Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science

MARK R. FONDACARO,* CHRISTOPHER SLOBOGIN** & TRICIA CROSS***

INTRODUCTION

The early juvenile court was rooted in the state's parens patriae authority.[1] Its goal was to treat wayward juveniles according to their "best interests"—akin to the way loving parents deal with their disobedient offspring—rather than as fully accountable adults under the criminal law.[2] Instead of prosecution and punishment, juveniles were subject to "adjudication" and "disposition,"[3] designed to help them change for the better.

A crucial corollary to this avuncular theory of juvenile justice was the belief that the procedures implementing it should also be different from the adult model. More specifically, proponents of the juvenile court thought that procedural "informality" would best serve the court's

* Mark Fondacaro, J.D., Ph.D., is an Associate Professor of Psychology and Associate Director, Levin College of Law Center on Children and Families, University of Florida.

** Christopher Slobogin, J.D., LL.M., occupies the Stephen C. O'Connell chair at the University of Florida Fredric G. Levin College of Law.

*** Tricia Cross, J.D., M.A., is an Associate at Arnold & Porter LLP, in Los Angeles.

The authors would like to thank Norman Poythress, Tom Tyler, David Wexler, Lois Weithorn, Barbara Woodhouse, and participants in a workshop at the University of Florida College of law for their comments on this Article.

1. Doug Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971); *cf.* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 159 (2d ed. 1977) (arguing that the adoption of the parens patriae justification for juvenile court was "an ex post facto fiction" designed to give spurious legitimacy to the new court).

2. Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 911 (1995) (The juvenile court's "mission was to remove young offenders from criminal courts and to provide them with the care and supervision typical of that found in a stable and loving family.").

3. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 1999 NATIONAL REPORT SERIES, JUVENILE JUSTICE: A CENTURY OF CHANGE 11–12 (Dec. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (describing the euphemistic terminology of the juvenile court).

substantive objective of individualized care.[4] Thus, for more than half a century, the juvenile justice system functioned largely in the absence of the procedural rules found in adult court and beyond the oversight and review of the regular judicial system.[5]

Over time, however, it became apparent that the juvenile justice system was not living up either to its rehabilitative goal or to the expectation that relaxed procedures would facilitate that goal. Among legal scholars, courts and other policymakers, there was a growing belief that procedural formality had been sacrificed for a rehabilitative agenda that never materialized.[6] The culmination of this criticism came in Justice Fortas' famous speculation in *Kent v. United States* that those enmeshed in the juvenile justice system were receiving "the worst of both worlds: . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[7]

Given the Court's long-standing reticence about using substantive due process to order change in state practices,[8] the "world" the justices decided to alter was the procedural one. And the way it sought to heal the systemic wound it perceived in *Kent* was to transplant adult procedures to the juvenile context. Subsequent Court decisions provided juveniles with the rights to counsel, silence, cross-examination, and almost all of the rest of the adult procedural armamentarium.[9]

Important to note, however, is that this procedural revolution was based in large part on the general language of the Due Process Clause, not the specific adversarial guarantees in the Sixth Amendment providing for notice, public jury trial, confrontation, compulsory process and counsel in "all criminal prosecutions."[10] In other words, the Court

4. *See infra* text accompanying notes 20–23.

5. SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 745 (1997) ("From the earliest beginnings until Justice Fortas's decision in *Kent* in 1966, juvenile courts operated without legal oversight or monitoring.").

6. *See, e.g.*, Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961); *Juvenile Delinquency*, HEARINGS BEFORE THE SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY OF THE SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 1ST SESS. (1959–1960); Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 7 (1965).

7. Kent v. United States, 383 U.S. 541, 556 (1966).

8. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 358 (3d ed. 1986) (detailing the Court's retreat from Lochnerian substantive activism out of concern that it was trenching on legislative prerogatives, while it maintained rigorous review of procedural due process claims).

9. *See infra* text accompanying notes 39–45.

10. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

imposed the adult model on the juvenile court not because the language of the Constitution required it, but because the adult model was considered necessary to avoid deprivations of liberty without "due process of law."[11] That interpretive approach means that, if it turns out other procedural mechanisms can be shown to be just as "fair" as the adversarial model, those mechanisms might satisfy the Constitution.

Much legal scholarship on the juvenile justice system, however, has assumed just the opposite. Most scholars seem to think it obvious that the Sixth Amendment, as well as the Fifth Amendment's right to silence, should apply to juveniles, and that juvenile procedures should be the same as or even more adversarial than those in adult court.[12] Indeed, some commentators have proposed the abolition of the juvenile justice system as a separate procedural entity.[13] Consistent with Justice Fortas' observation, abolitionists remain skeptical about the reality and potential for rehabilitation, but are much more sanguine about the benefits of traditional procedural due process. In effect, they assume that adult criminal procedural requirements are synonymous with "due process."

This Article provides a critical analysis of this premise. We argue that the pinnacle of procedural due process is *not* necessarily synonymous with adult criminal procedure requirements, and that youngsters can be afforded comparable or even enhanced procedural due process in other ways.[14] Based on concepts of justice rooted in empirical research, we present a framework for reconceptualizing due

---

11. *See infra* text accompanying notes 55–68.

12. *See, e.g.*, Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 167 (1989) ("I advocate a juvenile court that has more, rather than fewer, procedural protections available than in criminal courts."); Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 147 (1987) ("Juvenile proceedings are 'criminal' in nature when punishment is the sanction imposed. Therefore, the full trappings of the criminal process, including trial by jury in hearings open to the public, are constitutionally mandated."); Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 720–21 (1980) ("In the context ... of a delinquency adjudicatory proceeding that may lead to stigmatization and loss of liberty, the child's immaturity often requires that the constitutional protection afforded be greater than that given to adults.").

13. Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120 (1991) ("Treating juveniles differently from adults—by denying them jury trials, for example—violates the consistency norm of equal treatment for all and reminds the young that they do not have all the rights assigned to full-fledged members of the society."); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 97 (1998) ("Procedural justice requires providing youths with full procedural parity with adult defendants and additional safeguards to account for the disadvantages of youth in the justice system."); *cf.* Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 23–24 (1990).

14. Parts of this Article are based on Mark R. Fondacaro, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Behavioral Science* (Dec. 7, 2001) (paper presented at the 1st Annual Conference of the University of Florida Center on Children and the Law).

process in juvenile justice with the ultimate aim of striking an optimal balance between fairness, accuracy, and efficiency in handling delinquency cases. Rather than mechanically turning to adult criminal procedure as the gold standard of due process, we propose the adoption of a performance-based management system that draws on both modern trends in administrative law and recent advances in social science research concerning procedural justice and decisionmaking. While we believe that the procedural framework we present can and should effectively be linked to the rejuvenation of rehabilitative and preventive goals of the juvenile justice system, the merits of our procedural framework also should appeal to those committed to more punitive and retributivist regimes.

Part I of this Article briefly recaps the substantive and procedural history of the juvenile court. Its primary message is that the Supreme Court's procedural reform of the juvenile justice system was based on the Due Process Clause and general principles of fundamental fairness, which leaves the door open to flexible approaches to juvenile justice procedure. Part II then plumbs developments in the broader constitutional jurisprudence of procedure, particularly in the administrative and civil law arenas, which enthusiastically endorse a flexible view of due process. With the legal groundwork laid for the proposition that juvenile justice procedure can be rethought, Part III summarizes research on "procedural justice," which suggests that the adversarial model of procedure is not necessarily the most "just," whether viewed from a subjective or objective perspective. Part IV closes with a discussion of the implications of this research, and a proposal that due process in juvenile justice be reconceptualized in a way that allows empirical research and a performance-based management system to identify those procedures that best promote fairness, accuracy and efficiency.

I. SUBSTANCE AND PROCEDURE IN JUVENILE COURT

The pendulum swings of juvenile justice in this country are a well-known story. Before the twentieth century minors were tried as adults. The advent of a separate juvenile court with a rehabilitative orientation swung the pendulum the other way. In the last two decades, however, concern about juvenile crime and pessimism about rehabilitation has pushed juvenile justice back toward the common law approach. The substance and procedure of today's juvenile court are much closer to the adult model than they were forty years ago. But that does not mean the pendulum could not swing back yet again.

A. A BRIEF HISTORY OF JUVENILE JUSTICE

Under the common law, minors charged with crime were tried in

adult court. They were exempted from criminal responsibility if they were under 7 years of age, but held fully accountable for their crimes if they were over 14. In between those ages, they were presumed irresponsible, but that presumption was rebuttable.[15] If convicted, children were often housed with adult prisoners.[16]

Around the turn of the twentieth century, a dramatic change took place. Reformers and social scientists successfully nudged the dividing line between "youthful immaturity" and "adult maturity" to late adolescence, motivated by both a desire to avoid commercial exploitation of young people, especially immigrants,[17] and a belief that youngsters were "works-in-progress" who needed additional time to prepare for the assumption of adult roles and responsibilities.[18] The legal implementation of these ideas, in full flower nationwide by the 1930s, was the juvenile court, a separate system from adult court designed to "reform" children in trouble during their formative years so they would not develop into career criminals.[19]

The rehabilitative focus of the juvenile courts was accompanied by procedural informality, the near total absence, as one commentary put it, of "law, lawyers, reporters, and the usual paraphernalia of courts."[20] Judge Mack, one of the progenitors of the juvenile court, captured the idea nicely with his idyllic image of how the court should function: "Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."[21] As this statement suggests, the logic behind the relaxation of procedure was that judicial understanding of the child's character, lifestyle, and underlying problems, and thus of the appropriate treatment, could only be obtained through informal conversation.[22] The

15. *See* Stanford v. Kentucky, 492 U.S. 361, 368 (1989) (describing common law doctrine).

16. PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS 37 (2d ed. 1991) ("If convicted, [the juveniles] were cast into a common prison with older culprits to mingle in conversation and intercourse with them, acquire their habits, and by their instruction to be made acquainted with the most artful methods of perpetrating crime." (quoting New York Society for the Reformation of Delinquents, 1826 Annual Report 4 (1827))).

17. DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205–07 (1980).

18. *See* Ainsworth, *supra* note 13, at 1095 (describing the "child-study movement" of the late nineteenth and early twentieth centuries).

19. PLATT, *supra* note 1, at 9–10 (stating that by 1917, all but three states had a separate juvenile court, and by 1932, over 600 juvenile courts existed nationwide).

20. DAVIS ET AL., *supra* note 5, at 745.

21. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

22. SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 90 (1995) (calling the juvenile court process a "conversation"); *see also In Re* Gault, 387 U.S. 1, 25–26 (1967) ("The early concept[ ] . . . of the [j]uvenile [c]ourt proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over [his or her] problems, by paternal advice and admonition . . . ." (quoting Mack, *supra* note 21, at 120)).

adult adversarial process was thought to be counterproductive for children; it was seen as stigmatizing, traumatizing, and above all else irrelevant, given that the primary role of the court was to encourage rehabilitation, not to determine beyond a reasonable doubt whether the child committed a bad act.[23]

By the end of the 1970s, however, the pendulum had swung back toward the adult model, with a vengeance. On the substantive side, observers of the juvenile system, including social scientists, had concluded that "nothing works" when it comes to the rehabilitation of wayward juveniles.[24] Simultaneously, the perception grew among the public that increasingly younger children were committing increasingly heinous crimes, while a lax juvenile justice system exacerbated the situation by failing to impose appropriate punishment and capitalize on its deterrent effect.[25] Moreover, many came to believe that the treatment-oriented juvenile system contributed to moral failure among youth by failing to instill a sense of personal responsibility for behavior.[26] Finally, even those who were not convinced that harsh punishment of juveniles was appropriate were concerned about abuse resulting from the absence of procedural rules in juvenile court.[27]

The changes stemming from these various reactions were legion. On the substantive side, many jurisdictions eliminated or downgraded "status" offense jurisdiction for conduct like truancy and unruly

23. Mack, *supra* note 21, at 109, 119–20 (speaking of the need to avoid the stigmatization of criminal prosecution and stating that the primary determination to be made in juvenile court was not whether the juvenile is guilty but "what is he, how has he become what he is, and what had best be done in his interest and the interest of the state to save him from downward career"); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) (describing the interest of juvenile court reformers in avoiding the punitive atmosphere of adult court).

24. Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1160 (1968) ("The evidence from [social science] studies suggests that the publicized goals of the juvenile court are rarely achieved."); *cf.* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.").

25. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 806–09 (2003) (describing public, legislative, and media responses to the perceived threat of juvenile offenders, and how these responses interacted to create a "moral panic").

26. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 84 MINN. L. REV. 347, 390 (1999) ("The juvenile court's treatment ideology denied youths' personal responsibility, reduced offenders' duty to exercise self-control, and eroded their obligations to change. If there is any silver lining in the current cloud of "get tough" policies, it is the affirmation of responsibility.").

27. *See, e.g.*, Margaret K. Rosenheim, *Standards for Juvenile and Family Courts: Old Wine in a New Bottle*, 1 FAM. L.Q. 25, 29 (1967) (Adult-like protections are recommended because of the need to reach "an accommodation between the aspirations of the founders of the juvenile court and the grim realities of life against which, in part, the due process of criminal and civil law offers us protection."). *See generally* ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978).

behavior,[28] lowered the age at which children could be transferred to adult court for most crimes, and *required* transfer for a wide array of serious offenses, in some states for children as young as eleven.[29] Many states softened the impact of the latter two changes by providing that juveniles who were convicted in adult court be subject to juvenile sentences or "blended" juvenile/adult sentences for most crimes.[30] But the overall thrust of juvenile justice reform in the 1970s and 1980s was to "get tough" on young offenders, a movement that ran parallel to the increased sentences being handed out to adult offenders during this time period.[31] This tendency has pretty much continued unabated through today.[32]

More relevant to this Article, however, are the procedural changes that occurred. These were prompted in large part by the U.S. Supreme Court in a series of decisions between 1966 and 1971. The overall impact of these decisions was to convert the juvenile court from an informal conversation into an adversarial proceeding.

B. THE SUPREME COURT'S PROCEDURAL REVOLUTION IN JUVENILE JUSTICE

As late as 1966, the Supreme Court had not decided a single case involving juvenile court issues.[33] In part, this judicial abstinence had more to do with the Court's changing view of its role as a national guardian of liberties than with juvenile court per se. Only in the early 1960s had the Court even begun looking seriously at the *adult* criminal process: the Sixth Amendment's right to trial counsel was not imposed on the states until 1963,[34] while the Fifth Amendment's privilege against self-incrimination and the Sixth Amendment right to confront and cross-examine witnesses did not apply nationally until 1964 and 1965,

28. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act, which required states receiving delinquency prevention funds to divert or de-institutionalize youth who had been referred for status offenses, 42 U.S.C. § 5601, and today prohibits detention of such offenders "in secure detention facilities or secure correctional facilities." 42 U.S.C. § 5633(a)(11)(A) (2000).

29. For a description of transfer statutes and a state-by-state review as of 1997, see OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 106 (2000), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html. This document notes that, as of 1997, twenty-two states and the District of Columbia no longer impose any minimum age requirement for at least one method of transferring jurisdiction to adult court. *Id.*

30. *Id.* at 108 (describing the blended sentences movement and the states that have adopted it).

31. Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 624–33, 659 (1999) (comparing developments in adult and juvenile sentencing regimes and noting the increasingly punitive approach toward both groups).

32. *Id.* at 623 ("As a result of these legislative changes, juveniles today face more severe sanctions than at any time since the inception of the juvenile justice system nearly a century ago.").

33. Monrad G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 167 (1966).

34. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

respectively.[35] But part of the Court's silence on juvenile court issues was also due to the aforementioned lack of judicial oversight, even by the lower courts, over this separate system of justice.

Once the Supreme Court commenced its scrutiny of the juvenile courts, however, it did so with alacrity. Its first decision addressing a juvenile justice issue, *Kent v. United States*,[36] involved a sixteen-year-old boy who was summarily transferred from juvenile to adult court once he admitted to the police that he had participated in housebreaking, robbery and rape.[37] The Court held, unanimously, that the failure to convene a transfer hearing to determine whether Kent should have been tried as an adult violated the Constitution.[38] The era of unbridled discretion in juvenile justice was suddenly over.

The year after *Kent*, the Supreme Court considered another case with even more important ramifications for juvenile justice procedure. In *In re Gault*,[39] a fifteen-year-old boy was committed by a juvenile court to a state industrial school for a maximum of almost six years (the remainder of his minority status), simply for making an obscene phone call to a neighbor.[40] Had Gault been an adult he would have faced no more than a $50 fine or a maximum of two months in jail.[41] Furthermore, of course, he would have been entitled to the full panoply of procedural safeguards guaranteed to adults.

Instead, he received virtually no procedural protections. Neither Gault nor his parents ever received formal notice of the charge.[42] At the initial hearing the day after his arrest, with no lawyer and in the absence of *Miranda* warnings (which the Supreme Court had required in adult proceedings the year before),[43] Gault was questioned by the judge about whether he made lewd calls.[44] He was then detained, without explanation as far as the record showed, in a children's detention home for three or four days pending his adjudicatory hearing.[45] At that hearing the probation officer, testifying unsworn, described un-Mirandized statements made by Gault while he was in the detention home, and also presented a "referral report" to the judge, which the Gaults were not

35. Pointer v. Texas, 380 U.S. 400, 403 (1965) (Sixth Amendment right to confront and cross-examine witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (Fifth Amendment privilege against self-incrimination).

36. 383 U.S. 541 (1966).

37. *Id.* at 544, 546.

38. *Id.* at 553–54.

39. 387 U.S. 1 (1967).

40. *Id.* at 4–9.

41. *Id.* at 8–9.

42. *Id.* at 5.

43. Miranda v. Arizona, 384 U.S. 436 (1966).

44. *Gault*, 387 U.S. at 5–6.

45. *Id.* at 6.

allowed to see.[46] Nor was the complaining neighbor present at the hearing.[47] Had she been there, Gault or his parents would have had to conduct cross-examination themselves, because his family had not retained a lawyer, and had never been told they could do so.[48]

The Arizona Supreme Court concluded that this barebones procedure, one replicated every day in juvenile courts around the country, did not offend the requirements of the "due process concept."[49] But the United States Supreme Court reversed, holding that when a delinquency proceeding might lead to confinement in a state institution the state must provide: (1) written notice to the child and to the child's parents of the charges against the child, provided far enough in advance to allow for preparation for the hearing; (2) a right to counsel, including the right to have counsel appointed free of charge if the child or family is unable to afford one; (3) the right to confront and cross-examine witnesses, who are required to testify under oath; and (4) the privilege against self-incrimination.[50] In short, juveniles were now to receive most of the procedural protections accorded adults under the Sixth and Fifth Amendments.

Three years later, in *In re Winship*,[51] the Supreme Court administered the final touch to its "adultification" of the juvenile delinquency process.[52] The Court first held that adults may not be convicted of a criminal offense unless its essential elements are proven beyond a reasonable doubt.[53] It then applied that holding to the adjudication phase of a delinquency proceeding.[54] With this decision, and within a five-year period, the Court had imposed virtually all of the adult criminal procedure guarantees on the juvenile process.

An important aspect of these three Supreme Court decisions that is often ignored, however, is their legal basis. Adult criminal procedures flow primarily from the Sixth Amendment. *Kent*, *Gault* and *Winship*, on

46. *Id.* at 7.

47. *Id.*

48. *Id.* at 10.

49. *Id.* at 4.

50. *Id.* at 31–59.

51. 397 U.S. 358 (1970).

