysis. The Court showed itself incapable of accommodating its analysis to the special circumstances of childhood.

In *Fare*, the police took sixteen-year-old Michael C. into custody for interrogation about his suspected involvement in a murder. The officers who questioned him informed him of his *Miranda* rights, including his right to remain silent and to consult with an attorney. In response to direct questions about whether he was willing to talk, the minor asked for his probation officer. The police officer responded that he couldn't reach the probation officer and reminded Michael C. of his right to an attorney. Michael C. declined the attorney and went on to make incriminating statements that he later sought to suppress. Michael C. clearly asked for his probation officer in an attempt to secure the advice and support of a knowledgeable adult in deciding whether it was in his interest to talk to the police. In contrast, he declined a lawyer, whom he did not know and therefore did not trust ("How I know you guys won't pull no police officer in and tell me he's

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24 This counterweight rationale was stated more expressly in the Pennsylvania Supreme Court's decision below, quoted extensively and with apparent approval by the Court: "The other procedural rights held applicable to the juvenile process 'will give the juveniles sufficient protection' and the addition of the trial by jury 'might well destroy the traditional character of juvenile proceedings.'" Id at 540, quoting *In re Terry*, 438 Pa 339, 265 A2d 350, 355 (1970).

25 421 US 519 (1975).

26 Id at 541.

27 467 US 253 (1984).

28 Id at 256–57.

29 442 US 707 (1979).

an attorney?").[30] Michael C. was, in all innocence, seeking to adapt an adult right to make it work for a child.

The Court, however, refused to make the adaptation. Insisting upon fidelity to the adult-framed right against self-incrimination and the central role the attorney plays in protecting that right, the Court concluded that interpreting the child's right against self-incrimination to extend to his request for the assistance of his probation officer "would impose the burdens associated with the rule of *Miranda* on the juvenile justice system and the police without serving the interests that [the adult] rule was designed simultaneously to protect."[31] Again, the Court refused to see that a modified right might serve a child's interest better than the adult rule, or that this modified right might actually enhance, rather than impair, the workings of the juvenile justice system.

In rejecting Michael C.'s constitutional claim, the Court made much of the lawyer's "special ability . . . to help the client preserve his Fifth Amendment rights."[32] In applying this reasoning to juveniles, however, the Court gave no consideration to the very different, and indeed compromised, relationship juveniles tend to have with their lawyers. There is ample evidence to suggest that many children in juvenile court do not perceive their lawyers as their rights' champions, in part because this role is simply difficult for them to comprehend, and in part because many juvenile lawyers do not, in fact, assume the champion's role.[33] This difference in children's perception of their lawyers, in turn, translates into a difference in the lawyer-client relationship. Even after juveniles have an opportunity to become acquainted with their lawyers (an opportunity Michael C. had not yet had) they will often resist the sort of communication required to produce a successful lawyer-client relationship. A probation officer, admittedly less well versed in the law and less obligated to safeguard a child's rights, might nevertheless more effectively facilitate a child's exercise of her rights than a lawyer whom the child distrusts or ignores.

If the aim of the counsel-*Miranda* linkage is to ensure, first, that indirect invocations of the right to remain silent are honored, and, ultimately, that a defendant has an opportunity to explore the risks and

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30 Id at 710–11.

31 Id at 723.

32 Id at 719.

33 See Patricia Puritz, *A Call for Justice, An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 26–27 (1995) (reporting survey results reflecting a widespread view among juveniles that their attorneys were not on their side, did not give their cases adequate attention, and had not earned their trust). See also Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in Grisso and Schwartz, eds, *Youth on Trial* 243, 247–48 (cited in note 5) (discussing some of the developmental barriers to the establishment of successful attorney-client relationships with juveniles).

benefits likely associated with speaking to the police before deciding whether to do so, ensuring that a minor has an opportunity to consult with an individual who is both familiar to the minor and knowledgeable about the system might best serve those ends. Whether or not fundamental fairness requires police officers to cease questioning a juvenile who has asked to speak with his probation officer or some other trusted adult is hardly obvious, but the Court's failure even to consider the question in these terms was obviously wrong.

