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Gault Turns 40: Reflections on Ambiguity

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Birthdays and anniversaries, especially those ending in zero, tend to put one in a reflective mood. I recollect that as I approached my fortieth, fiftieth, sixtieth, and soon my seventieth birthdays, I found myself thinking about my past, trying to figure out what went wrong, what went right, and why; how I could fix that which was fixable and learning to live with that which was not, mindful of the old adage that one must have the wisdom to know the difference between the two.

The decimal anniversaries of cases have that same power of encouraging retrospection. Just as people change, so do cases. Indeed, it is rare that a case remains unaltered by subsequent decisions. By their very nature cases expand and contract, and wrapping an opinion around slightly different facts, in different times, and with new justices, inevitably makes new law. [FN1] In fact, cases can change even if they are never considered again, as when the Court does not apply or even cite them in a situation clearly calling for their invocation. Even without a funeral, the glaring omission is a clue that the case is dead, dying, or, at the least, limited to its facts. [FN2] Ditto for dishonest distinctions. [FN3]

This year marks the fortieth anniversary of In re Gault, [FN4] an extraordinary case that changed the legal landscape by imposing constitutional fetters on the lawless juvenile court system that prevailed in this country in 1967. [FN5] In re Gault was rendered at the height of the Warren Court's activism that wrought many doctrinal shifts, particularly in the criminal procedure area. [FN6] Those changes, or perhaps more accurately, clarifications, were not as extreme as critics claimed. [FN7] For the most part, the Court's decisions merely added on to an already existing foundation-the Court simply went from standards to rules, [FN8] a not insignificant movement, but also one not made out of whole cloth. Concededly, electing to use a standard or a rule is, like much of law, a value choice. In this context, using a standard runs the risk of under-inclusiveness, some people may be wrongfully denied constitutional protection, whereas a rule tends to be over-inclusive, some people receive constitutional protection when they may not be entitled to it. Take your pick.

For example, while Miranda held that the Fifth Amendment required police warnings as a way to overcome the inherent coercion of custodial interrogation, [FN9] an over-inclusive rule, [FN10] it had long been the law that confessions were inadmissible as a matter of due process, if the totality of the circumstances, an under-inclusive standard, [FN11] including whether the police advised the suspect of his rights, showed that they were involuntary, [FN12] and over the years less and less egregious police behavior was being viewed as coercive. [FN13] Similarly, Mapp, under the Fourth Amendment, made the fruit of illegal searches and seizures inadmissible in state criminal cases; [FN14] but the remedial exclusionary rule had long applied to the federal government, [FN15] and due process constraints applied to state officials who obtained evidence illegally in a way that was “shocking to the conscience,” a very under-inclusive standard. [FN16] So too Gideon granted the Sixth Amendment right to the assistance of counsel for every person charged with a felony in state court, as it did in federal court; [FN17] but again due process had required the right to an attorney in state cases if there were

"special circumstances," [FN18] and increasingly the Court found the need for a lawyer in almost every case, [FN19] until it became obvious that felony charges alone constituted special circumstances. [FN20] In effect, the standard had slowly been transformed into a rule. Gideon merely acknowledged the Court's actual practice and crystallized it into a formal, per se rule of law, one that was easy to apply and administer, and gave states fair notice of their federal constitutional obligations.

Gault was slightly different. [FN21] It seemed to come out of nowhere. [FN22] True, the Kent case, decided a year before Gault, had held that due process applied to waiver hearings in juvenile court. [FN23] However, it was not immediately clear if Kent was even of constitutional proportions. [FN24] At the least, Kent did not inexorably call for Gault. [FN25] Kent dealt only with the process by which juveniles were transferred to criminal court to be tried as adults, a narrow slice of the juvenile court's jurisdiction at that time-the hearing that operated as a funnel to the criminal courts. [FN26] In such a proceeding, due process required only a hearing, the right to counsel who could have access to the probation files, and a statement of reasons for waiving the child to criminal court. [FN27] Moreover, procedurally, the case did not come to the Court on direct appeal of the juvenile court's order; rather it was reviewed after Morris Kent's conviction as an adult, bringing with it the aura of the criminal court and a thirty-to-ninety year prison sentence imposed on a severely disturbed sixteen-year-old. [FN28] Gault, on the other hand, dealt with the very core of the "civil" juvenile court's jurisdiction [FN29]-the adjudicatory or fact-finding hearing to determine if the minor was a delinquent, [FN30] that is, a child who committed an act which if committed by an adult, would constitute a crime. The fact-finding proceedings at that time bore no small resemblance to the literary trial conducted by the Queen of Hearts: "Sentence first-verdict afterwards." [FN31] Justice Fortas, in Gault, like Alice, in Wonderland, responded, "[s]tuff and nonsense." [FN32]

Elsewhere and many years ago, I wrote concerning my view of Gault's potential. [FN33] The Gault holding was narrow and you had to read the footnotes, of which there were many, [FN34] to see just how narrow it was: [FN35] at the adjudicatory stage of a delinquency hearing [FN36] that could result in commitment to a state correctional facility [FN37] the child was entitled to notice, [FN38] assistance of counsel, [FN39] the right to cross-examination and confrontation, [FN40] and the privilege against self-incrimination. [FN41] The artful language of the opinion was broad, bountiful, and beautiful, seeming to promise a revolution in the rights of children charged with crime. [FN42] The holding, however, was, in large part, constitutionally minimalist. The rights to notice, counsel, cross-examination and confrontation, all contained in the Sixth Amendment and incorporated into the Due Process Clause of the Fourteenth Amendment and thus applicable to the states, [FN43] were granted to delinquents only as a matter of fundamental fairness under due process-a reincarnation of the pre-incorporation era. This strategy enabled the majority to declare that these hearings in juvenile court need not "conform to all the requirements of a criminal trial or even of the usual administrative hearing." [FN44]

On the other hand, the Court cleverly obfuscated the underlying constitutional basis for the decision, ambiguously asserting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," [FN45] and granting the privilege against self-incrimination explicitly under the Fifth Amendment "as it is with respect to adults." [FN46] This suggested a selective incorporation theory that reflected the functional equivalence of criminal trials and delinquency adjudicatory hearings.

To me, the Court's use of due process and the seemingly equal application of an explicit guarantee in the Bill of Rights, portended, or at least would have permitted, enhanced protection for children tried in juvenile court. Due process is flexible, and the result depends largely on the particular facts and circumstances; because of children's vulnerability and immaturity [FN47] it could be argued that youths accused of delinquency would need more constitutional protection than adults received, both in terms of the applicability and content of constitution-

al guarantees. Such a conclusion is buttressed by the functional equivalence between delinquency adjudicatory hearings and criminal trials. In both proceedings, a person is charged with violating a penal law and their purpose is to determine whether the accused is guilty of the charged offence. [FN48] Indeed, the Gault Court itself opined that a delinquency adjudication was "comparable in seriousness to a felony prosecution." [FN49] However, although the hearing and trial might be functionally equivalent, the child and adult are not. [FN50] Due process could, I thought, be used to provide the extra needed to assure that children's competency differentials that might interfere with a fair trial, e.g., immaturity, inarticulateness, low educational levels, were overcome, and would permit at least a rough equality with adults charged in criminal court. [FN51] Furthermore, such an analytical approach would permit the Court to grant "extra" protection to juveniles as a matter of due process, without also requiring that the "extra" be applied to adults. On the other hand, if the Court were to equalize constitutional protection for adults and children by interpreting specific guarantees in the Bill of Rights more broadly for children, it would make it more difficult for the Court not to apply these newly interpreted Bill of Rights guarantees to adults. Thus, in my view, the Bill of Rights protections would be the same for children and adults, both in terms of applicability and content, but pliant due process could vary that protection for juveniles, without doing so for adults. Fundamental fairness would demand that extra protection only for children, because of their competency differentials, but would not do so for adults. [FN52] In a sense, such an approach would be the converse of what the Court did prior to incorporation. At that time, due process usually gave defendants in state court less protection than the Bill of Rights guarantees gave defendants in federal court. [FN53] After incorporation, due process and specific guarantees were largely coterminous and applied in the same way in federal and state courts. [FN54] Some justices, however, argued that incorporation did not require that every aspect of a Bill of Rights guarantee be applied to the state courts as it was in federal court, on the theory that due process governs the states, whereas the Bill of Rights applies to the federal government. [FN55]