52. We do not mean to neglect *Breed v. Jones*, which applied the Double Jeopardy Clause to juvenile delinquency proceedings, with Chief Justice Burger himself writing that "it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a [delinquency] proceeding." 421 U.S. 519, 529 (1975). However, this decision is not "procedural" in the sense we have been using that word in this Article to refer to the rules governing the adjudication process. Rather, it determined whether an acquittal or conviction in juvenile court may be relitigated in adult court. Furthermore, within three years of *Breed*, the Court upheld a state procedure that allowed prosecutors in juvenile court to appeal referee decisions acquitting a child of delinquency charges, a decision that significantly undermines the thrust of *Breed*. Swisher v. Brady, 438 U.S. 204 (1978).

53. *Winship*, 397 U.S. at 364.

54. *Id.* at 368.

the other hand, relied almost exclusively on the Due Process Clause. That difference affords a much greater degree of flexibility in constructing a procedural framework.

The Court recognized this fact in all three decisions. For instance, in *Kent*, in the sentence immediately following his well-known "worst of both worlds" observation, Justice Fortas stated "[t]his concern, however, does not induce us . . . to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with . . . serious offenses . . . must be applied in juvenile court proceedings."[55] Thus, Fortas stated, while juveniles in Kent's situation were entitled to counsel, access to relevant records, and a statement of reasons for the transfer decision, the transfer hearing could still be "informal" and need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing."[56] In short, the procedural adequacy of the hearing granted in *Kent* was to be measured not by the extent to which it copied or incorporated all of the requirements of a criminal trial but rather by whether it functioned in accordance with principles of fundamental fairness.[57]

In *Gault* as well, the Supreme Court anchored its requirements regarding notice, counsel and confrontation in what it called "due process standards," which it cautioned should be "intelligently and not ruthlessly administered" in the juvenile context;[58] only the right to silence, found in the Fifth Amendment, was derived from a more specific Bill of Rights guarantee. In essence, Justice Fortas' majority opinion adopted a hybrid approach. The majority's result was identical to that reached by Justice Black in his concurring opinion, which argued that the procedural safeguards the Court adopted were tied to the explicit text of the Fifth and Sixth Amendments,[59] but its rationale was closer to Justice Harlan's concurring and dissenting opinion, which contended that all of the constitutionally mandated procedural safeguards in the delinquency context should stem from the Due Process Clause and derive from basic concerns about "fundamental fairness."[60]

For this reason, Harlan's framework for analyzing procedural due process is worth a closer look. He argued that the process due in juvenile proceedings should depend on three criteria:

[F]irst, no more restrictions should be imposed than are imperative to

55. Kent v. United States, 383 U.S. 541, 556 (1966).

56. *Id.* at 561–62.

57. *Id.*

58. *In re* Gault, 387 U.S. 1, 21 (1967).

59. *Id.* at 64 (Black, J., concurring) ("I do not vote to invalidate this Arizona law on the ground that it is 'unfair' but solely on the ground that it violates the Fifth and Sixth Amendments made obligatory on the States by the Fourteenth Amendment.").

60. *Id.* at 65–78 (Harlan, J., concurring in part and dissenting in part).

> assure the proceeding's fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.[61]

Applying these criteria, Harlan would have required that those subjected to juvenile delinquency proceedings be afforded only the rights to notice, state-paid counsel if institutionalization was possible, and a written record maintained by the court.[62] Although the majority obviously believed that these prescriptions were not enough, its reliance on the Due Process Clause at least did not unalterably foreclose use of Harlan's more flexible analysis.

In *Winship*, the Supreme Court relied on the same hybrid formula it adopted in *Gault*. As in *Gault*, the Court equated the adult and juvenile standards, but the basis of the decision was the Due Process Clause (as it had to be, given the absence of any specific supporting constitutional language for either adults or juveniles).[63] The Court also emphasized that its holding with respect to juveniles would not have "any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place," nor would it affect the informality of the pre-hearing or dispositional phases of the juvenile process.[64] Justice Harlan wrote a concurring opinion agreeing that any lesser standard of proof "offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment"[65] and emphasizing the minimal impact that holding would have on the rest of the juvenile system.[66]

None of this should obscure the fact that these three decisions made the juvenile court look very similar to adult criminal court. In his dissent in *Winship*, Chief Justice Burger was not persuaded by the assurances in the majority and concurring opinions in that case. He warned:

> What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive . . . . I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not

61. *Id.* at 72.

62. *Id.*

63. This was the main complaint of Justice Black in dissent. *In re* Winship, 397 U.S. 358, 377-86 (1970) (Black, J., dissenting).

64. *Id.* at 366 (majority opinion).

65. *Id.* at 369 (Harlan, J., concurring).

66. *Id.* at 375.

reflect our own by having these courts abolished.[67]

At the time, these comments could have been read as somewhat hyperbolic. But, as outlined earlier in this Article, a number of factors, including the Court's case law, have brought Justice Burger's forecast close to fruition.[68]

At the same time, the conceptual difference between the two procedural systems is real. That much Burger helped make clear in joining *McKeiver v. Pennsylvania*,[69] the decision that provided the strongest signal yet that the Supreme Court is serious about differentiating the legal bases for the adult and juvenile systems. Decided one year after *Winship*, *McKeiver* held that, in contrast to adults, juveniles do not have a constitutional right to a jury trial.[70] As in *Kent*, *Gault* and *Winship*, instead of grounding its analysis in the constitutional text of the Sixth Amendment—which guarantees the right to a public, jury trial in all criminal prosecutions—the Court framed the issue in due process terms.[71] The difference between *McKeiver* and the Court's other juvenile justice decisions is the extent to which it emphasized this point.

Justice Blackmun's plurality opinion began by stressing that *Kent, Gault*, and *Winship* had consciously refrained from equating juvenile delinquency with adult criminal proceedings.[72] Then, in a more definitive tone than it had in the past, the Court asserted that the adequacy of procedural requirements in the context of delinquency adjudications should be assessed solely according to whether they "'measure[d] up to the essentials of due process and fair treatment.'"[73] Using this metric, the Court reasoned that because a jury is not necessary to obtain "accurate" results,[74] and because of the need to maintain the "intima[cy]" of the juvenile proceeding and avoid the "clamor" of the adversarial process, the failure to provide juries to juveniles would not be fundamentally

67. *Id.* at 376 (Burger, C.J., dissenting).

68. *See also* Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 712–13 (noting that many states have amended the policy section of their juvenile code to emphasize punishment over rehabilitation).

69. 403 U.S. 528 (1971).

70. *Id.* at 545.

71. *Id.* at 541 ("[O]ur task here with respect to trial by jury, as it was in *Gault* with respect to other claimed rights, 'is to ascertain the precise impact of the due process requirement.'" (citation omitted)).

72. *Id.* at 533 ("The Court, however, has not yet said that all rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding. Indeed, the Court specifically has refrained from going that far.").

73. *Id.* at 533–34 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)). The Court continued: "The Court has insisted that these successive decisions do not spell the doom of the juvenile court system or even deprive it of its 'informality, flexibility, or speed.'" *Id.* at 534 (quoting *In re* Winship, 397 U.S. 358, 366 (1970))).

74. *Id.* at 543.

unfair.[75] In language that sums up application of the due process model to juvenile court, the Court added: "We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial."[76]

This crowning decision of the due process era in juvenile justice made clear that, despite the "adultification" of the juvenile court, Justice Harlan's fundamental fairness theory had taken root. Yet legal scholars who recite that *Gault* ushered in an era in which juvenile offenders secured the procedural safeguards afforded adult criminal defendants tend to gloss over the fact that, with the exception of the right to silence, these safeguards were derived from the Due Process Clause of the Fourteenth Amendment.[77] Beyond this nonchalant attitude toward the legal basis of the Court's decision, there seems to be an assumption that the Court's fundamental fairness theory is merely an artifact of its decision to exclude the juvenile justice system from the ambit of the "criminal prosecutions" mentioned in the Sixth Amendment. In fact, however, this theory is entirely consistent with the Court's adoption of a more flexible approach to procedural questions in other settings.

II. OTHER VISIONS OF PROCEDURAL DUE PROCESS

> [T]he Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem, and consequently has been too prone to indulge in constitutional codification. There is a need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes.[78]

Although these comments, made by Judge Friendly in 1975, were foreshadowed by *McKeiver* four years earlier, and could be seen as critical of *Gault*, they were not prompted by the Court's juvenile justice decisions but rather were a reaction to developments in administrative law in the early 1970s. In particular, Friendly's criticism was aimed at *Goldberg v. Kelly*,[79] a 1970 Supreme Court decision about procedure in

75. *Id.* at 545, 550.

76. *Id.* at 547.

77. Indeed, a number of articles, mostly by students, declare that *Gault* was based on the Sixth Amendment. David T. Huang, *"Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 445 (2001) ("*Gault* unequivocally concluded that the Fifth and Sixth Amendments apply to juveniles with equal force as they do to adults."). Yet the Court has clearly held otherwise. In *McKeiver*, five justices (the four-member plurality plus Justice Brennan) agreed that juvenile delinquency proceedings are not "criminal prosecutions." *See* McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1978) (plurality opinion); *id.* at 553 (Brennan, J., concurring in part and dissenting in part). Justice Harlan appeared to agree as well, but did not do so explicitly. *Id.* at 557 (Harlan, J., concurring).

78. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1316 (1975).

79. 397 U.S. 254 (1970).

welfare cases that could be called the *Gault* of administrative law, because of its preference for the traditional adversarial model of dispute resolution. Unlike *Gault*, however, *Goldberg*'s influence was short-lived. In 1976, the year after Judge Friendly's article was published, the Court decided *Mathews v. Eldridge*,[80] a case that has come to define modern trends toward administrative, as opposed to judicial, models of procedural justice.