The Court's adult rights or no rights approach has produced a hodgepodge of procedures that disserves children and the system alike. After all these years of ill-fitting constitutional correction, we still have a juvenile justice system that offers the "worst of both worlds" to children. This has led some to call for the abolition of juvenile court,[34] and others to defend it as only slightly better than the adult-court alternative.[35] But there is a third, better, alternative: The Court should rework its due process analysis to address what is required to make a separate juvenile justice system fundamentally fair for children.

III. TURNING BACK THE CLOCK ON CHILDREN'S DUE PROCESS RIGHTS

The proper due process inquiry for children, then, should focus not on the list of particulars developed for the adult criminal justice system, but rather on the fairness norms said to be embodied in the list. We should ask, as we do for adults, what process must we afford minors in order to remain faithful to these norms? Both the nature of minority and the special aims of the juvenile justice system call for deviations from the adult criminal list if we are to remain true to the values that the Due Process Clause protects.[36]

A. Due Process Principles

While procedural due process is the subject of endlessly varied analysis, most of this analysis reflects three interrelated values—

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34 See, for example, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J Crim L & Criminol 68, 68–69 (1997) (arguing that the juvenile court has deteriorated into "a scaled-down, second-class criminal court for young people" that does not serve its original rehabilitative purpose, and suggesting that trying juveniles in criminal court and treating youth as a mitigating factor would be a better alternative).

35 See, for example, Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 Wisc L Rev 163.

36 I note that Tracey Meares criticizes the adult list of procedures on somewhat similar grounds. See Meares, 70 U Chi L Rev at 229 (cited in note 13) (arguing that modern criminal procedure, "located in rigid rules derived from the Bill of Rights," will sometimes take inadequate account of fairness concerns).

accuracy, dignity, and participation—that are broadly viewed as essential to the fairness of procedures. Fair procedures are those designed to produce accurate results[37] and to treat the individuals whose interests are at stake with respect.[38] These two values are, in turn, well served by securing the meaningful participation of those interested individuals in the decisionmaking process.[39] While the three values of accuracy, dignity, and participation receive different emphases among courts and scholars, together they capture the core of the due process protections.

For adults, the Court has concluded that these values are well served by a set of procedures notable for their formality. Maximum due process for adults entails an adversarial hearing at which individuals are represented by counsel, evidence is presented pursuant to an elaborate set of rules, and decisions are made by a neutral third party.[40] The formality of the procedure and the qualification of the decisionmaker as a neutral arbiter of the law ensure a certain distance between decisionmaker and parties designed to increase the reliability of decisions made, even while it dignifies the parties and the interests at stake.[41] Rules controlling the order, method, and scope of the evidence presented are designed to ensure that decisions are made delib-

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37 See *Mathews v Eldridge*, 424 US 319, 335 (1976) (establishing a balancing test for analyzing due process claims that isolates accuracy as the value to be achieved through heightened process).

38 See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v Eldridge: *Three Factors in Search of a Theory of Value*, 44 U Chi L Rev 28, 49–52 (1976) (identifying dignity as an important consideration for due process); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L J 319, 347 (1957) (identifying dignity as a basic due process value).

39 The Court has frequently identified "the opportunity to be heard" as "the fundamental requisite of due process of law." See, for example, *Greene v Lindsey*, 456 US 444, 449 (1982), quoting *Grannis v Ordean*, 234 US 385, 394 (1914). See also Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L J 455, 487–88 (1986) (noting the "inseparable connection between participation and result efficacy").

