1-1-1968

Due Process in Protective Activities

B. J. George Jr.

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

B. J. George Jr., Due Process in Protective Activities, 8 Santa Clara Lawyer 133 (1968).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol8/iss2/1

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
DUE PROCESS IN PROTECTIVE ACTIVITIES

B. J. George, Jr.*

Major expansions of due process always start small. For example, the Justices who wrote the Weeks opinion in 1914 in no way foresaw Mapp v. Ohio, Katz v. United States and their progeny. Anyone who forecast at the time Brown v. Mississippi was decided that judicial codes regulating police interrogation and identification procedures would be promulgated would have been thought a wild visionary, yet this is the thrust of Miranda and the eye-witness identification cases. The signs are abundant that the protective processes by which organs of state assume responsibility for the immature, the mentally abnormal and the disadvantaged are about to undergo the most searching judicial examination under the due process and equal protection clauses. The initial assaults on the protective principle are most evident in the two areas in which judicial participation has been standard, juvenile court proceedings and compulsory commitment of the mentally-ill, but the first skirmishes have already occurred in two areas traditionally free from judicial supervision, school administration and welfare administration. As has been true of the criminal law, the initial concern is almost always with procedures, but an inevitable by-product is judicial evaluation of the norms on which the procedures rest.7

* Professor of Law, University of Michigan.

7 The Supreme Court has made only a limited entry into substantive criminal law; in Robinson v. California, 370 U.S. 660 (1962), the defendant was punished solely for being a narcotics addict. In Powell v. Texas, 389 U.S. 810 (1967), the Court has granted review in a case of criminal prosecution of an alcoholic. On the problem of intervention into substantive law on constitutional grounds see Packer, Making the
The most striking recent case manifesting judicial control of the protective activities of the state is *In re Gault*, in which the United States Supreme Court held that in "proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed," the respondent is entitled to notice of the charges, counsel, confrontation of prosecution witnesses, and the protection of the privilege against self-incrimination both in its judicial and extra-judicial form. The direct scope of the decision is of course narrow, but the Court is already considering further limitations on delinquency proceedings; it will not be long until juvenile delinquency proceedings, and probably other forms of juvenile court proceedings as well, will be completely revised by judicial fiat. The guiding premise almost certainly will be that statements of benevolent purpose are no substitute for fairness in administration, particularly if the therapeutic aims of the protective system are unrealized in practice.

Therefore, we can expect that *In re Gault* will be cited by analogy in contexts that bear no direct relationship to the delinquency proceedings that gave rise to it; it will be used as precedent in the most expansive way. It is already possible to discern the direction of judicial interest in both norms and processes in the fields of civil commitment of the mentally-ill, school administration and welfare administration that are the subject of this article.

I. DUE PROCESS IN CIVIL COMMITMENT PROCEEDINGS

Mental health legislation, like the juvenile court procedures criticized in *Gault*, came into existence as an exercise of the protective *parens patriae* concern of the state, in this instance to protect those whose mental condition or processes were such as to make them a danger to themselves or to others. Legislation for this purpose is found in every state, much of it more than two generations old.

---


8 387 U.S. 1 (1967).

9 Id. at 41.

10 Id. at 55.

11 In re Whittington, 36 U.S.L.W. 3143 (U.S. Oct. 10, 1967) (No. 36, renumbered No. 701), cert. granted, leave to proceed in forma pauperis. For a discussion of the arguments which are presented by the case see 3 Crim. L. Rptr. 4025 (April 10, 1968).