The due process revolution in juvenile justice is usefully compared to these parallel developments in the administrative/civil realm, because the latter developments reinforce the case for a fundamental fairness approach to juvenile justice that is not wedded to adult criminal procedure safeguards. In its due process decisions involving adult administrative settings, the post-*Mathews* Court has definitively rejected a one-size-fits-all procedural model and instead seems to be following Judge Friendly's injunction to experiment with different approaches. Even in situations that involve significant deprivations of juveniles' liberty and property, application of *Mathews'* framework has produced decisions that resonate with Harlan's and Friendly's flexible approach rather than with *Gault*'s equation of procedural due process with the adult criminal trial.

A. Due Process in the Administrative Setting

Before the 1970s, administrative decisionmaking, like decisionmaking in the juvenile process before 1966, was not a major concern of the Supreme Court.[81] On those few occasions when the Court held that the Constitution required any process in such proceedings, it only demanded a little, "however brief" and "however informal."[82] Above all, the Court saw the due process inquiry as a flexible one, immortalized in Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*:

> Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula.... Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment

80. 424 U.S. 319 (1976).

81. *See* William F. Fox, Jr., Understanding Administrative Law 142, 144 (1997) (explaining that the "Supreme Court did not seem particularly interested in questions of agency procedure through the first 100 years or so of our constitutional history," then decided a few important cases in the early part of the twentieth century, but subsequently merely "tinkered with agency due process over the next fifty years").

82. Londoner v. City of Denver, 210 U.S. 373, 386 (1908) (holding that a landowner is entitled to contest a city assessment not only in writing, as the city permitted, but also through a hearing where the landowner "shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal").

> inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.... The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished —these are some of the considerations that must enter into the judicial judgment.[83]

This context-dependent due process analysis was seriously challenged, albeit only briefly and indirectly, with the Court's decision in *Goldberg*. In *Goldberg*—decided three years after *Gault*, the same term as *Winship*, and one year before *McKeiver*—the Supreme Court addressed the procedure for terminating a mother's welfare benefits under the Aid to Families with Dependent Children program. The Court began somewhat ambivalently. It agreed with the petitioner that some sort of pre-termination hearing was required because loss of benefits would put her in an "immediately desperate" situation.[84] But it also stated that the hearing "need not take the form of a judicial or quasi-judicial trial."[85] Rather it need merely meet "minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved."[86] To this point, the opinion sounded like something Justice Harlan or Justice Frankfurter might have written.

But it soon became *Gault*-like. The Court held that the "minimum" procedural requirements for carrying out benefits terminations were: (1) timely and adequate notice detailing the reasons for termination; (2) the opportunity to appear personally before the decisionmaker and make oral arguments and present evidence (entitlements the Court thought necessary given the likely difficulty many welfare recipients would have with written submissions and the usefulness of "mold[ing one's] argument to the issues the decision maker appears to regard as important"); (3) the opportunity to confront and cross-examine adverse witnesses; (4) the right to retain an attorney at personal expense; (5) a statement by the decisionmaker indicating the reasons for the determination and the evidence relied on; and (6) an impartial decisionmaker who was not involved in making the decision under review.[87] The only adult criminal procedural safeguards missing from this list were the right to counsel at state expense and the right to a jury or written findings of fact.

Goldberg was roundly criticized, both within the Court and without,

83. 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).
84. *Goldberg*, 397 U.S. at 264.
85. *Id.* at 266.
86. *Id.* at 267.
87. *Id.* at 267–71.

for imposing costly procedures on a simple decision.[88] Yet the case led to what some commentators called a "due process explosion"[89] throughout the early 1970s, lasting until the decision in *Mathews*.[90] During this period courts tended to "judicialize" administrative decisionmaking procedures in any setting where individuals faced the potential loss of liberty or property, broadly defined, at the hands of a government actor.[91] In essence, they treated due process more like a "mechanical instrument" than the "delicate process of adjustment" envisioned by Justice Frankfurter.

In the midst of this due process explosion, it was often forgotten that the *Goldberg* Court had, in theory at least, agreed with Justice Frankfurter about the need for due process to be context-dependent. The Supreme Court's decision in *Mathews* six years later recognized as much, and took the principle very seriously. Its emphasis on the flexible nature of due process ultimately put the brakes on the constitutional codification of traditional adversarial safeguards outside adult criminal setting.

The issue in *Mathews* was whether Social Security disability benefits, as distinguished from the welfare benefits at issue in *Goldberg*, could be terminated without an evidentiary hearing. Seven members of the Court concluded that no hearing is required in such situations.[92] Justice Powell's opinion for the Court first established that due process analysis requires consideration of the following three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

88. Judge Friendly's opposition has already been noted. *See* Friendly, *supra* note 78, at 1284–85, 1316. In *Goldberg* itself, Justice Black argued that the costly procedures required by the majority would reduce the funds available for welfare recipients and make welfare bureaucrats more reluctant to find poor individuals eligible for welfare. 397 U.S. at 278–79 (Black, J., dissenting). Professor Mashaw documented these concerns in his study of New York's welfare system. *See generally* Jerry L. Mashaw, *The Management Side of Due Process: Accuracy, Fairness and Timeliness in Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

89. This phrase was first used by Judge Friendly, and has been adopted by a number of commentators. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 8–9 (1985); FOX, *supra* note 81, at 144; Friendly, *supra* note 78, at 1268.

90. Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

91. *See* Friendly, *supra* note 78, at 1300–01; Richard J. Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1980 (1996) (noting that the "combined effect" of *Goldberg* and other Court decisions between 1970 and 1972 was "to expand the scope of due process protection to encompass hundreds of new 'property' and 'liberty' interests" and that "*Goldberg* suggested that the government is required to provide a formal trial-type hearing before it could deprive anyone of any of the newly recognized constitutional interests").

92. *Mathews*, 424 U.S. at 349.

requirement would entail.[93]

Applying this test, the Court found that termination of disability benefits was not as significant a hardship as termination of welfare benefits (because people with disabilities often have other sources of income);[94] that adversarial procedures were not as important when the focus of the decision is objective medical evidence, as is the case with disability determinations;[95] and that the costs of elaborate hearings "may in the end come out of the pockets of the deserving."[96]

Mathews' three-part test, often described as requiring a balancing of fairness, accuracy, and efficiency considerations,[97] has provided the framework for most of the Supreme Court's due process cases since the mid 1970s.[98] The framework provides considerable latitude for informality and flexibility, and has now been applied to a wide variety of contexts.[99] The contexts most relevant for our purposes are those involving juveniles.

B. JUVENILE DUE PROCESS IN NON-DELINQUENCY SETTINGS

A precursor to *Mathews* by one year, but completely consistent with its approach, is the Supreme Court's decision in *Goss v. Lopez*.[100] There the Court held that a hearing is required before schools may subject students to suspensions of ten days or more, because without a hearing the chance of an erroneous deprivation of the student's entitlement to a public education is too high.[101] However, the Court went on to conclude that the due process "hearing" need only consist of an informal meeting between the student and the relevant school official, at which the student is informed of the charge and is permitted to tell his or her side of the story; a judicial hearing, the Court noted, "might well overwhelm administrative facilities in many places and, by diverting resources, cost

93. *Id.* at 335.

94. *Id.* at 340–41.

95. *Id.* at 343–44.

96. *Id.* at 348.

97. *See generally* 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 (1976).

98. We say "most" decisions, because for a time a segment of the Court seemed willing to ignore even the minimal requirements imposed by *Mathews* and adopt a position of complete deference to legislative decisionmaking. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 681 (1977) (holding that lack of procedure associated with paddling a student was the product of a "legislative judgment, rooted in history"). However, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541–48 (1985), the Court explicitly rejected that approach.

99. *See, e.g.*, II KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 53 (1994).

100. 419 U.S. 565 (1975).

101. *Id.* at 580 ("[T]he risk of error is not at all trivial.").

more than it would save in educational effectiveness."[102] Despite the finding that the suspension involved a non-trivial property deprivation, the Court did not refer to *Gault* or any other juvenile justice decision.

Of course, a ten-day suspension from school is not comparable to the six-year commitment that faced Gerald Gault. Outside the delinquency context, the Supreme Court decision involving the most closely analogous situation to *Gault* is *Parham v. J.R.*,[103] decided three years after *Mathews*. There, the Supreme Court addressed the issue of whether an adversarial proceeding was required prior to a juvenile's civil commitment to a state psychiatric facility by the juvenile's parents or guardians. The three-judge federal district court, relying on *Gault*, held that due process in the juvenile commitment context required adequate notice and an adversary-type pre-deprivation hearing before an impartial judicial or quasi-judicial body.[104] But the Supreme Court reversed, holding that due process was satisfied simply by an evaluation from a neutral factfinder, who could be the admitting psychiatrist.[105] Thus, Chief Justice Burger concluded for six members of the Court, if the parents or guardian seek admission and the neutral evaluator determines that evidence of mental illness exists and that the child is suitable for treatment, the child may be admitted to a psychiatric facility.[106]

In justifying this decision, the Court used *Mathews'* three-factor balancing test, looking at the first and third factors (the private interest at stake and efficiency) before examining the second, risk of error, factor. The Court conceded that civil commitment of a minor implicates the juvenile's constitutionally protected liberty interest.[107] However, the Court reasoned that this liberty interest was qualified by and coupled with the parental interest in the child's well-being. While recognizing that parents do not always act in their child's best interests, the Court was willing to assume that they normally do, an assumption that weighed against highly formal procedures when parents seek care for their children.[108] The Court also agreed with the state's argument that adversarial proceedings were an inefficient means of meeting its goals, by noting the benefits of speedy care, the need to minimize the time mental health professionals spend in admission proceedings, and the concern

102. *Id.* at 582–83.

103. Parham v. J.R., 442 U.S. 584 (1979).

104. *Id.* at 596–98 & n.7.

105. *Id.* at 607 ("[A] staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment.").