40 See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 13.8 at 583 (West 6th ed 2000) (listing the various elements, "which may be required as part of the 'due process' which must be afforded to an individual"). The extent of the procedures required by the Constitution varies for adults from one civil context to the next, but this variation is not based on any view that different procedures would be more fair; but only on the view that lesser procedures are sometimes fair enough, in light of countervailing costs. See *Mathews*, 424 US at 334–35 (setting forth a test for due process that includes consideration of "fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

In the adult criminal context, this procedural list has been further refined with reference to the rights specifically enumerated in the Bill of Rights. See *Medina v California*, 505 US 437, 443 (1992) (noting that, in the criminal context, the Court has rarely found due process violations that "extend beyond the specific guarantees enumerated in the Bill of Rights") (citations omitted). While the Court's analysis of adults' due process rights in the civil and criminal contexts has diverged somewhat, the Court's criminal list closely parallels the equally formal conception of due process due to civil defendants when the stakes are similarly high.

41 See Redish and Marshall, 95 Yale L J at 482–83 (cited in note 39) (concluding that adjudicatory independence is the linchpin of procedural fairness).

erately and on the right grounds. The provision of counsel ensures an individual's competent participation in proceedings whose formality might otherwise put them at a disadvantage.

The fact that these procedural mechanisms serve adults' due process interests does not mean they will produce the same benefits for children.[42] For children, full adult procedures are likely to thwart meaningful participation, at a cost to children's dignity and the accuracy of the results obtained.

B. Applying Due Process Principles to Minors

To be fair, procedures in juvenile court must take account of children's special developmental status and the unique goals of the juvenile justice system. After considering the significance of these two factors to our due process analysis, I will suggest how we might alter procedures in juvenile court to bring them in line with due process principles.

1. Minority's effect on participation.

For children, every aspect of the formalized procedure designed to serve adults' due process interests threatens to undermine children's parallel interests. Children are much less prepared to understand, let alone participate in, such proceedings. Rather than demonstrating respect and neutrality, the formality of the process and the professional distance of the judge are likely to alienate children from the decisionmaking process. Moreover, the substance of the dispute in question is also likely to elude minors. Studies suggest that children, even teenagers, have considerable difficulty understanding rights as abstractions.[43] That is, they perceive their rights as privileges afforded by adults, commonly the very adults whose authority is, in fact, qualified by those rights. Because of children's lesser ability to sustain thoughts over time, the delays inevitably imposed by affording them formal procedures will reduce their ability to track the proceeding, let alone appreciate its purpose. Affording minors lawyers to speak on their behalf may only make things worse. As already noted, minors are

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42 Some scholars have suggested that our formal system of procedures, including the central role assigned to attorneys, prevents the effective participation of adult clients as well. See, for example, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L J 2107, 2118–19 (1991) (arguing that poverty lawyers frequently silence and disempower their clients by speaking for them, and portraying them as dependent victims).

43 See Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (1981) (documenting the inability of most juveniles age 14 or younger to understand their rights to silence and to legal counsel); Buss, *The Role of Lawyers* at 244–46 (cited in note 33) (describing psychological and experiential phenomena that limit children's understanding of their rights).

likely to misperceive the lawyer-client relationship in a manner that only increases the distance between child and decisionmaker.

It is saying nothing new to conclude that children have trouble following and participating in criminal trials.[44] Indeed, these troubles have inspired many to argue that, by adult standards, many children should be found incompetent to stand trial in adult criminal court.[45] Some have concluded that this argues for modifying adult criminal procedures for children,[46] while others have concluded that this argues against trying minors in adult court at all.[47] Either way, a commitment to the due process principles of accuracy, dignity, and participation suggests that the Constitution requires some modification of the adult procedures to make due process rights meaningful for children.

2. The juvenile justice system's special participatory demands.

The different substantive goals of the juvenile system must also be taken into account in assessing what process is due. What it means to be "accurate" and what it will take to make participation meaningful change when we shift from a guilt-and-punishment-focused system to one focused on rehabilitation and caring.