13 See 387 U.S. at 17-24.

There is a certain amount of decisional law interpreting these statutes, though until recently it related primarily to two problems, (1) the constitutionality of the legislation itself and (2) the property rights and liabilities of those characterized as mentally ill. The first line of cases uncritically sustained the validity of the legislation as based on the parens patriae power of the state; in most respects it paralleled the decisions sustaining, on the same basis, the constitutionality of early juvenile court legislation. The second contains more decisions on a wider array of property questions than any juvenile law counterpart, but in fact affected only the small minority of mental hospital inmates or candidates who owned property of enough value to make litigation worthwhile. An occasional habeas corpus proceeding tested the legitimacy of a refusal to discharge a patient, but for the most part the decision whether to release turned on the conclusion as to whether the applicant or relator was "insane," and not on the adequacy of the administrative procedures by which that determination had been reached.

All indications are, however, that almost every aspect of civil commitment proceedings and the standards on which they are based will be re-evaluated by the courts. The emerging issues are along the following lines.

Adequacy of the substantive standards. Statutes in the great majority of states require as a condition of involuntary commitment that the person to be hospitalized suffer from mental illness, mental deficiency or epilepsy. These terms, however, are rarely defined. If
a definition is attempted, it often is either tautological or incorporates medical terminology from an earlier era that no longer corresponds to current psychiatric usage.

There must, however, be something more than illness to justify involuntary commitment. The usual standard is danger to the person or property of others or danger to the safety of the person to be committed. On the basis of this combined purpose to protect the community against acts that would be criminal if done by a "normal" person and to safeguard the person himself against physical harm, the civil commitment statutes have generally been sustained as constitutional. But a number of statutes, including recent ones, also turn on factors like the patient's "welfare" or his need for treatment. This aspect of the statutes has also been in general sustained, though reluctantly, in some of the recent decisions. However, there is no clear indication why in this instance detention is possible because it benefits the detainee and not because direct protection of the community demands it, when in other contexts only the latter ground has been viewed as constitutionally significant. As a result of legislative ambivalence toward the aims of mental health legislation, present substantive standards are ill-defined and essentially uncircumscribed authorizations under the parens patriae power for confinement of indefinite duration. The substitution in the mental health statutes of epithets for definitions is typical of a dragnet legislative approach observable in juvenile codes and criminal vagrancy statutes. A number of recent decisions have struck down

---

22 E.g., D.C. CODE ANN. § 21-501 (1967): "'Mental illness' means a psychosis or other disease which substantially impairs the mental health of a person; 'mentally ill person' means a person who has a mental illness . . . ."

23 Cf. MICH. COMP. LAWS ANN. § 330.54 (1967).

24 See LINDMAN & McINTYRE, supra note 14, at 44-48 (tables of statutory provisions); Project, 14 U.C.L.A. L. REV., supra note 14, at 872-73.

25 See cases cited note 16 supra.

26 E.g., SMITH-HURD ILL. ANN. STAT., ch. 91 1/2, § 1-8 (1966); N.Y. MENTAL HYGIENE LAW § 2(8) (McKinney 1951).

27 E.g., CAL. WELF. & INST. CODE § 5550 (West 1966); SMITH-HURD ILL. ANN. STAT. ch. 91 1/2, § 1-8 (1966); MICH. COMP. LAWS ANN. § 330.21 (1967); N.Y. MENTAL HYGIENE LAW § 2(8) (McKinney 1951).


30 See, e.g., MICH. COMP. LAWS ANN. § 712A.2 (1967): "[R]epeatedly disobedient to the reasonable and lawful commands of his parents . . . ." "repeatedly associates with immoral persons, or who is leading an immoral life," "habitually idles away his or her time," and "is in danger of becoming morally depraved"; N.Y. FAMILY CT. ACT § 712(b) (McKinney 1963): "an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."

the traditional vagrancy statutes; it is very probable that juvenile
code language and the purported tests in civil commitment statutes
will also undergo attack. But it is more likely that the gross in-
formality in commitment procedures will first engage the courts' 
attention.

Fairness of commitment procedures. One versed in the pro-
cedural safeguards surrounding a criminal proceeding is immediately
aware of the lack of emphasis placed on courtroom activity in civil
commitment proceedings; even the informal juvenile delinquency 
proceedings struck at in Gault appear as models of procedural
regularity in comparison to most mental health procedures.