106. This was the outcome permitted by the decision, see *id.*, although the Court did not directly address the substantive criteria for commitment, only the appropriate procedures.

107. *Id.* at 600.

108. *Id.* at 604 ("[W]e conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.").

that the costs of "hundreds—or even thousands—of hearings each year . . . would come from the public moneys the legislature intended for mental health care."[109]

Finally, the Court was not convinced that adversarial procedures were needed to reduce the risk of erroneous commitment, and even suggested it might increase it. The commitment decision, the Court reasoned, is primarily a medical, not a legal, judgment and thus less in need of adversarial testing.[110] The majority even went so far as to suggest that the benefits of using adversary proceedings to assure decisionmaking accuracy in this setting were "more illusory than real."[111] Furthermore, such proceedings might pit parent against child, or the child against his or her eventual therapist, which would bode ill for both relationships.[112] Thus, the Court was "satisfied that an independent medical decisionmaking process, which includes [a] thorough psychiatric investigation . . . followed by additional periodic review of a child's condition, will protect children who should not be admitted." Further, the Court did not "believe the risks of error in that process would be significantly reduced by a more formal, judicial-type hearing."[113] The Court saw no need for either a judge or a lawyer to be involved in the process.

Although *Goss* and *Parham* are often characterized by critics as cases that deny due process protections to juveniles,[114] both decisions did in fact address issues at the heart of due process doctrine: truth seeking and fairness. For example, the comprehensive evaluation required in *Parham*, which the Court stated should "carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies [and] an interview with the child," is clearly aimed at promoting decisionmaking accuracy.[115] Moreover, although the child subject to commitment does not have the right to call or cross examine witnesses, he or she is provided with some "opportunity to be heard" through the required face-to-face interview, a procedure that *Goss* also mandates for students subject to possible suspension. At the same time, consistent with the framework outlined in *Mathews,* in neither case was the Court concerned solely with issues of accuracy and fairness of decisionmaking; it also explicitly addressed the

109. *Id.* at 605–06.

110. *Id.* at 607–09.

111. *Id.* at 609.

112. *Id.* at 610.

113. *Id.* at 613.

114. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY U. CHI. L.J. 111, 130 (2004) (criticizing *Goss*); Michael L. Perlin, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in* Parham v. J.R., 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981) (criticizing *Parham*).

115. 442 U.S. at 606–07.

government's interest in the efficient use of public resources. Thus, as noted above, in *Goss* the Court was worried about a "diversion of resources" if it required more elaborate procedures, and in *Parham* it likewise favored an investigative model over a legal adversary process in part to ensure mental health professionals spend most of their time treating youngsters in need rather than testifying in legal proceedings.

Parham is a particularly important decision for this discussion about juvenile justice, because it dealt with civil commitment. Civil commitment can result in a serious deprivation of liberty that can often be as intrusive and as long in duration as the detention experienced by juveniles charged with felony offenses,[116] yet the procedure outlined in *Parham* is a far cry from that endorsed in *Gault*. That observation raises what, for us, is a central question. Which procedural approach makes the most sense from the standpoint of promoting fair and accurate decisionmaking, public safety, and the well-being of children under the jurisdiction of the juvenile justice system: the adversarial procedural framework outlined in *Gault*, or the investigative framework outlined in *Parham* and inspired by *Mathews*?

We believe that, whatever the merits of *Gault* at the time it was decided, today the investigative model informed by the Supreme Court's analysis in *Parham* and *Mathews* holds the greater promise for promoting these goals. We are *not* suggesting that the specific procedures permitted in *Parham* (much less in *Goss*) be mechanically transplanted to the context of delinquency adjudications. But we are arguing that the *Mathews*-inspired investigative approach in *Parham* and *Goss* is far more *promising* as a means of achieving a fundamentally fair system. To live up to that promise, the procedural framework guiding the juvenile justice system must be informed by modern social psychological research aimed at understanding and promoting fairness, accuracy and efficiency.

III. CONTRIBUTIONS FROM SOCIAL SCIENCE: SOCIAL PSYCHOLOGICAL RESEARCH ON PROCEDURAL JUSTICE

Recent due process cases have insisted on a multi-factor balancing analysis that places as much emphasis on the risk of reducing error, the

116. The average length of civil commitment has shortened considerably in the past decade, to fewer than forty-five days. *See* RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 814 (4th ed. 2004). However, perhaps twenty-five percent of those committed stay in the hospital for over four years. *Id.* The majority in *Parham* did recognize that juveniles who are committed are entitled to periodic review, 442 U.S. at 617, and Justice Brennan argued that such review should be more adversarial in nature. *Id.* at 633–34 (Brennan, J., concurring in part and dissenting in part). However, the majority refused to address this issue in any greater detail, stating simply "we have no basis for determining whether the review procedures of the various hospitals are adequate to provide the process called for or what process might be required if a child contests his confinement by requesting a release." *Id.* at 617. Thus, as it stands, the staff physician procedure that is adequate for initial admission may be adequate for periodic review as well.

"value" of procedural safeguards, and systemic efficiency as it does on liberty and property interests. Although some due process traditionalists find this trend alarming, social and behavioral scientists, many of them with legal training, are producing social psychological research that suggests this type of balancing analysis may come closer to achieving "just" procedures than a rigid adherence to the adversarial model. In particular, research on "procedural justice" points to several ways in which non-adversarial methods may be superior to the traditional adult criminal procedural safeguards in certain settings.

The study of procedural justice in the social sciences largely traces its roots to the pioneering work of John Thibaut, Laurens Walker, and their colleagues in the 1970s. This group coined the procedural justice term to refer to the social psychological effects of varying decisionmaking procedures, particularly with respect to the effects these procedural variations have on fairness judgments.[117] In their groundbreaking work, *Procedural Justice: A Psychological Analysis*,[118] Thibaut and Walker used empirical methods to explore differences between the adversary model followed by American courts (where the parties are responsible for producing evidence) and the inquisitorial model employed by courts in many European countries (where the judge or a judicial delegate takes on the investigative role).

In carrying out this research, Thibaut and Walker addressed both "objective" and "subjective" aspects of procedural justice. As defined by Allan Lind (a sometime colleague of Thibaut and Walker's) and Tom Tyler, objective procedural justice is concerned with "the capacity of a procedure to conform to the normative standards of justice, to make either the decisions themselves or the decision-making process more fair by, for example, reducing some clearly unacceptable bias or prejudice."[119] Thus, objective aspects of procedural justice include accuracy of outcome and the collection and use of available information. Subjective procedural justice, in contrast, concerns the "capacity of each procedure to enhance the fairness judgments of those who encounter the procedures."[120] Here the perceptions of the participants are the important focal point. The following discussion begins with a description of findings from Thibaut and Walker and others concerning subjective procedural justice, and then examines empirical findings relevant to objective procedural justice. These two aspects of social science research roughly correspond to the fairness and accuracy considerations identified in *Mathews*. The discussion in this Part ends with a brief comment on how

117. *See* John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1289 (1974).

118. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

119. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 3 (1988).

120. *Id.* at 3–4.

social science can also address the efficiency prong of the *Mathews* analysis.

A. SUBJECTIVE PROCEDURAL JUSTICE/FAIRNESS

One of the most significant findings of Thibaut and Walker's early research was that satisfaction with dispute outcomes is substantially affected by factors other than winning or losing the dispute.[121] Thus, even those who fail to prevail on their claim nonetheless exhibit greater outcome satisfaction and express greater willingness to accept the decision when the procedures used to reach the decision are *perceived* as fair. "This finding," Lind and Tyler have noted, "showed that it is possible, by judicious choice and design of procedures, to enhance the quality of social life without increasing the outcomes available for distribution under the procedures."[122] As Thibaut and Walker themselves explained, subjective justice is "crucial because one of the major aims of the legal process is to resolve conflicts in such a way as to bind up the social fabric and encourage the continuation of productive exchange between individuals."[123] In short, subjective procedural justice is an important means of getting both litigants and society at large to buy into the decisions that resolve disputes.

Thibaut and Walker's early work, reported in the mid-1970s, suggested that both disputants and the public preferred the adversary system to the inquisitorial system, because they perceived the former system's procedures to be fairer. More specifically, Thibaut and Walker found that their research participants felt the adversarial mode gave them more *decision control* (ability to "unilaterally determine the outcome" of the case) and *process control* (ability to determine "the development and selection of information"), and particularly more of the latter.[124] These perceptions of fairness, in turn, led to a greater willingness to accept verdicts arrived at through adversary procedures rather than those that resulted from an inquisitorial process,[125] a preference shared even by individuals from countries with inquisitorial systems.[126]

---

121. *See, e.g.*, THIBAUT & WALKER, *supra* note 118, at 80 (reporting a study finding that adversary representation produced "greater satisfaction of the involved parties with the judgment, quite independently of both the favorableness of the judgment and the participants' beliefs concerning the issue under adjudication").

122. LIND & TYLER, *supra* note 119, at 26.

123. THIBAUT & WALKER, *supra* note 118, at 67.

124. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546 (1978).

125. *Id.* at 547. *See generally*, THIBAUT & WALKER, *supra* note 118, at 118 ("It is perhaps the main finding of the body of our research, therefore, that for litigation the class of procedures commonly called 'adversary' is clearly superior.").

126. THIBAUT & WALKER, *supra* note 118, ch. 8 (finding respondents in four countries—the United States, France, West Germany and Great Britain—all preferred the adversarial process to the inquisitorial process).