The fact that the aims of the juvenile justice system have shifted over time does not undermine this point, even if it changes the particulars. While states have modified the express aims of their juvenile courts to give more emphasis to community safety and offender accountability,[48] assisting the offender remains a prominent goal. The very continued existence of separate juvenile courts makes clear that states have maintained their commitment to affording at least some children special opportunities and protection not afforded to their

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44 See generally Part II of Grisso and Schwartz, eds, *Youth on Trial* (cited in note 5). In particular, see Richard J. Bonnie and Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in Grisso and Schwartz, eds, *Youth on Trial* 73, 88 (discussing cognitive and psychosocial limitations on adolescents' abilities to comprehend judicial proceedings); Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, in Grisso and Schwartz, eds, *Youth on Trial* 139, 146–53 (discussing studies evaluating cognitive abilities of adolescents and their application in the trial context).

45 See, for example, Grisso, *Youths' Capacities as Trial Defendants* at 164–65 (cited in note 44) (suggesting that as the number of juveniles tried as adults increases, "it could be argued that immature or deficient development of cognitive and social abilities . . . should be formally recognized as relevant bases for incompetence").

46 See, for example, Feld, 88 J Crim L & Criminol at 96 (cited in note 34) (calling for "certain modifications of substantive and procedural criminal law to accommodate younger defendants" in a single criminal justice system).

47 See, for example, Bonnie and Grisso, *Adjudicative Competence and Youthful Offenders* at 92 (cited in note 44) (arguing that children under fourteen should be tried exclusively in juvenile court).

48 See Elizabeth Scott, *The Legal Construction of Childhood*, in Rosenheim, et al, eds, *A Century of Juvenile Justice* 113, 134–35 (cited in note 5) (describing increased attention to the goals of public safety and offender accountability in the decades after *Gault*).

adult counterparts.[49] All of these modern goals—providing assistance to offenders, holding them accountable for their wrongs, and securing community safety—call for modifications in the procedures afforded minors, if minors' meaningful participation and the consequent benefits to the accuracy and dignity of the proceedings are to be achieved.

Where rehabilitation remains an important goal of the juvenile justice system, the goal of accuracy must encompass not only the findings of fact on the underlying offense, but also the assessment of the juvenile's problems and needs upon which the rehabilitative response is to be built. A proceeding that correctly identifies a juvenile as a shoplifter, but incorrectly identifies his motives, his underlying problems, and his needs for support, might well be described as "accurate" in an adult criminal system, but should not be so described in the juvenile justice system. Accuracy on these subjects, moreover, is likely to depend heavily on the juvenile's effective participation. The juvenile's own view of his situation is key to the development of an effective treatment plan, and his commitment to whatever treatment plan is imposed is key to its effective implementation. To be fair, then, the proceeding must be designed to encourage the active engagement of the child in the planning process.

While the goals of community safety and offender accountability are clearly shared by the adult criminal justice system, they each take on a somewhat different cast in the juvenile justice context. These differences, in turn, should alter our assessment of what process is due. In the context of juvenile proceedings, the community safety assessment is tightly intertwined with the treatment planning issues. How much of a risk a juvenile poses depends, in large part, on whether he is prepared to engage in a treatment program and whether his treatment program is well designed to address the causes of his offending behavior. Thus, accuracy in assessing community safety links back to accuracy in treatment planning, which, as discussed, depends heavily on a juvenile's meaningful engagement.

The assignment of criminal responsibility also takes on a different meaning in the juvenile justice system, a meaning that, again, depends on the juvenile's engagement for its success. For adults, the value of assigning criminal responsibility is perceived in largely external terms: In holding a wrongdoer accountable, we aim to achieve retribution and deter repetition of the offense. But in the juvenile justice system, the focus is also on internal development: Holding a child accountable is intended to help teach the child the connection between their prior

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[49] The growing practice of trying minors as adults reflects a trend away from any universal commitment to a rehabilitative or protective response.

acts, the present response, and their obligations in the future.[50] While the external aims can be achieved without regard to the offender's subjective experience of the proceeding,[51] the system cannot hope to accomplish its teaching function absent the child's comprehending participation in the process.