The first requirement of procedural fairness is that there be
advance notice that proceedings are to be held. Though the
statutes generally provide for some form of notice, it is also common
to authorize a withholding of notice because either it would be
detrimental to the respondent's health or it might disrupt treat-
ment. If notice is given, it is very probably in conclusory terms
drawn directly from the civil commitment statute itself. It is
doubtful, in short, whether in many cases there is constitutionally
adequate notice.

A second requirement of fairness in criminal and quasi-criminal
proceedings is that there be representation by counsel. No state pro-
hibits representation by an attorney, but in only about half is counsel
required to be appointed for an indigent respondent. Even this
right is generally viewed as statutory only; there is but limited
authority that the right is constitutional. Either for lack of a
statutory obligation to appoint counsel or on the basis of a claimed
waiver of counsel, often drawn from the want of a specific request,

32 E.g., Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. Sup. Ct. 1967); Parker
v. Municipal Judge of the City of Las Vegas, 427 P.2d 642 (Nev. Sup. Ct. 1967);
"Psycopathic Personality" and "Sexual Deviation": Medical Terms or Legal Catch-
33 In re Gault, 387 U.S. 1, 33 (1967); Armstrong v. Manzo, 380 U.S. 545 (1965);
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Simon v. Craft,
182 U.S. 427 (1901).
34 See LINDMAN & MCINTYRE, supra note 14, at 25.
35 See CAL. WELF. & INST. CODE § 5557 (West 1966); LINDMAN & MCINTYRE,
supra note 14, at 23.
36 See LINDMAN & MCINTYRE, supra note 14, at 29, 100-03; Cohen, The Function
of the Attorney and the Commitment of the Mentally Ill, 44 Texas L. Rev. 424, 437
(1966); Note, The Right to Counsel at Civil Competency Proceedings, 40 Temp. L.Q.
381 (1967).
37 Dooling v. Overholzer, 243 F.2d 825 (D.C. Cir. 1957); People v. Potter, 228
N.E.2d 238 (Ill. App. 1967) (under Sexually Dangerous Persons Act); People ex rel.
corpus seeking release from hospital); Comment, 61 Nw. U.L. Rev., supra note
18, at 1002-04.
most respondents are in fact unrepresented by an attorney; if the attorney appears his role is seldom clear to him. As a result, the committee receives only perfunctory representation by counsel, less effective by far than even that which an indigent criminal defendant receives under a system of random assignment of uncompensated counsel. Moreover, even a conscientious attorney faces great difficulty in preparing his client's case adequately. The only means to obtain data about an indigent respondent's mental condition is the diagnostic commitment to a public hospital for observation that the court always has the statutory power to order. This commitment, however, is in no way subject to the control of the attorney. There is not yet any invocation of the equal protection concept paralleling the criminal procedure cases on appeal and right to counsel that requires the state to underwrite the cost of a qualified diagnostic examination by private psychiatrists.

Fairness also requires a right to be heard. The statutes generally provide for a hearing before any long-term hospitalization can be ordered. However, on the basis either of administrative activity or an ex parte judicial order, it is possible to retain a person in involuntary patient status for observation or treatment for periods of, for example, nine, thirty or sixty days before a final judicial determination of commitability is made. When the hearing is held, in only a minority of states does the respondent have the right by statute to be present. The hearing itself is brief and the evidence is predominantly either hearsay or ostensibly expert testimony delivered in conclusory terms. The respondent himself may well be examined by the court if he attends the hearing. The propriety of the order may theoretically be tested through appeal, often in the

---

38 See Cohen, supra note 36; Note, 40 Temp. L.Q., supra note 36, at 387-89.
39 See Lindman & McIntyre, supra note 14, at 37.
40 See Id. at 89-93.
43 See Lindman & McIntyre, supra note 14, at 26-27.
44 D.C. Code Ann. § 21-523 (1967) (Initial detention without court order is limited to 48 hours, but the court may order diagnostic commitment for not more than 7 additional days.).
47 See Lindman & McIntyre, supra note 14, at 27.
form of a de novo hearing in a court of general trial jurisdiction, but release is for the most part not obtained on review, but through administrative release or habeas corpus in a court other than the committing court.\(^4^9\)