Thibaut and Walker's findings in this regard were compromised, however, by the fact that they generally tested only "pure" models of adversarial and inquisitorial systems. As they described these models, "[i]n a pure adversary system, openly biased advocates urge their clients' cases before a passive decisionmaker," while a "pure inquisitorial system" involves "an expert decisionmaker [who] actively investigates the claims of unrepresented litigants."[127] In other words, Thibaut and Walker's pure inquisitorial model prevented disputants (or their representatives) from presenting their own view of the facts unencumbered by interference from the decisionmaker.[128]

More recent research, often using less rigid depictions of the two models, calls into question Thibaut and Walker's conclusions about adversarial and inquisitorial procedures. For instance, subsequent research directly contradicted their finding that culture does not affect preferences for certain procedures.[129] Furthermore, a number of studies have challenged the finding that *Americans* prefer the adversarial process. Based on this second generation of research, Lind and Tyler concluded that "pure" adversarial and inquisitorial procedures both have something to offer in terms of subjective procedural justice, and that policymakers "should be able to design a variety of hybrid procedures that engender high[er] levels of perceived fairness."[130]

A brief accounting of some of this newer research demonstrates the type of hybrid procedures that might be perceived as fairer than either of the pure forms. For example, Blair Sheppard conducted two studies in which participants were offered four, rather than two, procedural options: an inquisitorial procedure that involved a single investigator; an inquisitorial procedure that involved two investigators (one for each side of the dispute); a pure adversary procedure; and a hybrid procedure that allowed the disputants to present their evidence and arguments but also allowed the judge to ask questions and seek clarification.[131] He found that

127. John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 (1972).

128. For a summary of the criticism of Thibaut and Walker's use of "pure" adversarial and inquisitorial models, see Blair H. Sheppard, *Justice is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953, 953–55 (1985).

129. Rebecca A. Anderson & Amy L. Otto, *Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison*, 31 SOC. BEHAV. & PERSONALITY 557 (2003) (reporting a study of Dutch and Americans finding that participants showed a clear preference for their own country's procedures); Kwok Leung, *Cross-Cultural Study of Procedural Fairness and Disputing Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 898, 903 (1987) (finding that Chinese preferred mediation to adversarial procedures and preferred bargaining and inquisitorial adjudication substantially less, and that Americans were ambivalent about which of the first two procedures they preferred).

130. LIND & TYLER, *supra* note 119, at 117.

131. Sheppard, *supra* note 128, at 956–57. Thibaut and Walker conducted a similar study, using these four models plus a fifth, bargaining model, but did not provide disputants with the ability to present their own side of the case in any of the inquisitorial conditions. Thibaut et al., *supra* note 117,

while the subjects preferred the adversary procedure to the two inquisitorial procedures, the great majority preferred the hybrid procedure above any of the other three, apparently because they perceived it as the most fair.[132]

A similar study, conducted by Norman Poythress and his colleagues, asked mental health professionals to compare the adversarial process to a number of hybrid alternatives in the context of a simulated medical malpractice scenario.[133] One hybrid involved the exclusive use of court-appointed medical experts subject to cross-examination by the parties. A second hybrid hypothesized a court-appointed research psychologist who surveyed experts in the field as to their evaluation of various diagnoses and treatments relevant to the facts of the case.[134] The adversarial model, in contrast, relied on the parties to find and examine the experts. Participants evaluated these alternatives in terms of their preference for the procedure and its perceived fairness, among other variables.[135]

Results revealed that each of the hybrid procedures compared favorably with the adversarial procedures in almost all respects. The hybrids fared significantly better in terms of perceived accuracy, process control, fairness, satisfaction regardless of outcome, control of outcome, and overall preference.[136] The adversarial model was rated most favorably only with respect to "voice" (involvement in the process).[137] As Poythress and his colleagues noted, while this latter finding reflected "the relatively unbridled control over case presentation with that model, subjects' consistent assignment of more favorable ratings to hybrid models on other dimensions suggests a willingness to relinquish some of that control in return for the enhancement of other procedural justice attributes."[138] Accordingly, the results suggested that "there are variations in the standard adversarial trial procedures that will permit us to optimize all criteria for a just system and escape the dilemma of a system that purchases fairness at the expense of (objective and subjective) accuracy."[139]

Donna Shestowsky's recent research regarding preferences for dispute resolution methods arrived at similar results.[140] Noting that, due

---

at 1275–79 & n.25.

132. *See* LIND & TYLER, *supra* note 119, at 87.

133. Norman Poythress et al., *Procedural Preferences, Perceptions of Fairness and Compliance with Outcomes: A Study of Alternatives to the Standard Adversary Trial Procedure*, 18 LAW & HUM. BEH. 361 (1994).

134. *Id.* at 363.

135. *Id.* at 365.

136. *Id.* at 373.

137. *Id.*

138. *Id.*

139. *Id.* at 375.

140. Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Close,*

to the growth of alternative dispute resolution mechanisms such as mediation, the "legal landscape has changed remarkably" since Thibaut and Walker's work in the 1970s, Shestowsky conducted three experiments designed to investigate preferences for "nonadjudicative" as well as "adjudicative" procedures.[141] All of the experiments involved a claim for damages.[142] In order, they investigated whether preferences for a given procedural model were influenced by (1) the relative status of the disputants (in terms of age and standing in the community); (2) the party's role in a dispute (plaintiff or defendant) where the facts favored one side; and (3) the party's role in a dispute in which the facts were equally favorable to both the defendant and plaintiff.[143]

Shestowsky found that participants' preferences for procedures were consistent across all the three experiments. Of particular interest here, she found that, regardless of condition, fewer than ten percent of the participants rated adjudicative procedures (involving a judge as decisionmaker and lawyers for both sides) as their preferred method of dispute resolution.[144] She also found that, across all conditions, disputants preferred "direct control over the presentation of evidence (rather than using a representative to do so)."[145] Again, these results, which are representative of a considerable body of research,[146] contrast with the early findings of Thibaut and Walker, who found, using "pure" adversarial and inquisitorial models, that participants are partial to adversarial procedures and lawyers.

These three studies concluding that hybrid procedures are preferred to the pure adversarial and inquisitorial models are all subject to methodological criticism. For instance, the participants in Shestowsky's study were Stanford students, who might have felt more comfortable representing themselves than would many others.[147] And in all three

---

Modern Look at an Old Idea, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004).

141. *Id.* at 213, 230–31.

142. *Id.* at 246.

143. *Id.* at 230, 239.

144. *Id.* at 246 ("Configurations that would represent an adjudicative model (one in which a neutral third-party makes a binding decision, each party has a lawyer who presents evidence, and the rules of law apply) did not obtain a first choice rating by even 10% of the participants in any of the experiments.").

145. *Id.* at 240.

146. Tom R. Tyler, *Procedural Justice Research*, 1 SOC. JUST. RES. 41, 45 (1987) ("Often, . . . litigants' conceptions of fair process differ from the need to have a formal trial and can be accommodated in informal dispute resolution settings."); *see also* William Austin et al., *Effect of Mode of Adjudication, Presence of Defense Counsel, and Favorability of Verdict on Observers' Evaluation of a Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 281, 297 (1981) (finding that criminal defendants are least satisfied when an adjudicative procedure yields an unfavorable outcome, contradicting previous studies that had suggested that adjudicative procedures are the most preferred dispute resolution procedure within all outcome conditions).

147. Shestowsky, *supra* note 140, at 239.

studies, the stakes involved were minimal, meaning their results might not be generalizable to criminal prosecutions and similar types of disputes.[148] Finally, all three studies were conducted in the "laboratory," using mock scenarios, not disputants involved in actual cases (an external validity complaint that is also true, it should be noted, of Thibaut and Walker's work).[149] At the least, however, this type of research calls into question the latter's findings that adversarial procedures are superior from a subjective procedural justice perspective.

Surveys of those who have actually experienced differing types of dispute resolution in the criminal process also challenge that conclusion. A "meta-analysis" of such surveys, some of which involved offenders charged with very serious crimes, found that victim-offender mediation and family conferencing (often with no judges or lawyers involved) were consistently more successful than traditional criminal justice in fostering defendants' perceptions of fairness (with 91% of offenders whose cases were handled in mediation finding the process fair, versus 78% of those whose cases were handled by a court).[150] Similar differences were found in terms of defendants' satisfaction with the handling of their cases (84% to 73%);[151] their perception that they had an opportunity to tell their stories (88% versus 64%);[152] their perception that their opinions were adequately considered (72% versus 55%);[153] their assessment of the decisionmaker's fairness (91% versus 63%);[154] and their satisfaction with the outcome (77% versus 67%).[155] The differential in *victims'* reaction to nonadjudicative and adjudicative procedures was generally even more

148. The scenario in Shestowsky's study involved damage to a $800 bicycle, *see id.* at 239, while Poythress' hypothetical involved a psychiatric malpractice suit, posed to mental health professionals, Poythress, *supra* note 133, at 366, and Sheppard questioned undergraduates and airport passengers, Sheppard, *supra* note 128, at 956–57. However, other studies producing similar results have been more closely related to the criminal setting. *See* Leung, *supra* note 129, at 903 (using a reckless driving scenario resulting in physical injury in a study finding no strong preference for adversarial over mediation procedures); Austin et al., *supra* note 146 (survey of criminal defendants finding dissatisfaction with adversarial process when outcome is unfavorable).

149. See THIBAUT & WALKER, *supra* note 118, at 4.

> [W]e have made no attempt to reproduce the richness of variety and detail that exist in the courtroom and elsewhere in the legal process. Therefore, our settings do not—and do not attempt to—represent in any complete way the settings to which applications can be made. Nor do our subjects faithfully represent the personae of the courtroom. With few exceptions, we have studied university students—from the undergraduate college and the law school.

Id.

150. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 179–80 tbl.1.

151. *Id.* at 181 tbl.2.

152. *Id.* at 183 tbl.3.

153. *Id.* at 185 tbl.4.

154. *Id.* at 187 tbl.6.

155. *Id.* at 193 tbl.9.

marked, again in favor of the former.[156]

Both experimental research and participant surveys suggest that alternatives to the traditional adversarial procedure are often perceived as more fair and more accurate. Whether the latter perception is correct has also been the subject of empirical study.