3. Due process for minors in the juvenile justice system.

The achievement of the special aims of the juvenile justice system all depends on a juvenile's effective participation. The special developmental status of children suggests that effective participation requires a set of procedures very different from those afforded adults. But just as with adults, these procedures will need to be protected as rights to withstand the compromising pressures of resource limitations and power disparities.

To secure children's meaningful participation, their proceedings must be comfortable, comprehensible, and swift. Children should be allowed to speak directly with witnesses rather than left to watch their lawyer's formal, and likely inscrutable, examinations. Lawyers might still serve an important role as legal advisors, while relinquishing the role of spokesperson to their child clients. Because judges have no special expertise in communicating with children or assessing their needs, they might be replaced by other more qualified decisionmakers. Social service professionals would have the benefit of subject matter expertise, whereas non-professional adults known to the child might be in the best position to secure the comfortable participation of that child. Whoever the decisionmaker, the child should be afforded a meaningful opportunity to speak with her directly at considerable length on more than one occasion. To ensure that the accused appreciates the connection between self and offense, and offense and response, proceedings should last no longer than a few weeks from the time of the accusation to the time of final disposition.

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50 These connections will not be obvious for children, both because of their weaker sense of connection between prior acts and current self, and because of their weaker grasp of the abstract concepts that account for our obligations to society. See Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order: Sequence in the Development of Moral Thought*, in William Damon, ed, *Social and Personality Development, Essays on the Growth of the Child* 388, 390–91 (Norton 1983) (reporting study results suggesting that societally-focused, more abstract, moral orientation gradually emerges in adolescence). Compare Mack, 23 Harv L Rev at 120 (cited in note 5) ("The object of the juvenile court and of the intervention of the state is, of course, in no case to lessen or to weaken the sense of responsibility either of the child or of the parent. On the contrary, the aim is to develop and to enforce it.").

51 Admittedly, an offender's subjective experience will affect a proceeding's specific deterrent value, but the aim of specific deterrence can be achieved through a much more superficial understanding of these proceedings than that required to achieve the educational aims of the juvenile court.

This alternative set of procedures resembles, in many respects, the "restorative justice" approaches that have become increasingly popular throughout the world.[52] Dissatisfaction with traditional juvenile court proceedings have led many countries, including the United States, to experiment with a form of restorative justice known as "family group conferencing," which brings together victim, offender, their two communities of support, and law enforcement to discuss the offense and its consequences, and to develop a plan for restitution. These proceedings, stripped of conventional due process protections, have proven highly successful in achieving the due process aims of meaningful participation, and, relatedly, respectful treatment. Offenders who play an active role in the decisionmaking process report a high degree of satisfaction with the process and demonstrate their commitment to the process by fulfilling their conference-imposed obligations in a large percentage of cases.[53]

The family group conference, however, has been limited to circumstances where the accused juvenile is willing, at the outset, to admit that he committed the offense.[54] Such a limitation places the conference process outside of the juvenile justice system, leaving the failed procedures of that system intact. To import family group conferencing procedures into a system capable of finding contested facts, those procedures would need to be modified to include some authoritative decisionmaker (again, not necessarily a judge). But because the family group conference's success in securing accused offenders' meaningful participation depends, in part, on the absence of such a decisionmaker, it is worth considering what we gain by compromising the consensus process before concluding that due process for juveniles requires such a change.

The advantage of the traditional juvenile court over the family group conference as a fact-finding body is easy to exaggerate. A large proportion of cases processed in juvenile court are resolved by agreement, as the product of the sort of plea negotiations that encourage juveniles to waive their trials in exchange for less serious dispositions.[55] It would be foolish to assume that all such pleas reflect genuine admissions of guilt, just as it would be irresponsible for lawyers to dis-

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52 See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in Michael Tonry, ed, 25 *Crime and Justice: A Review of Research* 1, 2–3 (Chicago 1999) (describing the spread of restorative justice programs throughout the world in the 1990s).