Even though most of the Bill of Rights guarantees have been incorporated, the Court still uses due process when there is no explicit guarantee in the Bill of Rights that would prohibit the state's conduct. [FN56] For example, the Court sometime uses due process in confession cases notwithstanding the Fifth Amendment Miranda decision. First, the Court does a Miranda analysis, and if that does not provide the defendant with protection, it goes on to do a due process voluntariness analysis, which may or may not yield the same result. [FN57] Similarly, if the Court would apply a specific guarantee to children in juvenile court, for example, Miranda, the Court would probably hold, as it did in Michael C., that defendants (adult or juvenile) must specifically invoke their rights. If a child did not do so, he would be denied Fifth Amendment protection under Miranda. The Court, however, could then do a due process analysis and might conclude that because children are immature, suggestible, and lacking in education, due process would require that a parent or attorney be present during custodial interrogation.

The dual bases in Gault, however, also had the potential of diminishing children's rights in juvenile court. Due process is malleable, and instead of being used to give children more constitutional protection than adults receive in criminal court, it could also be manipulated so as to give them less. The Court's emphasis on fundamental fairness and due process rather than the explicit Bill of Rights guarantees pointed in that direction, [FN58] as did Justice Fortas' decision in Gault to grant only the absolute minimum content of the rights that were applied. For example, even the Fifth Amendment privilege applied only to in-court admissions, [FN59] and the due process right to notice only considered whether the petition was served on a timely basis. [FN60] Whether the notice was sufficiently explicit regarding the charges went unresolved. [FN61] Seen in that light, due process would be a floor, a very low one, and the constricted Bill of Rights guarantees a low ceiling.

At first, the Court followed the broader reading of Gault, and in Winship it applied the reasonable doubt

standard both to criminal trials and delinquency adjudicatory hearings. [FN62] This suggested a functional equivalence approach. As the Court noted in Addington v. Texas: [FN63]

> The Court [in Winship] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. Winship recognized that the basic issue-whether the individual in fact committed a criminal act-was the same in both proceedings. There being no meaningful distinction between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt ....Unlike the delinquency proceeding in Winship, a civil commitment proceeding can in no sense be equated to a criminal prosecution. [FN64]

The major setback was McKeiver, holding that due process did not require a jury trial in adjudicatory hearings in juvenile court. [FN65] Note that the issue is framed in due process terms, not as a Sixth Amendment question. The plurality opinion stressed the fundamental fairness aspect of Gault; indeed, at one point when Justice Blackmun was reciting the constitutional rights granted by Gault, he simply omitted the Fifth Amendment privilege against self-incrimination, [FN66] a right that is not as necessary to assure fundamental fairness under the Due Process Clause. In the plurality's opinion, the earlier delinquency cases emphasized accuracy in fact-finding, and jury trials did not fit into that category because bench trials were not inherently unfair or inaccurate. Jury trials, Justice Blackmun said, would make the hearings too formal and adversarial, and would not enhance the unique benefits of the juvenile court system. [FN67]

Nonetheless, it was puzzling why the Sixth Amendment right to a jury trial, which three years earlier had been deemed so fundamental in our Anglo-American tradition that it was incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable to the states, [FN68] was not necessary to assure fundamental fairness in the closed world of juvenile courts [FN69] in which judges presiding at the usually secret adjudicatory hearings had access to the children's probation files detailing their past history and any statements they made concerning the particular charge. [FN70] This did not bode well for my expansionist view of Gault.

The lack of a jury trial in juvenile court clearly discriminates against children because of their age. [FN71] The famed Kalven and Zeisel jury studies, [FN72] which have recently been replicated, [FN73] indicate a twenty-five percent disparity between bench and jury trials-the judges convicted significantly more often than the juries did. This was not solely a result of jury nullification; the judges were simply more blasé they had seen and heard it all before, and had access to information that was hidden from jurors.

Juries, unencumbered by experience and probation files, show greater lenity and thereby give our criminal justice system more flexibility and permit a more humane imposition and distribution of punishment; juries in juvenile court would allow the child to be judged as an individual, rather than as just another member of a disreputable class who had previously appeared in juvenile court on other charges and who had confessed his current crime to the probation officer. The original concept of juvenile courts was to provide individualized treatment of children. [FN74] Jury trials are a way of accomplishing that goal. Their greatest virtue, however, may be the very formality complained of in McKeiver. Jury trials tell children the state means business, and they advise judges that they sit in a court, a real court, one bound by constitutional fetters with consequences for failure to adhere to them. If we insist that those youths who “do the crime, do the time,” it's only fair that there be “no incarceration without jury adjudication.” [FN75]

Three years after McKeiver, in Breed, [FN76] a unanimous Court took another turn, again reading Gault expansively, explicitly finding that the Fifth Amendment Double Jeopardy Clause applied in juvenile court, and claiming that it was

> simply too late in the day to conclude that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. [FN77]

My point exactly. The Court's statement quoted above, however, only related to the question of the applicability of the Double Jeopardy Clause. [FN78] What about the content of that right? Should the content of the Double Jeopardy Clause be the same for juveniles and adults? In attacking that question, the Breed Court used a fundamental fairness due process type of analysis, which considered whether a fulsome interpretation of the content of the clause would enhance the unique benefits of the juvenile court, [FN79] thereby adopting an analytical approach that would serve only to limit, but not enhance, the contents of specific Bill of Rights guarantees applied in juvenile court. And while in Breed the Court found that the Double Jeopardy Clause prohibited the state from starting a delinquency adjudicatory hearing, aborting it, and then waiving the child to criminal court for trial as an adult on the same charge, in Swisher, the Court permitted the state to appeal unfavorable decisions (or, as the majority termed it, "recommendations") of juvenile court referees to the "real" finders of fact, juvenile court judges, who could reverse without having heard the live testimony and assessing the credibility of witnesses. [FN80] The Breed ruling regarding the content of the Double Jeopardy Clause would strengthen the juvenile court system because it would permit the child to cooperate with probation officials without fear of incriminating himself if the case were ultimately transferred to criminal court, [FN81] whereas Swisher's Fifth Amendment double jeopardy analysis was influenced by the state's need to use referees to meet the heavy caseloads in juvenile court, [FN82] even though it meant giving the state two chances to convict the child, a procedure that presumably would not be permitted in criminal court. [FN83] The majority did note, however, that "[i]t is not usual in a criminal proceeding for the evidence to be presented and recorded in the absence of the one authorized to determine guilt. But if there are objections to such a system, they do not arise from the guarantees of the Double Jeopardy Clause." [FN84] The Court explicitly did not address this due process argument. [FN85] The dissent did, and found that the "appeal" provision violated both Double Jeopardy and due process. [FN86]

Swisher does not rest comfortably alongside McKeiver. In McKeiver, Justice Blackmun stressed that jury trials in juvenile proceedings were not necessary because judges could be fair triers of fact. However, in Swisher it turns out that the fair and impartial judge does not have to hear the testimony in order to convict. One wonders what the child acquitted by the referee and convicted by the juvenile court judge makes of such a procedure.