It is therefore apparent that if the concerns of the \textit{Gault} case were transferred to the routine civil commitment proceeding, the inevitable conclusion would be that civil commitment proceedings almost always lack fundamental due process. For the time being, there is no direct Supreme Court authority laying down procedural safeguards for purely civil proceedings. Nevertheless, there are a few clear indications that any entry by the Court into the field will bring about major changes.

In \textit{Specht v. Patterson}\(^6^0\) the Court examined the Colorado sexual psychopath law that permitted a trial judge to make an indeterminate commitment after conviction if he found that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill."\(^6^1\) The Court decided that a statute in that form contemplated in essence a new charge leading to a different form of criminal punishment. That being so, due process required that the defendant be present and represented by counsel, have an opportunity to be heard, be able to confront and cross-examine the witnesses against him, be afforded the opportunity to present affirmative evidence on his own behalf, and be entitled to findings of fact "adequate to make meaningful any appeal that is allowed."\(^6^2\) The District of Columbia Court of Appeals, in a related vein, has held that without a new hearing there cannot be an involuntary commitment of a criminal defendant acquitted because of mental disease or defect,\(^6^3\) particularly if he did not acquiesce in the entry of the insanity defense;\(^6^4\) while the decisions turn technically on a question of statutory interpretation, \textit{Cameron v. Mullen}\(^6^5\) recognizes that there are latent constitutional issues in the problem.

Also of interest is \textit{Baxstrom v. Herold},\(^6^6\) holding that a convict

\(^{49}\) \textit{Cf. Smith-Hurd ILL. ANN. STAT.} \textit{ch. 91\%2, §§ 10-13 to -15} (1966), which in section 10-15 provides for transmission of the habeas corpus decision to the original committing court, which then enters a finding of discharge on its records. The conflict of course arises from the fact that venue for habeas corpus is at the place of confinement, \textit{Ahrens v. Clark}, 335 U.S. 188 (1948), which is seldom the place of original residence of the inmate.

\(^{50}\) 386 U.S. 605 (1967).


\(^{52}\) 386 U.S. at 610; \textit{cf. In re Gault}, 387 U.S. 1, 57-58 (1967).


\(^{54}\) \textit{Rouse v. Cameron}, 387 F.2d 241 (D.C. Cir. 1967).

\(^{55}\) 387 F.2d 193, 199 (D.C. Cir. 1967).

\(^{56}\) 383 U.S. 107 (1966). For further discussion of \textit{Baxstrom} and its aftermath,
cannot be administratively transferred to civil mental patient status at the expiration of the maximum term of imprisonment imposed on him by a criminal judgment. Equal protection requires that he receive the same procedural safeguards that the ordinary civil committee has under statute.\textsuperscript{67}

There is also recent state authority invoking constitutional safeguards in mental health proceedings, particularly the right to counsel.\textsuperscript{68} Because of their functional relationship to criminal prosecutions, criminal sexual psychopath proceedings have been the first to experience the new concern for procedural regularity inspired by \textit{Baxstrom v. Herold}.\textsuperscript{50} It is therefore probably only a matter of time until the Supreme Court confronts directly the matter of procedural fairness in civil commitment proceedings.

\textit{The question of treatment.} Insistence upon a measure of due process will no doubt be countered by the same assertion offered in opposition to efforts to bring juvenile procedures within the Constitution, namely, that considerable adjustment in the usual procedural attributes of either a criminal prosecution or a civil trial is necessary if the therapeutic goals of the protective system are to be attained. As indicated earlier, the Court in \textit{Gault} did not find this argument persuasive, particularly when it did not appear that the therapeutic ideal was being attained in practice.\textsuperscript{60} The same doubt must be expressed about civil commitment of the mentally-ill, for the laudable aims posited for the mental health system have not been attained;\textsuperscript{61} the system serves to promote the unjust warehousing of societal misfits.