53 See id at 23 (discussing studies reporting that offenders completed their reparations and compensation obligations in a high percentage of cases).

54 See id at 17 (describing the family group conference process, which begins "[o]nce wrongdoing is admitted").

55 See, for example, Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J Crim L & Criminol 190, 232–33 (1997) (criticizing over-reliance on plea bargaining in the juvenile justice system).

courage any such strategic pleas, regardless of the potential consequences faced by the juvenile.[56] Moreover, the family group conference, while not expressly designed to resolve contested facts, has at times led to the revelation of important, previously undisclosed truths through its direct and supportive process of interpersonal engagement.[57] To a considerable extent, we can expect a process that achieves a genuine conversation between an offender, a victim, and representatives of their communities to do a better job of revealing what actually occurred than either a formal adversarial proceeding or a settlement negotiated in its shadow.

There will surely be some cases in which a consensus process cannot (and should not) resolve whether a juvenile committed the offense in question. This reality could support a requirement that all contested cases be considered by a discrete decisionmaking authority from the outset, or, alternatively, that such an authority be made available to the child after a consensus process proved unavailing. This second approach would allow all cases to begin in a context where the child had the best prospect of comprehension and meaningful participation. To ensure that the prospect of a failed consensus would not inhibit the juvenile's candor that is so essential to the consensus process, the prosecution could be barred from introducing any comment of the juvenile or his community of support in a subsequent fact-finding procedure.[58]

Both of these approaches could be designed to secure fundamental fairness for children. We should show caution in prescribing the precise form due process should take on this and many other matters to avoid repeating the mistake of *Gault*. Should we be bold enough to discard the first list the Court too hastily derived from its adult counterpart, we should develop the new list only slowly over time.[59] In the

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56 See id at 233 (noting the strong inclination of juveniles to accept a plea to avoid incarceration, regardless of actual guilt). The case of Lionel Tate, whose violent roughhousing killed a six-year-old playmate, offers a particularly striking example of the potential stakes associated with declining an opportunity to plea bargain. Acting on her son's behalf, Lionel Tate's mother asserted his innocence and rejected the prosecutor's offer that would have subjected Lionel to a three-year term in a juvenile facility. Tate was subsequently tried as an adult and sentenced to life in prison. See Dana Canedy, *As Florida Boy Serves Life Term, Even Prosecutor Wonders Why*, NY Times § 1 at 1 (Jan 5, 2003).

57 See Braithwaite, *Restorative Justice* at 16 (cited in note 52) (describing a restorative justice process that led to the revelation of considerable unreported child sexual abuse, and concluding that this development threw "into doubt" the belief that "the traditional criminal trial process is superior to restorative justice processes for justly getting to the truth of what happened").

58 Compare FRE 410 (rendering guilty plea discussions inadmissible under certain circumstances, in large part for similar policy reasons).

59 This gradual, case-by-case process of interpretation comports with Tracey Meares's account of the Court's fundamental fairness analysis in the adult criminal context. Meares, 70 U Chi L Rev at 221–23 (cited in note 13).

course of that development, courts should assess the juvenile procedures in question against their success in achieving the general due process values of participation, accuracy, and dignity.

CONCLUSION

To secure children's meaningful participation, the juvenile justice system must offer children a process very different from the formal adversarial process afforded adults charged with crimes. While intentionally less sentimental, the procedural vision set out here bears a strong resemblance to the vision of the juvenile court's founders a century ago. The difference here is to suggest that, for children, some version of these procedures is not only preferable to the adult set but similarly constitutionally required. Just as children's due process rights have protected them from the process failures illuminated in *Gault*, so should they protect them from the process failures *Gault* mistakenly produced.