One might think that if the Court gave children in the juvenile courts the same rights as adults in criminal court, the inequities would disappear. Justice Black reflected this notion. True to his total incorporation theory the entire Bill of Rights applies to defendants in criminal proceedings, state and federal, and, he argued in Gault, "it would be a plain denial of equal protection of the laws-an invidious discrimination-to hold that others could because they were children" be denied them. [FN87] The Court has never decided a delinquency case on equal protection grounds, although invited to do so. [FN88] The Court prefers the more elastic due process, which it uses only to diminish constitutional protection for children. Unless the Court accepts the concept that delinquency adjudicatory hearings and criminal trials are functionally equivalent, [FN89] it is doubtful that an equal protection analysis would yield any different result.

As it turns out, however, even when the Court gives children the same protection as adults, children still end up getting less simply because they are children. For example, in Michael C., [FN90] the Court, only willing to assume that Miranda applied fully to children, [FN91] found that the sixteen-year-old youth undergoing custodial interrogation waived his Fifth Amendment privilege. [FN92] After Michael C. was advised of his rights, he asked for his probation officer. When told he was not available (rather than inappropriate), and again asked if he

wanted a lawyer, Michael expressed concern that if he asked for a lawyer the police would trick him by sending in a "ringer," a policeman posing as a lawyer. [FN93] The majority held that the request to speak with a probation officer, or any other layperson, [FN94] was not a per se invocation of either the right to counsel or the right to remain silent. [FN95] The child had to explicitly ask for an attorney. [FN96] That test may be workable for adults, but certainly not for children. If a child calls for a parent or relative or other trusted layperson, that child is saying he needs help to deal with the police, which is exactly why the Court in Edwards [FN97] held that once a suspect in custody asks for an attorney, absent a valid waiver, no further interrogation was permissible. [FN98] A child asking for a trusted adult is saying the same thing in the only way he can-adults hire attorneys, not children.

Moving to a totality of the circumstances test to determine if Michael waived his Miranda rights, the Court found that although he was interrogated continuously, one-on-one, through the night, he waived his rights. [FN99] The Court stated explicitly that

> [t]his totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. [FN100]

The totalities test does not provide sufficient protection for children undergoing custodial interrogation. Part of the problem is that it is a standard rather than a rule, a rule such as no child can waive his privilege without having first spoken to a parent or lawyer, or that the parent and attorney have to be present during custodial interrogation, as suggested by Justice Fortas in Gault. [FN101] Although age, education, and experience are factors considered in the totalities test, [FN102] most children appearing in juvenile court have roughly the same backgrounds, particularly those facing serious charges, who tend to be older adolescents. That makes it difficult for juvenile court judges to make refined distinctions among children for purposes of ascertaining waiver, and makes it more likely that such adolescents, approaching adulthood, will be compared to younger children in the juvenile court, and thus are more likely to be found to have waived their rights. [FN103] It is a test designed for adults, where there is a wide range of different ages and circumstances. Therefore, even though the same test regarding invocation and waiver of rights is used for both children and adults, juveniles, simply because of their age, inexperience, immaturity, and heightened suggestibility, get less protection than their adult counterparts.

Gault's analysis of Fifth Amendment protection for children was insistent that waivers should not be lightly inferred, [FN104] and that whenever possible, parents or lawyers be present during any questioning. [FN105] Justice Fortas also cited examples of children who had made confessions and were ultimately found to be innocent. [FN106] These concerns were not expressed or alluded to in Michael C-in fact, Gault was not even cited. That is an odd omission given that Gault was the only juvenile delinquency case that discussed confessions. Did this mean that the Court was trying to tell us something about Gault's viability?

In 1984, in Schall, [FN107] the Court conceptually reversed course all the way back to the pre-Gault era, upholding a vague and overbroad preventive detention law for alleged delinquents. [FN108] The provision allowed New York juvenile court judges to detain youngsters if there was a "serious risk" that they would commit a criminal act before the adjudicatory hearing. [FN109]

More important than the result was the Court's reasoning. The opinion is peppered with aphorisms constricting constitutional protection for minors: fundamental fairness, [FN110] children are always in some form of custody, [FN111] the state's "parens patriae interest in preserving and promoting the welfare of the child" [FN112]

makes “a juvenile proceeding fundamentally different from an adult criminal trial,” [FN113] the need for flexibility and informality, [FN114] and perhaps the most dangerous of all, judges “must exercise a substitute parental control for which there can be no particularized criteria.” [FN115] It was as if Gault had never been decided.

I try to distinguish Schall on the ground that the case dealt with a pre-adjudicatory proceeding, a detention hearing, whereas Gault and its progeny addressed only the fact-finding hearing to determine guilt or innocence. [FN116] Although the distinction is accurate, because of the Schall Court's emphasis on the child's lesser liberty interest and the differences between a juvenile proceeding and a criminal trial, I am not sure that the distinction is altogether convincing.

One year later, in T.L.O., the Court seemed to retreat somewhat from the low level fundamental fairness approach emphasized in Schall by applying the Fourth Amendment to searches and seizures of public school students by school officials. [FN117] The content of the right, however, was not very protective. The Court announced that school searches fell into the category of “special needs,” [FN118] used a balancing test, dispensed with the need for a warrant and probable cause, and concluded that only a “reasonableness, under all the circumstances” test was sufficient. [FN119] As is usual when the balancing test is used, both in adult and juvenile cases, [FN120] the government usually wins. Here again we have seeming parity between adults and children. Again, however, the parity still gives children less protection. Because of the compulsory education laws, children have no choice about attending school where they are under constant supervision. In the adult special needs cases, the defendants at least usually assume the risk of participating in the regulated activity and thus can avoid application of the lowered content of the Fourth Amendment.

The Court in T.L.O. found that the full-scale search of the student's purse to ferret out evidence that she violated school rules by smoking cigarettes in the lavatory was reasonable. [FN121] The school official found marijuana and turned it over to the police; that evidence was used against her in the juvenile court delinquency proceeding. [FN122] Although the Court initially took the T.L.O. case to decide if the exclusionary rule of the Fourth Amendment applied to searches of public school students by school officials, [FN123] the Court opted instead to decide the case on substantive Fourth Amendment grounds. The federal constitutional exclusionary rule issue, which was specifically reserved, has still not been resolved by the Court. [FN124]

After T.L.O., the Court took on the issue of random urinalysis drug testing in the public schools. [FN125] In Acton, the Court again used the special needs balancing test, and upheld the random drug testing of grade school and high school students who participated in interscholastic athletic programs. [FN126] Justice Scalia emphasized that the program was directed at children, and that they had voluntarily participated in these activities. [FN127] Children had a decreased expectation of privacy, [FN128] the search, urinalysis, was not intrusive, [FN129] (even though the collection of urine was observed by school officials), and the school district had a strong need to combat heavy drug use in the student body. The athletes were role models for other students [FN130] and could be injured if they used drugs. [FN131] Moreover, the results of the testing were not made available to the police. [FN132]

In Earls, the Court went further, and 5-4 upheld drug testing of students who wanted to participate in any extracurricular activities. [FN133] The Court invoked the balancing test, and noting that the test results were not made available to the police, Justice Thomas concluded that the policy was reasonable. [FN134] While it is true that children could avoid the testing by not joining any extra-curricular activities, the penalty for doing so would be significant-students miss out on important sources of learning, and universities look for such activities when students apply for admission. [FN135]