B. Objective Procedural Justice/Accuracy

Objective procedural justice aims at constructing procedures that promote accurate decisionmaking. A major challenge to evaluating objective justice, of course, is the criterion variable: when is a decision accurate? As Lind and Tyler asked, "how is one to know which defendants are truly guilty or innocent?"[157] Perhaps because of these methodological difficulties, the research on objective procedural justice is decidedly less robust, and thus less definitive, than the research on subjective procedural justice. Even Thibaut and Walker conceded, however, that what they called "autocratic" procedure, in which both process and decision control is delegated to a third party, "is most likely to produce truth."[158] Their continued preference for the adversary model stemmed from their belief that "the fundamental objective of the legal process" is not "the discovery of truth" or "the realization of the most accurate view of reality," but rather "the attainment of distributive justice," which they asserted the adversary system, with its requirement that the parties present their own view of the evidence, is most likely to achieve.[159]

These conclusions were derived primarily from examinations of the ability of adversarial and inquisitorial procedures to reduce bias and increase the amount and accuracy of information used by the decisionmaker. Thibaut & Walker produced the groundbreaking research in this area as well, and much of it did appear to favor the adversarial process. For instance, one of their studies found that subjects who were exposed to new evidence using adversarial procedures relied less on their existing biases than participants in the inquisitorial condition.[160] In another study, this time with Lind as their colleague, they found that, while law students acting as attorneys usually gathered about the same number of facts regardless of whether they were placed in an adversarial or inquisitorial role, attorneys in the adversarial condition

156. *Id.* at 179–93 tbls.1–9. Many of the studies described in this meta-analysis involved random assignment. *Id.* at 169–70. In some, however, parties chose mediation or refused it; the former group therefore may have been predisposed to see mediation as beneficial.

157. Lind & Tyler, *supra* note 119, at 19.

158. Thibaut & Walker, *supra* note 118, at 547.

159. *Id.* at 556.

160. Thibaut & Walker, *supra* note 118, at 41–53; *see also* John Thibaut et. al., *supra* note 127, at 397.

engaged in a more thorough investigation of the facts when the evidence was unfavorable to the student-attorneys' clients.[161]

Their research did not all point in one direction, however. First, Lind and Tyler have noted that, contrary to the conclusion one might draw from the finding reported just above, "there is no real evidence in the original experiment that inquisitorial procedures suffer from premature cessation of investigation."[162] More importantly, a third Thibaut, Walker & Lind study, which used the same methodology as the latter study but examined the *accuracy* of the facts presented, produced results that were not supportive of the adversarial process.[163] This study found that when the evidence favored the client or was balanced, attorneys in both conditions presented evidence that reflected the facts of the case. When the facts weighed against the client, however, the adversarial attorneys were much more likely to present biased evidence, creating the impression that the facts were more evenly balanced than they were.[164]

This research suggested that inquisitorial procedures may result in the presentation of more accurate and less biased information.[165] To test these propositions further, Sheppard and Vidmar studied the effect of adversarial and inquisitorial procedures on the preparation of witnesses and their impact on the decisionmaker, using students as lawyers, witnesses and judges.[166] They found that, while witness biasing did not occur in the inquisitorial condition, "adversary procedures create lawyer role demands that in turn may result in the biasing of witness testimony."[167] Additionally, the data suggested that the biased testimony influenced the decisionmaker.[168] A second study by Vidmar and Laird found that bias may be produced simply by labeling a witness the plaintiff's or the defendant's. This research found that witnesses subtly varied phrasing of their testimony depending on whether the plaintiff, the defendant or the court called them, enough so that a three-judge panel, while perceiving the witness appointed by the court to be "neutral," were more likely to find for the plaintiff when the witness testified for the plaintiff, and for the defendant when the witness was called by the defendant.[169]

---

161. THIBAUT & WALKER, *supra* note 118, at 41–53.

162. LIND & TYLER, *supra* note 119, at 114.

163. THIBAUT & WALKER, *supra* note 118, at 28–40.

164. *Id.*

165. As Lind and Tyler point out, "[o]ne interpretation of the results of this study might be that the inquisitorial procedure leads to better information gathering and presentation." LIND & TYLER, *supra* note 119, at 25.

166. Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOL. 320, 322 (1980).

167. *Id.* at 329.

168. *Id.*

169. Neil Vidmar & N.M. Laird, *Adversary Social Roles: Their Effects on Witnesses'*

As with much of the research on subjective procedural justice, the generalizability of this experimental work to the real world can be questioned. But impressionistic evidence from observers of our legal system supports the surmise that the adversarial process obstructs access to evidence and produces biased information, especially as it operates in the criminal justice system. American prosecutors are routinely blamed for failing to disclose exculpatory evidence or information that could be used to challenge the credibility of witnesses.[170] Defense attorneys commonly raise obstructionist objections and introduce questionable evidence in an effort to create reasonable doubt.[171] In contrast, in more inquisitorial systems such as those in many European countries, the practice of judicial investigation substantially reduces the pressure on the parties to produce or withhold evidence to win a case.[172] Coaching of witnesses is unethical,[173] and the evidence produced does not depend on prosecutorial whim or the energy or resources of the defense.[174] On objective measures as well, the adversarial system may not provide the optimal procedure.

C. EFFICIENCY

Research providing statistical information is likely to have its most conspicuous impact in connection with this third prong of the *Mathews* test. The costs of certain procedures, both in terms of direct expenditures on the process and in terms of the monies thereby diverted from other parts of the system are, in theory at least, more quantifiable than either subjective or objective justice. Social science can therefore make

---

Communication of Evidence and the Assessment of Adjudicators, 44 J. PERSONALITY & SOC. PSYCHOL. 888 (1983). It should be noted, however, that this study did not involve a witness testifying for the other side, which might have reduced the biasing effect.

170. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697–703, 720–30 (1987) (cataloguing scores of instances in which prosecutors failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), but only nine cases in which discipline was considered and only two which resulted in serious sanction).

171. One judge is particularly adamant in making this claim. HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 141 (1996) ("Given the probability that the defendant is guilty, the defense attorney knows that the defendant will win only if counsel is successful in preventing the truth from being disclosed—or, failing that, misleading the jury once it is disclosed. So, when the defendant is guilty, the defense attorney's role is to prevent, distort, and mislead." (emphasis omitted)).

172. Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1093–94 n.22 (1975) (Under an adversary model, "the adversaries are often reluctant to exchange information about the evidence discovered, while the nonadversary agency entrusted with preparation of the case for trial will, as a rule, transmit all it has unearthed to the court.").

173. *Id.* at 1088–89 (In a nonadversary system, "[t]he parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial. 'Coaching' witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice.").

174. *See generally* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 582 (1973) ("An official inquiry must . . . disregard possible interparty arrangements, and pursue the search for the real truth.").

contributions here as well.

Unfortunately, to date, there appear to be no studies directly comparing the costs of inquisitorial, adversarial, and hybrid procedures in a given legal setting. But the Supreme Court's assumption, in cases like *Mathews* and *Parham*, that adversarial procedures are more expensive is not unreasonable, especially if such procedures include the jury trial. Indeed, it may be because of its expense that the American criminal process rarely actually uses the adversarial process,[175] and instead relies primarily on plea-bargaining, which is itself inquisitorial in nature.[176]

Another cost that should be factored into the efficiency calculus is the extent to which parties to the dispute can afford the process. Privately financed evidence collection, which is the hallmark of the adversarial system, may discriminate against the poor. In an inquisitorial system, on the other hand, the judge/decisionmaker is responsible for developing the evidence and can be of significant assistance to an indigent defendant.[177]

All of this is speculative. But, as with the research on subjective and objective justice, these comments about efficiency call into question the superiority of the adversarial process.

IV. INTEGRATING LAW AND SOCIAL SCIENCE IN PURSUIT OF FUNDAMENTAL FAIRNESS: TOWARD A PERFORMANCE-BASED SYSTEM OF JUVENILE JUSTICE

The upshot of the procedural justice research is that the automatic equation of adversarial procedures and "fairness" or accuracy is not warranted. It may well be that, in some settings, alternatives to a process in which parties represented by counsel are responsible for providing and challenging evidence better promote both subjective and objective justice, and will often cost less as well. The central question raised by this Article is whether the juvenile delinquency proceeding is one of those

175. GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 469 (2d ed. 1994) (citing studies showing that 90–95% of all civil and criminal cases are settled rather than tried).

176. Gerald E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003) ("[T]he defining characteristic of the existing 'plea bargaining' system is that it is an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker."). Note, however, that an inquisitorial system can be inefficient and expensive as well. *See* Marcus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 558–81 (1997) (explaining inefficiencies of German criminal procedure).

177. *See* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 146 (Carol Steiker ed., 2006) ("Appointed defense counsel are often chronically underfunded, overworked, and of uneven competence. . . . Thus, defendants would . . . prefer a quasi-inquisitorial system, with a neutral magistrate who is charged with digging up the truth.").

settings.

Unfortunately, we cannot answer that question here. Although the research we have briefly surveyed suggests that the procedures that many consider the gold standard of due process do not deserve that status, it only begins to answer the inquiry. Since no research focusing on various alternatives in the juvenile justice setting exists, we would be foolish to suggest otherwise.

The point we can make, one that is a predicate for answering the above question, is that decisions about fundamental fairness should be *performance-based* and *management-oriented*. By that we mean to endorse the following basic tenets:

> 1. Consistent with *Mathews*, procedures should be constructed so as to promote individual and public perceptions of fairness, accurate decision making, and the efficient use of available resources in a way that in fact optimizes fairness and accuracy.
>
> 2. The best method of determining whether specific procedures meet this goal is through ongoing feedback, evaluation and reform, both in individual cases and systemically, in the experimental spirit endorsed by Judge Friendly.
>
> 3. An administrative mechanism that can manage this evaluation process must exist.