Relevant studies show that the inmate and custodial worlds of a mental institution differ in no significant way from those of a prison.\textsuperscript{62} In terms of living conditions and the opportunity for


\textsuperscript{68} See cases cited in note 37, supra.

\textsuperscript{69} E.g., \textit{Huebner v. State}, 33 Wis. 2d 505, 147 N.W.2d 646 (1967); cf. Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966).

\textsuperscript{60} \textit{In re Gault}, 387 U.S. at 22-29.


work and recreation, a prison is more often than not superior to a mental hospital. Moreover, a prison inmate serving other than a mandatory life sentence can look forward to a definite time by which he can be discharged; even the lifer has the near certainty that after some period of time the governor will examine his case with pardon or commutation in view. But a hospital inmate has no such assurance.

This is, of course, a betrayal of the assumption underlying the therapeutic principle that hospitalized persons will receive treatment. In fact, however, there is no treatment of an acceptable kind available in most state institutions. Staff strength is inadequate, and salary levels are so low that many state mental health workers have only marginal qualifications. The promiscuous use of electroshock and insulin shock treatments that courts once thought to be a permissible form of "treatment" and not cruel and unusual punishment has given way to the administration of tranquilizers. These may have treatment value in some cases, but all too frequently they are used to produce placid but essentially unchanged inmates who are easier to control than patients under active psychotherapy. Quite often inmates are older persons cast off by family and society alike, kept in hospitals and asylums because American society, in unfavorable contrast to most cultures, refuses to shoulder responsibility for the declining years of the indigent and rejected. In short, procedures essentially uncontrolled by due process of law have consigned thousands of Americans to a bleak form of incarceration terminated only by death. If by chance release occurs while an inmate is still capable of leading a productive life, he is ostracized

63 See J. Katz, J. Goldstein & A. Dershowitz, Psychoanalysis, Psychiatry and Law 700-02 (1967) (otherwise unreported table prepared by a hospital inmate to support his application for habeas corpus).
64 See material cited in note 61, supra.
65 See Mental Illness, Due Process and the Criminal Defendant, supra note 56, at 171-90.
68 To indicate the magnitude of the problem, the U.S. Bureau of the Census, Statistical Abstract of the United States 79 (88th ed. 1967) indicates that at the end of 1964 there were 490,449 patients resident in state and county hospitals, and an additional 199,599 mentally retarded persons in public institutions. The total for all hospitals, including those on outpatient status, was 1,153,000. The World Almanac 690 (L. Long ed. 1967) cites from National Institute of Mental Health sources a figure of 602,690 patients resident in state and county hospitals at the end of 1964.

In comparison, the Statistical Abstract, supra, at 164, lists 214,335 resident prisoners in federal and state prisons, while the World Almanac, supra, at 692 lists 214,356 prisoners in state and federal prisons and reformatories.
as one who was "insane," in many respects to a greater extent than if he had been adjudged "criminal" or "delinquent."

Concern is beginning to be expressed whether civil commitment without treatment does not deny equal protection and constitute cruel and unusual punishment. Thus far no regular civil commitment cases have presented the issue. However, three recent federal court of appeals decisions in closely analogous situations indicate there is a duty to treat mental patients.

In *Rouse v. Cameron* the court held that one involuntarily committed to a mental hospital after acquittal on criminal charges by reason of insanity has a right to treatment enforceable through habeas corpus. The decision turns technically on an interpretation of District of Columbia legislation requiring that "a person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment." This, the court said, required a bona fide effort by hospital staff to give therapy suitable to the patient's individual needs, the adequacy of which is to be judged by contemporary psychiatric knowledge. The failure to treat cannot be justified by want of staff or facilities. The authorities marshalled by Judge Bazelon, though used in the course of statutory interpretation, are equally suited to a decision based on constitutional grounds.