The urinalysis drug testing cases do not appear to affect the juvenile court system; the cases deal with the right to privacy in public schools. While it may be true that there is no direct effect, indirectly there is. In both urine search cases the majority stressed that a child's liberty interest is not as great as an adult's, [FN136] that they are subject to the control of their parents, [FN137] that the public schools have "custodial and tutelary" power over them, [FN138] and that students' rights are not as extensive as adults.' [FN139] These observations strongly resonate with the Schall Court's analysis of the strength of the state's police and parens patriae powers over children. Moreover, should the Court ever address the issue of random urine drug testing when the school officials do turn the evidence over to the police, the language in Acton and Earls would lend support to the view that the searches were perfectly "reasonable." [FN140]

Whither Gault? Clearly, it's showing its age. Not that I believe Gault is in danger of being explicitly overruled. There are just so many cases that the Court can get rid of that way, and Gault has become settled doctrine. [FN141] What it can do, and by and large does very well, is turning cases inside out until they are barely recognizable. [FN142] Compare Gault, [FN143] Winship, [FN144] and Breed [FN145] with McKeiver, [FN146] Schall, [FN147] Michael C., [FN148] and the drug testing cases. In effect the Court has created two lines of cases dealing with the rights of children who engage or may engage in criminal misconduct-one expansive and the other restrictive. This not a unique phenomenon. It occurs quite frequently in many contexts and gives the Court greater flexibility when confronting various issues. [FN149] The downside is fudgy law, uncertainty, and the appearance of dishonesty.

Moving away from Gault's promise poses some dangers. Many states have increased penalties for delinquents who remain in the juvenile court system. More ominously, states have adopted blended and extended sentencing schemes which authorize or require heavy prison sentences for children convicted of crime. [FN150] We are no longer talking about just a couple of years in state training schools-the ante is a bit higher. Under many of the extended and blended sentencing laws, minors are receiving long prison sentences, which they may have to serve in adult facilities. [FN151] Furthermore, states are waiving younger and younger children to criminal courts to be tried and sentenced as adults.

The Supreme Court has never dealt with the constitutionality of such laws. [FN152] There is, however, one more Supreme Court case that may be relevant in this context; even though this decision does not deal with the juvenile court system, I believe that it can be used to reinvigorate Gault and prevent long and wrong prison sentences for children tried both in juvenile and criminal courts. In Roper v. Simmons, [FN153] a five-person majority ruled that the Eighth Amendment prohibits the death penalty for adolescents who commit capital offenses when under the age of eighteen-a rule not a standard. The majority relied, at least in part, on the emerging national consensus against the death penalty for adolescents [FN154] and noted the international rejection of such a punishment. [FN155] More to the point, however, Justice Kennedy noted that there were "[t]hree general differences between juveniles under eighteen and adults" which "demonstrate" why minors could not be considered in the narrow class of "worst offenders" subject to the death penalty. [FN156]

These three differences are the immaturity and irresponsibility of juveniles, the response of adolescents to peer pressure, and perhaps most important, the "transitory nature" of a minor's personality traits, that is, the possibility that children can change as they get older. Studies indicate that there is a physiological basis for adolescent change. [FN157] The brain is simply not fully developed until the mid-twenties. [FN158] Imposing the death penalty in such circumstances constitutes punishment for a physical phenomenon that may well disappear in a short period of time.

I do not mean to suggest that adolescents should not be punished for committing criminal acts-clearly, they should. After all, only a small percentage of teenagers commit serious crimes, indicating that most adolescents learn how to control their behavior notwithstanding their immaturity. [FN159] However, the studies do raise the question of how much punishment is appropriate for those who do not. Roper takes away the possibility of execution. Arguably, Roper could be extended to prohibit heavy prison sentences that effectively deprive such minors of ever leading productive lives, in particular, life imprisonment without possibility of parole, or long sentences that keep children locked up until they are too old and scarred to live on the outside. [FN160] As Justice Kennedy noted in Roper, "the State cannot extinguish life and [the defendant's] potential to attain a mature understanding of his own humanity." [FN161] Of what value is this potential to those who will never be free again and thus unable to demonstrate their grasp of the enormity of their actions in extinguishing a human life. Is not such imprisonment also in some way an extinction of life? "Execution kills instantly, life imprisonment kills by degrees ... their purpose is the same, to take away life." [FN162]

Although the Court has approved of retribution as a basis for imposing the death penalty, [FN163] the question is how much retribution is necessary to appease that objective in non-capital cases involving adolescents. Eighth Amendment proportionality analysis could be used to conclude that even in murder cases, life sentences for adolescents are unconstitutional.

It is true that in Harmelin v. Michigan [FN164] a majority of justices concluded that a mandatory sentence of life imprisonment without possibility of parole for possession of a large quantity of cocaine was not unconstitutional. Furthermore, only two other states had such laws, indicating a national consensus against them. Nevertheless, Justice Kennedy, concurring and concurring in the judgment, [FN165] took the position that proportionality analysis could be used in non-death penalty cases, but only if the punishment was "grossly disproportionate." [FN166] Thus, a majority of the justices in Harmelin determined that proportionality analysis of some sort could be used in non-death penalty cases. Interestingly, in Roper, Justice Kennedy noted that the offender in that case would receive a life-sentence without possibility of parole, a sanction he termed "severe." [FN167]

Does severe equal gross?

Concededly, Roper is a death penalty case and therefore not of strong precedential value in other contexts. Nonetheless, to cabin the reasoning of a Supreme Court case that recognizes the important differences between children and adults regarding the extent of "moral blameworthiness" for committing a heinous crime, is to deprive the decision of its power to grow and affect the development of law, and denies the organicity of case law-which returns us to the beginning of this article and Gault.

I believe that notwithstanding the difference in fora, Roper can be read as reinforcing the underlying promise of Gault. Roper says children and adults are different, and deserve different treatment, at least in terms of capital punishment. More broadly, however, it gives a child who commits a crime greater constitutional protection than an adult who commits the same crime. In my view, Gault stands for the proposition that the status of being a child does not permit a denial of basic constitutional rights, and may in fact, as in Roper, be a basis for giving them more constitutional protection than adults receive. That is, equality plus, not minus.

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[FN1]. In Griswold v. Connecticut, 383 U.S. 479 (1965), the Court issued a narrow ruling invalidating a state law criminalizing the use of contraceptives by married persons. The Court used an intensified means scrutiny to protect the right to marital intimacy. By 1972, in Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Court interpreted Griswold to mean that individuals, whether married or single, were entitled to use contraceptives and invalidated a criminal law banning their distribution. Similarly, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (granting women the fundamental right to abortion in the first two trimesters), was modified by Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (overruling the trimester framework and defining the fundamental right to an abortion only when the state placed an "undue burden" on the woman seeking an abortion on non-viable fetuses), and modified again by Gonzales v. Carhart, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 20 A.L.R. Fed. 2d 673 (U.S. 2007) (upholding a federal criminal law prohibiting doctors from performing abortions when the fetus's head or limbs were protruding outside the body; the doctor was required to perform it inside the woman's body).

[FN2]. See, e.g., Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 109 Ed. Law Rep. 539, 70 Fair Empl. Prac. Cas. (BNA) 1180, 68 Empl. Prac. Dec. (CCH) P 44013 (1996) (invalidating, on equal protection grounds, a state constitutional prohibition against any governmental special protection for homosexuals; the majority did not cite to or explain the effect of Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (upholding a state law criminalizing homosexual sodomy because it was rationally related to the state power to enforce morality). In Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), the Court overruled Bowers, purportedly using rational relationship scrutiny, and rejected morality as a sufficient governmental purpose, at least in that context. However, in Gonzales v. Carhart, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 20 A.L.R. Fed. 2d 673 (U.S. 2007), the Court accepted morality and ethics as valid governmental aims sufficient to uphold a federal criminal law banning "partial birth" abortions.