The application of these tenets to juvenile justice requires, first and foremost, that questions about the appropriate procedure in the juvenile justice system be recast into empirical hypotheses rather than framed, as they have been up to now, by reference to adult criminal procedure requirements. Whether decisionmaking accuracy and fairness are best promoted by a judge, a hearing officer, or a layperson; multiple or single decisionmakers; and the rights to cross-examination, silence and the assistance of counsel are all empirical questions.

Of course, these questions are pertinent in the adult criminal justice setting as well. A fundamental fairness/performance-based approach to answering them requires, as Justices Harlan and Frankfurter emphasized, that any special attributes of the setting in question be taken into account. In the juvenile justice context, these special aspects might include the facts that juveniles tend to be dependent on and under the authority of others, are less likely than adults to be competent to make the types of decisions that arise in the legal arena,[178] and are less willing than adults to reveal their thoughts and feelings.[179] They may also be

178. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 797 (2005) (reporting a recent study by the MacArthur Foundation "found a high risk of trial incompetence among younger teens and even mid-adolescents using the measures applied to adults").

179. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 429 (2d ed. 1997) (A "common problem" among

particularly sensitive to any failure on the part of legal actors to listen to their story and treat them with dignity.[180] Taking these considerations into account, we should be open to the possibility that juveniles charged with crime will respond better to "social-worker" judges than distant, passive decisionmakers, and that informal hearings are more likely than public, jury trials to produce an environment conducive to obtaining relevant adjudicative and dispositional facts.[181] We should also be willing to contemplate the possibilities that party control of evidence obfuscates rather than clarifies,[182] that rigorous cross-examination is not the "greatest legal engine ever invented for the discovery of truth,"[183] and that unfamiliar defense counsel and rules of evidence curb juveniles' ability to tell their story.[184] Research on "teen courts," for instance, suggests that an adjudicative process that mimics aspects of the European inquisitorial model might be more "therapeutic" for juveniles and more effective at curbing their antisocial behavior than the traditional adversarial model.[185]

---

juvenile offenders is that they "'clam up,' or, alternatively, try to present themselves as streetwise 'tough guys,' lest clinicians conclude that they are crazy [or weak].").

180. *See* Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 217 (2005) (reporting a study indicating that youth view the legal system as less legitimate and with more cynicism when interactions with legal actors are viewed as unfair or harsh).

181. The Honorable Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395, 400 (2005). Sciolino endorses a process involving:

> (1) speaking directly to the defendant rather than defense counsel; (2) working collaboratively with a treatment team; (3) being a proactive participant in a non-adversarial process; (4) applying a direct, immediate and personal approach to each . . . offender; and (5) recognizing success with praise, applause, rewards, or a graduation ceremony in the courtroom.

Id.

182. *Cf.* LIND & TYLER, *supra* note 119, at 114 (countering Thibaut & Walker's argument that the adversarial process enhances distributive justice through helping "disadvantaged" litigants by noting that the "disadvantage" is often simply a "paucity of evidence," not social or economic disadvantage).

183. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1376 (3d ed. 1940). Roger Park has described ways in which cross-examination may expose perjurers, but has also noted that "adversarial cross-examination may often be simply 'dramatized argument,'" and that "the adversarial context of cross-examination undoubtedly inhibits the asking of clarifying questions, because fear of backfire prevents advocates from delving in the unknown." Roger C. Park, *Adversarial Influences on the Interrogation of Trial Witnesses*, *in* ADVERSARIAL V. INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 131, 145–63, 166 (Peter J. van Koppen & Steven D. Penrod eds., 2004). Thus, he suggests that jurors be allowed to ask clarifying questions and that, "in high-stakes criminal cases," a lawyer assist them in this enterprise, a procedure which is, at the least, quasi-inquisitorial. *Id.* at 166.

184. *Cf.* State v. Van Sickle, 411 N.W.2d 665, 666–67 (S.D. 1987) (Courts should warn defendants who wish to proceed pro se that "'presenting a defense is not a simple matter of telling one's story,' but requires adherence to various 'technical rules' governing the conduct of a trial." (quoting WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 11-5 (1984))).

185. Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 287, 290–95 (David B. Wexler & Bruce J. Winick eds., 1996) (reporting possible psychological benefits and low recidivism

Finally, in a performance-based management system the spirit of ongoing evaluation and feedback characterizes not only the evaluation of the decisionmaking procedures, but also assessment of the system's ability to promote substantive policy objectives, such as rehabilitation, crime prevention, deterrence, restitution, and retribution. As *Mathews* itself suggested,[186] inquisitorial methods might be perceived as fairer and more accurate when the inquiry is "scientific," and thus might be preferable when the decision is a clinical judgment about whether a juvenile needs treatment to prevent recidivism (the principal goal of a preventive-rehabilitative system) rather than a moral judgment about blameworthiness and punishment.[187] Even if, however, the juvenile justice system continues its trend toward a punitive regime, the choice between the traditional adversarial model and a more investigative approach is not a foregone conclusion, as the European example illustrates. The procedural choice should not be based, as it has largely been up to now, on whether the juvenile justice system is genuinely therapeutic (and therefore does not require more "protective" adversarial procedures), but rather should be driven primarily by an empirical assessment of which procedural mix best achieves the goals of the system, whatever they are.

The choice of procedures will also be affected by other empirical considerations. It may be, for example, that certain approaches *directly* contribute to a substantive policy objective, rather than merely facilitate its implementation. For instance, some research suggests that "relational" procedures focused on promoting dignity are better at reducing recidivism independent of whether they produce outcomes the juvenile prefers.[188] Along the same lines, research suggests that the right to silence inhibits prospects for rehabilitation.[189] Another consideration

---

rates associated with teen court and noting that "the teen court model described here seems to share some important features with the Continental criminal justice system").

186. Mathews v. Eldridge, 424 U.S. 319, 322 (1976) ("The decision whether to discontinue disability benefits will normally turn upon 'routine, standard, and unbiased medical reports by physician specialists.'" (quoting Richardson v. Perales, 402 U.S. 389 (1971))).

187. However, we would be the first to concede that the latter judgments are far from infallible. *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 6–11 (2003).

188. Shelly Jackson & Mark R. Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 LAW & POL'Y 101, 116 (1999) (finding that adolescents who reported that their parents did not treat them with dignity were more likely to engage in deviant behavior); William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 160–62, 164 (analysis of fifteen studies that found that juvenile offenders who take part in mediation are up to twenty-six percent less likely to recidivate than those who go to court and commit less severe offenses).

189. *Self-Incrimination Rights Conflicts with Treatment, Home Release Programs*, 4 CORRECTIONAL L. REP. 1 (1992); *see also* Stephanos Bibas & Richard A. Bierschback, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 148 (2004) ("If encouraged in the right way, remorse and apology can help offenders cleanse their consciences and return to the moral fold," and

might be whether the chosen procedure would permit synergies with other child-based legal agendas. For example, a modern trend in family law is toward the unification of legal systems dealing with cases involving children (e.g., dependency, divorce, custody, delinquency).[190] The purpose of this unified court is to have all legal matters involving children and families addressed by a single decisionmaker rather than subject the same family to multiple jurisdictions and judges, an arrangement that might provide significant benefits to juvenile offenders.[191] Insistence on strict adversarial safeguards for delinquency cases could make this integration unfeasible, however, given the less formal procedures relied on by other family law courts. The important point is that data should be collected in an ongoing manner to assess the extent to which specified and adopted policy objectives are being met at the individual-child level and with respect to the system as a whole.

CONCLUSION

Justice Fortas was correct when he proclaimed that juvenile offenders prior to the *Kent* decision experienced the worst of both worlds, neither adequate due process protection nor effective rehabilitation. For several decades, juvenile justice reforms, instigated by lawyers and assisted by advocacy-oriented social scientists, sought to fix the juvenile justice system by focusing on providing children with adult procedural "safeguards." The reformers' hope was that children would at least get the best of one world: adult criminal due process protections. As a result, children now have adult-like procedural safeguards.

We have seen, however, that these modern procedural reforms rest on the misguided assumption that adult criminal procedures necessarily provide the ultimate in due process protections. When instead procedural due process is conceptualized in terms of fundamental fairness based on maximizing accuracy, fairness, and efficiency in decisionmaking, its implementation becomes an empirical question open to feedback and based on particular contextual demands. Procedural justice research to date casts serious doubt on the reformers' premise.

Another premise of the reformers is that the backward-looking, culpability-based system of justice is both morally superior and less subject to abuse than the preventive model.[192] Thus, along with adult

"procedure can and should make more room for the substantive values that these expressions serve.").

190. *See* Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 397 (2003).

191. *Id.* at 396 (The unified court's ability "to integrate a juvenile's behavior, environment, history—and family—into a service-oriented, therapeutic remedy" is its "greatest strength in addressing delinquency matters.").

192. *See* AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS: SUMMARY AND ANALYSIS 34-35 (1982) (recommending that "just deserts" determine sentencing in the juvenile delinquency context);

procedures have come adult liability principles. Calls for more retribution and punishment have hardened, while support for rehabilitation—Justice Fortas' other bad "world"—has diminished. While a performance-based management system focused on fundamental fairness does not require the adoption of any particular policy objective, we have argued elsewhere that a rehabilitation-oriented regime focused on risk management and crime prevention is preferable to a punishment-based model.[193] We believe that if the juvenile justice system develops a focus on both fundamental fairness and maintains its rehabilitative and preventive goals, children will truly receive the best of both worlds: procedural safeguards that have a demonstrated impact on the fairness and accuracy of decisionmaking, and intervention programs focused on principles of least restrictive intervention and crime prevention.

Feld, *supra* note 13, at 131–32 (recommending a culpability-based system because the rehabilitative approach relies on "rudimentary and unproven treatment techniques," and because the juvenile court cannot "combine successfully criminal social control and social welfare in one system").

193. *See* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children,* 1999 WIS. L. REV. 185.

***