A companion case applies exactly the same requirements to commitments for sexual psychopathy. Indefinite commitment under such a statute is "justifiable only upon a theory of therapeutic treatment." That being so, "lack of treatment destroys any otherwise valid reason for differential consideration of the sexual psychopath."

The possibility of incarceration without treatment was also the primary factor causing the court in *Sas v. Maryland* to express reservations about the validity of the Maryland Defective Delinquent Act. The court noted:

> But a statute though "fair on its face and impartial in appearance" may be fraught with the possibility of abuse in that if not administered


70 *See generally Note, Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 Harv. L. Rev. 1288 (1966); material cited in note 61, supra.

71 373 F.2d 451 (D.C. Cir. 1967) (For subsequent outcome see note 54 supra, and accompanying text.).


73 373 F.2d at 457-58.

74 Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966).

75 *Id.* at 473 (quoting LINDMAN & McINTYRE, supra note 14, at 308).

76 334 F.2d 506 (4th Cir. 1964).

in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society. Many of the inmates in Patuxent are there by reason of offenses against property rights. Many jurists and laymen would seriously question the wisdom of the practice of indefinitely confining young men under these circumstances. Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.\textsuperscript{78}

It is therefore evident that the foundation has been laid for the development of a constitutional right to treatment, a substantive right independent of the right to a procedurally fair hearing. A decision to this effect will of course have the same devastating impact on the compulsory commitment system that the impending prohibition against the use of criminal process against alcoholics\textsuperscript{79} poses for disposition of the chronically intoxicated.

\textit{Fairness in the return process.} If commitment procedures are loose and constitutionally suspect, the process of return to the community is even more suspect because it is largely invisible.\textsuperscript{80} Discharge is often a matter of administrative convenience; the tests applied seldom have any observable relationship to the criteria the legislature originally established for commitment.\textsuperscript{81} In the case of the elderly, the want of a place to live may very well control the decision. Many states of course provide in their statutes for some form of judicial supervision or review of the return process.\textsuperscript{82} This review, however, is almost always subsequent to an administrative decision to release the patient, so that if under the circumstances the court intervenes, it is to insist that the inmate be retained in

\textsuperscript{78} 334 F.2d at 516-17 (footnotes omitted).


\textsuperscript{80} See generally LINDMAN \& MCINTYRE, \textit{supra} note 14, at 123-30; Comment, 34 U. CHI. L. REV., \textit{supra} note 61, at 654-59; Comment, 61 Nw. U. L. REV., \textit{supra} note 18, at 1007-08.

\textsuperscript{81} LINDMAN \& MCINTYRE, \textit{supra} note 14, at 126-28.

\textsuperscript{82} D.C. CODE ANN. § 21-548 (1967) requires the hospital authorities to examine each case at least every 6 months, and to release the individual immediately if the conditions that justified the original involuntary hospitalization no longer exist. Judicial redetermination is provided under N.Y. \textit{MENTAL HYGIENE LAW} § 73 (McKinney Supp. 1967), which makes the original commitment order valid for one year, requires new proceedings before an extension can be ordered, and limits the extended periods to 2 years each. See MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT, \textit{supra} note 56, at 102-07.

Another element of unfairness is that the inmate is usually required to establish that he has recovered. Overholser v. O'Beirne, 302 F.2d 852 (D.C. Cir. 1962). The procedure under N.Y. \textit{MENTAL HYGIENE LAW} § 73 (McKinney Supp. 1967) cures this by requiring new proof of condition before a new order can be entered.
custody despite his desire to be free. This may protect the community, but it is certainly not a patient-oriented review. However, because release procedures are almost always ex parte, in most instances no one appears to advocate retention in custody if the institution elects to discharge the patient. The only exception is likely to be a case in which the patient has a criminal record and the prosecuting or district attorney intervenes to keep the patient under continued custodial control. For the most part, however, the court merely approves pro forma the administrative decision already reached.