Sometimes the Court will state explicitly that the decision is limited to the particular context even when conceptually it should be relevant in other situations. See, e.g., Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 n.12, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (finding state action when a state clerk in an ex parte hearing conducted pursuant to state law issued a writ of attachment to a creditor and denying that the holding meant that mere invocation of state legal procedures was a joint participation or conspiracy with state officials, and expressly limiting the holding to creditor-debtor pre-attachment judgments).

[FN3]. For example, see Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), which distinguished an earlier case that was almost identical to the case at bar. Id. at 560-61. Subsequently, in Hudgens v. N. L. R. B., 424 U.S. 507, 518, 96 S. Ct. 1029, 47 L. Ed. 2d 196, 91 L.R.R.M. (BNA) 2489, 78 Lab. Cas. (CCH) P 11278 (1976), the majority overruled the earlier case and admitted that the Court should not have made the distinction which was based on "rather attenuated circumstances." Id. at 523 (Powell J., concurring).

[FN4]. Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN5]. Gault, 387 U.S. at 30 ("Under our Constitution, the condition of being a boy does not justify a kangaroo court.").

[FN6]. See, e.g., Malloy v. Hogan, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."); Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) ("The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment. The right of cross-examination is included in the right of

an accused in a criminal case to confront the witnesses against him."); Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) ("The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that have been held applicable to the states.").

[FN7]. See, e.g., Joseph L. Hoffmann & Lauren K. Robel, Federal Influences in State Cases: Sentencing, Prosecution, and Procedure: Federal Court Supervision of State Criminal Justice Administration, 543 Annals 154, 155-56 (1996) ("These decisions were revolutionary in their aggressive reliance on specific provisions in the federal Bill of Rights to protect state criminal defendants.") (footnotes omitted).

[FN8]. Kathleen M. Sullivan, The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 97 (1992) ("[I]n many criminal procedure and privacy cases, the Warren Court shifted in large measure to rule-like or categorical approaches.").

[FN9]. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[FN10]. It is over-inclusive in the sense that some suspects who had not been properly "Mirandized" could have their confessions suppressed even though they were voluntary under the Due Process Clause. The Miranda Court fully understood that this would occur and accepted it as the price for eliminating custodial coercion.

[FN11]. The totality of the circumstances standard weighed many factors and was so nebulated that some people who had in fact made coerced confessions were nevertheless found to have given a voluntary statement. For a nice analysis of the problems with the due process standard in the confession area, see Yale Kamisar et al., Basic Criminal Procedure 552-58 (2005).

[FN12]. See, e.g., Haynes v. State of Wash., 373 U.S. 503, 514, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963).

[FN13]. See, e.g., Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961) (holding petitioner's confession inadmissible in state criminal trial because officer told him that he could only call his wife if he cooperated and a made a statement); Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (finding petitioner's confession inadmissible in state criminal trial because police officer, a childhood friend of the petitioner, told him that if he did not confess the officer would lose his job).

[FN14]. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961) ("All evidence obtained by searches and seizures in violation of ... [the Fourth Amendment of the United States Constitution], is, by that same authority, inadmissible in a state court.").

[FN15]. Weeks v. U.S., 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (overruled in part by, Elkins v. U.S., 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960)) and (overruled by, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)) ("The Fourth Amendment is not directed to individual misconduct of state officials. Its limitations reach the federal government and its agencies."); Mapp, 367 U.S. at 648 ("In a federal prosecution, [the Fourth Amendment of the United States Constitution] bars the use of evidence secured through an illegal search and seizure.") (quoting Wolf v. People of the State of Colo., 338 U.S. 25, 28, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (overruled by, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)) (holding that the substantive aspect of the Fourth Amendment was applicable to the states, but declining to apply the remedial exclusionary rule of the Fourth Amendment to the states)).

[FN16]. See Rochin v. California, 342 U.S. 165, 175, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952) (defendant was forcibly removed from his home without a warrant and authorities ordered his stomach pumped for evidence of drugs.) But see Irvine v. People of California, 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 561 (1954) (refusing to apply Rochin because although the case at bar demonstrated flagrant Fourth Amendment violations, it did not involve physical violence to the defendant's person).

[FN17]. Gideon v. Wainwright, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963) ("The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.").

[FN18]. E.g., Betts v. Brady, 316 U.S. 455, 461-62, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) (stating that the right to counsel found in the Fourteenth Amendment was fluid and depended on the circumstances of the case).

[FN19]. See, e.g., Hudson v. State of N.C., 363 U.S. 697, 80 S. Ct. 1314, 4 L. Ed. 2d 1500 (1960) (holding that because the co-defendant had pled guilty the case was sufficiently complex to warrant the right to counsel); Chewning v. Cunningham, 368 U.S. 443, 82 S. Ct. 498, 7 L. Ed. 2d 442 (1962) (holding that a trial as to whether the defendant was a recidivist was of sufficient importance to warrant the right to counsel).

[FN20]. Gideon, 372 U.S. at 343 ("The Court concludes that certain fundamental rights, safeguarded by the first eight amendments against federal action, are also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."); see also id. at 350-51 (Harlan, J., concurring) (noting that "[t]here have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty").

[FN21]. Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN22]. Gault, 387 U.S. at 12 (noting that the Court had not yet addressed the "precise" question raised).

[FN23]. Kent v. U.S., 383 U.S. 541, 562, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) ("We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.").

[FN24]. Kent, 383 U.S. at 557 (concluding that "this result is required by the statute read in the context of constitutional principles."). In Harris v. Procunier, 498 F.2d 576 (9th Cir. 1974), the court considered whether Kent should be applied retroactively, thus necessarily raising the question of whether that case was of constitutional proportions. The majority concluded that Kent was not retroactive. Judge Hufstedler, dissenting, noted that "[a]t the time of the Kent decision, there was some doubt that the requirement of counsel it announced was of constitutional dimension. In re Gault... clarified the Kent decision ...." Id. at 581 n.1.

[FN25]. Prior to Kent, the Court, using due process, had held that confessions made by teenagers were coerced, and thus inadmissible in state criminal trials. The Court relied heavily on the age of the defendants. See Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325, 87 A.L.R.2d 614 (1962); Haley v. State of Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948). Thus, although the Court had applied due process to children in the criminal court, it had not done so for children in juvenile court.

[FN26]. Kent, 383 U.S. at 553.

[FN27]. Kent, 383 U.S. at 554 ("there is no place in our system of law for reaching a result of such tremendous consequences without ceremony-without hearing, without effective assistance of counsel, without a statement of reasons.").

[FN28]. Kent, 383 U.S. at 550.

[FN29]. See, e.g., Ariz. Rev. Stat. Ann. Juv. Ct. R. P., Rule 6 (2003) ("The conduct of the hearing shall be as informal as the requirements of due process and fairness permit, and shall proceed generally in a manner similar to the trial of a civil action before the court ...."); Cal. Welf. & Inst. Code 203 (West 1998) ("An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."). See also In re Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469, 472 (5th Dist. 1966) (holding that "juvenile court proceedings are not criminal trials, but ... [instead are] civil proceedings ...."); In re Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716, 718 (1967) (finding that "delinquency hearings are not in the nature of a criminal trial but constitute merely a civil inquiry or action ...."); Miss. Code Ann. 43-21-203(5) (1993) ("No proceeding by the youth court in cases involving children shall be a criminal proceeding but shall be entirely of a civil nature."); N.Y. Fam. Ct. Act 165(a) (McKinney 1999) ("[W]here the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved."); S.D. Codified Laws Ann. 26-7A-34 (1) (1995) ("Adjudicatory hearings shall be conducted in accordance with rules of civil procedure ... except as otherwise provided in this chapter .... "); Tex. Fam. Code Ann. § 51.17 (Vernon 2003) (except "when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title"); In Matter of S.L.L., 906 S.W.2d 190, 192-93 (Tex. App. Austin 1995) (per curiam) ("Juvenile delinquency proceedings are both civil and criminal in nature .... [M]any of the rights afforded by the Code of Criminal Procedure to adult criminal defendants are provided to the juvenile in the Family Code. However, the Family Code does not mirror precisely the Code of Criminal Procedure, creating gaps and ambiguities between the civil and criminal law.").

[FN30]. Application of Gault, 387 U.S. 1, 4, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). At the time Gault was decided, many states lumped delinquents (criminal law violators) and status offenders (runaways and truants), into one category, and called it delinquency. States now categorize these two types of offenders separately. The conventional wisdom is that Gault applies only to criminal law violators. In fact, however, Gerald Gault was adjudicated delinquent both for a criminal act and for "deporting himself so as to endanger his health or morals." Id. at 8 n.5, 9 n.6, 24 n.31, 27 n.39, 34 n.54. Therefore an argument can be made that Gault is applicable both to delinquents and to status offenders. See Irene Merker Rosenberg, The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past, 27 U.C.L.A. Rev. 656, 662 n.33 (1980) (making such an argument); Irene Merker Rosenberg & Yale L. Rosenberg, The Legacy of the Stubborn and Rebellious Son, 74 Mich. L. Rev. 1097 (1976) (analyzing the various strategies that states use to circumvent the Gault and Winship guarantees in status offender cases).

[FN31]. Lewis Carroll, Alice in Wonderland 47 (Sam'l Gabrs 1916).

[FN32]. Carroll, supra note 31, at 47; Gault, 387 U.S. at 59 ("We do not agree, and we reverse.").

[FN33]. Rosenberg, supra note 30, at 664 ("[T]he majority's exegesis of the applicability of constitutional principles in the context of the juvenile court system was expansive and far reaching.").

[FN34]. Gault, 387 U.S. at 58 (on at which the majority opinion's 102nd and final footnote is found).

[FN35]. Rosenberg, supra note 30, at 662 (“Examination of Justice Fortas's opinion for the Court in Gault reveals a broad, far-ranging discussion of the history and philosophy of the juvenile court system, its deficiencies and its realities, but a comparatively narrow holding.”).

[FN36]. Gault, 387 U.S. at 13, 31 n.48.

[FN37]. Gault, 387 U.S. at 13, 27, 36-37, 41, 44, 49, 56-57.

[FN38]. Gault, 387 U.S. at 33 (“Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded.”).

[FN39]. Gault, 387 U.S. at 34 (asserting that the right to counsel “is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration”).

[FN40]. Gault, 387 U.S. at 57 (“We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.”).

[FN41]. Gault, 387 U.S. at 55 (“It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.”).

[FN42]. Gault, 387 U.S. at 13 (“Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”).

[FN43]. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963) (incorporating the right to counsel in all state felony criminal trials); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (incorporating the right of confrontation and cross-examination). The right to notice in the Sixth Amendment was not incorporated until Rabe v. Washington, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2d 258 (1972). However, even without incorporation, the due process right to notice encompassed both timeliness and specificity.

[FN44]. Gault, 387 U.S. at 30-31 (quoting Kent, 383 U.S. at 562).

[FN45]. Gault, 387 U.S. at 13.

[FN46]. Gault, 387 U.S. at 55.

[FN47]. Bellotti v. Baird, 443 U.S. 622, 634, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”). For discussion of the instances in which the Court has acknowledged the differences between adults and children, see Barbara Kaban & Ann E. Tobey, When Police Question Children: Are Protections Adequate?, 1 J. Center Children & Cts. 151, 153 (1999).

[FN48]. See N.Y. Family Ct Act § 342.2 (2) (2007) (“Any determination at the conclusion of a fact-finding hearing that a respondent committed an act or acts which if committed by an adult would be a crime must be

based on proof beyond a reasonable doubt."); Mullins v. State, 240 Ark. 608, 401 S.W.2d 9 (1966) ("The ultimate purpose of any criminal trial is to discover the truth as to the guilt or innocence of the accused.").

[FN49]. Gault, 387 U.S. at 36.

[FN50]. See Bellotti, 443 U.S. at 634 n.47; Kaban & Tobey, supra note 47, at 153. Cf. Roper v. Simmons, 543 U.S. 51 (2005) (holding that because of the differences between adolescents under the age of eighteen and adults, the former cannot be executed).

[FN51]. See Roper, 543 U.S. at 599 ("It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults ....") (O'Connor, J., dissenting); Kaban & Tobey, supra note 47, at 151 ("Young children more easily succumb to suggestion, trickery, and coercion.").

[FN52]. The law now is contra. The vulnerability and immaturity of children usually results in lowered constitutional protection for them. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976) (using a significant state interest standard when assessing the privacy rights of minors rather than the compelling state interest test used for adults).

[FN53]. Compare, e.g., Betts v. Brady, 416 U.S. 455 (1942), discussed at note 18 supra, with Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963), discussed at note 17 supra.

[FN54]. See, e.g., Malloy v. Hogan, 378 U.S. 1, 11, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (incorporating the privilege against self-incrimination, and affirming that an incorporated right gives as much protection to defendants in state court as it does to defendants in federal court).

[FN55]. See Malloy, 378 U.S. at 14 (Harlan, J., dissenting) (arguing that "jot for jot" incorporation compelled uniformity which was contrary to federalism, and would ultimately result in diluting federal standards as a way out of the jot for jot straightjacket). See also Apodaca v. Oregon, 406 U.S. 404, 414, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) (upholding non-unanimous jury verdicts in state courts; eight justices agreed on jot for jot incorporation but were divided as to the contents of the jots; Justice Powell concurring in the judgment, joined the conservative wing for the result that unanimity was not required in state courts, but opined that the rule in federal court would be different because states are governed by due process whereas federal rights are governed by the explicit guarantees of the Bill of Rights). Justice Powell's opinion is contained in Johnson v. Louisiana, 406 U.S. 356, 366, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), a companion case.

[FN56]. See, e.g., Compare Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (upholding state law putting the burden of proof as to competency to stand trial on the defendant; the Court concluded that due process was not violated because the law was not fundamentally unfair, nor did it offend principles of justice so deeply rooted in the nation's history and tradition as to be denominated fundamental), with Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (holding that where governmental actions are governed by explicit guarantees in the Bill of Rights, the analysis is limited to that guarantee and may not consider the more generalized concept of substantive due process). See also Jerrold Israel, Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines, 45 St. Louis U. L. J. 303 (2001) (reviewing the Court's inconsistent guidelines for interpreting the independent content of due process in the post-incorporation era).

[FN57]. See, e.g., Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (finding no Mir-

anda violation and no Sixth Amendment violation even though police interrogated defendant without counsel present despite counsel's request that it be delayed until he arrived at the police station; the majority went on to do a due process analysis and determined that the police misbehavior was not egregious enough to violate due process).

[FN58]. See the discussion between Justices Black and Harlan in Gault regarding the meaning of due process. Application of Gault, 387 U.S. 1, 59, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN59]. Gault, 387 U.S. at 7 n.3, 43 & n.74. The record did not support the view that Gerald made out of court statements to the probation officer which were then used against him at trial. Id. at 43.

[FN60]. Gault, 387 U.S. at 33 ("It [due process] does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice.").

[FN61]. Gault, 387 U.S. at 34 n.54. The majority explicitly did not determine if the notice accusing Gerald of "delinquency," without stating any facts as to the offense, was specific enough.

[FN62]. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Winship was made completely retroactive in V. v. City of New York, 407 U.S. 203, 92 S. Ct. 1951, 32 L. Ed. 2d 659 (1972). For the history of Winship, see Irene Merker Rosenberg, Winship Redux: 1970-1990, 69 Tex. L. Rev. 109, 110-12 (1990).

[FN63]. Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (holding that commitments to state mental hospitals had to be based on clear and convincing evidence).

[FN64]. Addington, 441 U.S. at 427-28 (citation and footnote omitted).

[FN65]. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971) (plurality opinion).

[FN66]. McKeiver, 403 U.S. at 543 (stating that, "[a]s that standard [fundamental fairness] was applied in those two cases [Gault and Winship], we have an emphasis on fact-finding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis").

[FN67]. McKeiver, 403 U.S. 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.").

[FN68]. Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

[FN69]. McKeiver, 403 U.S. at 541 (stating that "[t]he juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil").

[FN70]. Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. Rev. 1083, 1123 (1991) ("Being deprived of a jury trial hurts juveniles in a number of ways. Juries traditionally have been treasured as a protection against biased judges and overzealous prosecutors, because the jury has no access to background information about the accused which might cause them to prejudge the case.") (footnotes omitted).

The juvenile court judges use the probation files to make pre-trial detention decisions and very often, those

same judges conduct the fact-finding hearings.

[FN71]. One could argue that the discrimination is based on the forum rather than the age of the accused. However, inasmuch as only children are in that forum, it remains a discrimination based on age.

[FN72]. Harry Calvin & Hans Zeisel, The American Jury (1966).

[FN73]. Theodore Eisenberg et al., Judge-Jury Agreement in Criminal Cases: A Partial Replication of Calvin & Zeisel's The American Jury, 2 J. Empirical Legal Stud. 171 (2004).

[FN74]. Christine Chamberlin, Note, Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System, 42 B.C. L. Rev. 391, 398 (2001) ("[T]he juvenile justice system retains several unique features reflecting its initial goals of individualized treatment and rehabilitation.").

[FN75]. I made up the second clause.

[FN76]. Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975).

[FN77]. Breed, 421 U.S. at 529.

[FN78]. Breed, 421 U.S. at 529.

[FN79]. Breed, 421 U.S. at 540 ("We regard a procedure that results in such a dilemma as at odds with the goal that, to the extent fundamental fairness permits, adjudicatory hearings be informal and nonadversary. See Gault ...; Winship ...; McKeiver ....") (citations omitted).

[FN80]. Swisher v. Brady, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 2d 705, 25 Fed. R. Serv. 2d 1463 (1978).

[FN81]. Breed, 421 U.S. at 532.

[FN82]. Swisher, 438 U.S. at 537 ("We recognize that juvenile courts, perhaps even more than most courts, suffer from the problems created by spiraling caseloads unaccompanied by enlarged resources and manpower.").

[FN83]. But cf. Ludwig v. Massachusetts, 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976) (upholding the constitutionality of a state law that required a defendant charged with certain offenses to be tried in a lower court without a jury; if the defendant wished to appeal that decision to a higher court for a de novo trial with a jury, he or she would risk receiving a heavier sentence if convicted).

[FN84]. Breed, 421 U.S. at 722-23.

[FN85]. Breed, 421 U.S. at 209-13.

[FN86]. Breed, 421 U.S. at 229-30 (Marshall, J., dissenting).

[FN87]. Application of Gault, 387 U.S. 1, 61, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (Black, J., concurring).

[FN88]. See In re Winship, 397 U.S. 358, 359 n.1, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[FN89]. As the Court appeared to do in Addington v. Texas and Breed v. Jones and Addington v. Texas. See text at, supra notes 63-64, 76-77, respectively

[FN90]. Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

[FN91]. Michael C., 442 U.S. at 717 n.4 ("[W]e assume without deciding that the Miranda principles were fully applicable to the present proceedings.").

[FN92]. Michael C., 442 U.S. at 728.

[FN93]. Michael C., 442 U.S. at 710-11. The following exchange took place between the police and defendant during the interrogation.

"A. Can I have my probation officer here?

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

"A. How I know you guys won't pull no police officer in and tell me he's an attorney?

"Q. Huh?

[FN94]. The majority in Michael C. stressed the unique role of counsel in Miranda. Michael C., 442 U.S. at 719.

[FN95]. Michael C., 442 U.S at 724 ("We hold, therefore, that it was error to find that the request by respondent to speak with his probation officer per se constituted an invocation of respondent's Fifth Amendment right to be free from compelled self-incrimination.").

[FN96]. Michael C., 442 U.S. at 724.

[FN97]. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

[FN98]. Edwards, 451 U.S. at 487 ("His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.") In contrast, if a suspect merely invokes his right to silence, the police can, under certain circumstances, reinitiate interrogation. Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). The Court insists that there is a distinction between defendants who ask for an attorney and those who invoke their right not to incriminate themselves. In Edwards, the Court concluded that the suspect was asserting his inability to deal with the police without counsel, whereas in Mosley the suspect is implicitly claiming that he can deal with the police unaided.

[FN99]. Michael C., 442 U.S. at 733 (Powell, J., dissenting).

[FN100]. Michael C., 442 U.S. at 725.

[FN101]. Application of Gault, 387 U.S. 1, 54, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN102]. Michael C., 442 U.S. at 725 ("This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him.").

[FN103]. Of course, if the child is waived to criminal court and the determination as to admissibility of the confession is made there, compared to adults, the child's age, experience and education, may well work in his favor.

[FN104]. Gault, 387 U.S. at 55.

[FN105]. Gault, 387 U.S. at 34-37 (discussing the need for the presence of parents and counsel).

[FN106]. Gault, 387 U.S. at 42-57 (citing In the Matters of Gregory W. and Gerald S., 224 N. E. 2d 102 (1966); In the Interests of Carlo and Stasilowicz, 225 A. 2d 110 (1966)).

[FN107]. Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

[FN108]. Irene Merker Rosenberg, Schall v, Martin: A Child is a Child is a Child, 12 Am. J. Crim. L. 253, 255 (1984) ("In both its substantive and procedural due process discussions, the Court set the stage for an analytical retrenchment with respect to the constitutional rights of children alleged to be delinquent.").

[FN109]. Schall, 467 U.S. at 281.

[FN110]. Schall, 467 U.S. at 263.

[FN111]. Schall, 467 U.S. at 265.

[FN112]. Schall, 467 U.S. at 296.

[FN113]. Schall, 467 U.S. at 263.

[FN114]. Schall, 467 U.S. at 263.

[FN115]. Schall, 467 U.S. at 279-80.

[FN116]. The Schall Court itself did not make that distinction.

[FN117]. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985).

[FN118]. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 640, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 4 I.E.R. Cas. (BNA) 224, 130 L.R.R.M. (BNA) 2857, 13 O.S.H. Cas. (BNA) 2065, 49 Empl. Prac. Dec. (CCH) P 38791, 111 Lab. Cas. (CCH) P 11001, 1989 O.S.H. Dec. (CCH) P 28476 (1989) (Marshall, J., dissenting) ("In widening the 'special needs' exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process begun in T. L. O. of eliminating altogether the probable-cause requirement for civil searches.").

[FN119]. T.L.O., 469 U.S. at 365.

[FN120]. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 4 I.E.R. Cas. (BNA) 224, 130 L.R.R.M. (BNA) 2857, 13 O.S.H. Cas. (BNA) 2065, 49 Empl. Prac. Dec. (CCH) P 38791, 111 Lab. Cas. (CCH) P 11001, 1989 O.S.H. Dec. (CCH) P 28476 (1989) (asserting that railroad safety was a special need and upholding railroad safety regulations that authorized drug testing of employees after an accident without the need for a warrant or individualized suspicion); Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (concluding that the state's ability to facilitate probation supervision was a special need and upholding the warrantless search of a probationer's home based on "reasonable grounds").

[FN121]. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985).

[FN122]. T.L.O., 469 U.S. at 328-29.

[FN123]. T.L.O., 469 U.S. at 328-29.

[FN124]. T.L.O., 469 U.S. at 333 n.3. Most states, however, exclude evidence in a delinquency adjudicatory hearing if it was obtained illegally by police officials. See Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) (holding that evidence obtained by police officers was the result of an illegal seizure; the Court did not address the exclusionary rule issue because state law itself prohibited the use of illegally obtained evidence in delinquency hearings); Irene Merker Rosenberg, A Door Left Open: The Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Hearings, 24 Am. J. Crim. L 29, 58 (1996) (doubting that the result would be the same for illegal searches by school official); see also Irene Merker Rosenberg, Florida v. J.L. and the Fourth Amendment Rights of Juvenile Delinquents: Peekaboo!, 69 U. Cinn. L. Rev. 289, 293 (2000) (discussing the exclusionary rule issue that was not addressed in J.L.).

[FN125]. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564, 101 Ed. Law Rep. 37 (1995). See also Irene Merker Rosenberg, Public School Drug Testing, The Impact of Acton, 33 Am. Crim. L. Rev. 349, 371 (1996) ("[T]he Acton... Court utterly failed to acknowledge the intensely private nature of excretory functions, particularly for children, permitting the majority to down-play the extent of the intrusion on the individual privacy right. Rather than dealing sensitively with a sensitive subject, the Court reduced the level of discourse almost to that of scatological humor.") (footnote omitted).

[FN126]. Acton, 515 U.S. at 657 ("Legitimate privacy expectations are even less with regard to student athletes.").

[FN127]. Acton, 515 U.S. at 657 ("By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.").

[FN128]. Acton, 515 U.S. at 658 ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.").

[FN129]. Acton, 515 U.S. at 659 ("Requiring advance disclosure of medications prior to a urinalysis test is not per se unreasonable. Indeed, it is not a significant invasion of privacy.").

[FN130]. Acton, 515 U.S. at 663 (discussing the "role-model" effect of the student athletes).

[FN131]. Acton, 515 U.S. at 649 ("[D]rug use increases the risk of sports-related injury.").

[FN132]. Acton, 515 U.S. at 649; Jacqueline A. Stefkovich & Judith A. Miller, Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?, 1999 B.Y.U. Educ. & L.J. 25, 53 (1999) ("Police were not involved in the school's drug testing program and evidence obtained through the program was not turned over to the police.").

[FN133]. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 826, 122 S. Ct. 2559, 153 L. Ed. 2d 735, 166 Ed. Law Rep. 79 (2002) (discussing drugs found in the car of a member of the Future Farmers of America).

[FN134]. Earls, 536 U.S. at 833 (noting that "the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a 'need to

know' basis").

[FN135]. Earls, 536 U.S. at 667 (Ginsburg, J., dissenting).

[FN136]. Acton, 515 U.S. at 654 ("Unemancipated minors lack some of the most fundamental rights of self-determination, including even the right of liberty in its narrow sense.").

[FN137]. Acton, 515 U.S. at 654 ("They are subject, even as to their physical freedom, to the control of their parents or guardians .... When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them.").

[FN138]. Acton, 515 U.S. at 654.

[FN139]. Acton, 515 U.S. at 654.

[FN140]. See Irene Merker Rosenberg, The Public Schools Have a "Special Need" for Their Students' Urine, 31 Hofstra L. Rev. 303 (2002) (discussing the dangers of the special needs doctrine).

[FN141]. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion) (discussing the requirements for overruling precedent).

[FN142]. Bradley C. Johnson, Its Fruit Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit from Employment Division v. Smith, 80 Chi.-Kent. L. Rev. 1287, 1311 (2005).

[FN143]. Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN144]. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[FN145]. Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975).

[FN146]. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971) (plurality opinion).

[FN147]. Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

[FN148]. Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

[FN149]. For example, the Supreme Court created two lines of cases dealing with the federal interstate commerce power, see U.S. v. E. C. Knight Co., 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895) (holding there was no direct affect on interstate commerce) and Houston, E. & W.T.R. Co. v. U.S., 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) (allowing federal power to regulate rates on trains in intrastate commerce). In the modern era the Court has replicated this pattern. Compare U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626, 99 Ed. Law Rep. 24 (1995) (invalidating a federal commerce law criminalizing possession of a gun in a school zone area; the Court discussed four factors-whether the regulated activity is economic or commercial, whether there are findings, or a jurisdictional element, and whether it invaded traditionally state concerns; it is unclear which factors are more heavily weighted), with Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (upholding federal commerce law prohibiting possession of home grown marijuana even for medical purposes, notwithstanding state law permitting such activity; the majority distinguished Lopez on the ground that the federal law was part of a longstanding comprehensive regulation of drugs, whereas the law in Lopez was merely a narrow statute directed at guns in school zones). See also City of Cleburne, Tex. v. Cleburne Living

Center, 473 U.S. 432, 455-78, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (purportedly using a rational relationship analysis, the Court invalidated the city's refusal to grant a waiver to a group home for retarded persons; Justice Marshall, dissenting in part, concurring in part, argued that the Court was using a sliding scale approach and that its failure to acknowledge that fact would cause confusion in the lower courts).

[FN150]. See, e.g., Mass. Gen. Laws Ann., ch. 119, 72B (2003) (providing for a minimum sentence of twenty years for juveniles age fourteen and over who were convicted of murder, the same sentence as an adult).

[FN151]. See, e.g., State v. Ira, 132 N.M. 8, 2002-NMCA-037, 43 P.3d 359 (Ct. App. 2002) (upholding a ninety-one and one-half year sentence imposed on a teenager who, when he was age fourteen and fifteen, sexually abused his younger step-sister); Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws, National Center for Juvenile Justice (2003).

[FN152]. But cf. Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (plurality opinion) (upholding a state law, one of only three in the country, mandating life imprisonment without possibility of parole for possession of a large quantity of cocaine).

[FN153]. Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[FN154]. Roper, 543 U.S. at 560.

[FN155]. Roper, 543 U.S. at 575.

[FN156]. Roper, 543 U.S. at 598.

[FN157]. Roper, 543 U.S. at 570 (citing Erik Erikson, Identity: Youth and Crisis (1968)).

[FN158]. See, e.g., Cordia Wallas, What Makes Teens Tick, Time Mag., May 10, 2004, 57 (describing scientific studies, including brain imaging, concluding that the brain is not fully developed until the mid-twenties).

[FN159]. See, e.g., Patryk J. Chudy, Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges, 85 Cornell L. Rev. 518, 579 (2000) (arguing that “given the fact that only a small percentage of juveniles engage in criminal behavior, generalized curfews restrict the entire juvenile population for the criminal acts of a small minority”).

[FN160]. See Ellen Marrus & Irene Merker Rosenberg, After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court, 42 San Diego L. Rev. 1151, 1167 (2005) (discussing the way abuse of many violent adolescents impedes their maturation).

[FN161]. Marrus & Rosenberg, supra note 160, at 573-74.

[FN162]. Anton Chekhov, The Bet**,** in Great Short Stories of the World 632 (Reader's Digest 1972). One protagonist argues, that “[c]apital punishment and life imprisonment are equally immoral; but if I were offered the choice between them, I would certainly choose the second .... It's better to live somehow than not to live at all.” Id. at 632-33.

[FN163]. See Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion).

[FN164]. Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (plurality opinion).

[FN165]. Harmelin, 501 U.S. at 996.

[FN166]. Harmelin, 501 U.S. at 1,110.

[FN167]. Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
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