If administrative discharge is denied or delayed, it is possible to seek habeas corpus to test the propriety of continued detention. This is, in fact, the procedural medium through which most of the present law governing mental health commitments has been developed. It is, however, a limited remedy for most inmates because it is expensive and no subsidy of litigation expenses has been provided. But one court has now applied the right of assigned counsel to a habeas corpus proceeding brought by an indigent to test eligibility for release, and other courts may follow suit. Perhaps of more importance, as federal courts begin to recognize that federal constitutional guarantees of due process, equal protection and protection against cruel and unusual punishment pertain to the mental health area, there will be increasing resort to federal habeas corpus once the patient has exhausted his state remedies. In the process, some of the due process incidental to the commitment process will begin to be applied to the return process, though if the analogy of criminal prosecutions compared to parole procedures is valid, at a somewhat slower rate.

In summary, the field of mental health law remains largely unexplored in modern constitutional jurisprudence. But the wave of probing decisions is beginning to swell, so that in a matter perhaps of months the rights of the mentally-ill to an ascertainable standard for commitment, a fair adversary commitment procedure, and medically sound treatment may well be grounded in the fourteenth amendment.

84 Under 28 U.S.C. § 2241(c)(3) (1964) federal habeas corpus is available to a state "prisoner" held "in custody in violation of the Constitution . . . of the United States." This should be a sufficient basis for federal inquiry into mental health detention.
85 Increasing judicial controls over involuntary commitment procedures will accelerate efforts to use so-called "voluntary commitments." See LINDMAN & McINTYRE, supra note 14, at 107-15; Note, 79 HARV. L. REV., supra note 70, at 1297-98. There is, of course, some question about how "voluntary" the commitment can be if the
II. DUE PROCESS IN SCHOOL ADMINISTRATION

One might say that schools, mental hospitals and prisons are the three custodial institutions that have been largely ignored by judges and lawyers. The disinterest in prisons has begun to end and we have see how mental hospitals are beginning to come under judicial scrutiny. It has only been recently that school regulations and the procedures by which they are invoked have come under attack in the courts. The Gault decision may prove to be the excuse if not the reason for expanded judicial examination of decisions by school administrators that determine whether a child continues in school. Though physical custody is not involved, deprivation of the right to receive an education is important enough to the future of the pupil and his family that protests against arbitrary administrative action can be expected with increasing frequency.

The principal problem areas in the current litigation are: schooling for minority groups; the substantive validity of dis-

person is mentally ill. See, for example, the test for waiver of criminal procedural rights in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("an intentional relinquishment or abandonment of a known right or privilege"), as elaborated in Fay v. Noia, 372 U.S. 391, 439 (1963). It is probably sufficient that there be legal remedies, including habeas corpus, to enforce the voluntary patient's desire to leave whenever he wishes. A test case may very well arise in connection with statutes, e.g., MICH. COMP. LAWS ANN. 330.19a (1967), which make release of a "voluntary" minor patient contingent on parental approval to age 21.

The Group for the Advancement of Psychiatry has recommended that control over involuntary admissions be placed in an independent "review board." Laws Governing Hospitalization of the Mentally Ill, 6 GAP REPORTS AND SYMPOSIA 141, 152-53 (No. 61, May 1966). Assuming this were not viewed as taking away constitutionally-based judicial powers, due process requirements imposed on judicial action would of course apply to the administrative substitutes as well if compelled hospitalization were the result of the administrative action. Cf. the fate of efforts to remove the substantive insanity issue from the jury in State v. Lang, 168 La. 958, 123 So. 639 (1929), Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931), and State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).


87 Pertaining more to the free exercise clause than to due process, this problem concerns the extent to which minority religious groups can be permitted to maintain special schools that do not meet minimum state standards. It should be noted that this is not a problem that affects Roman Catholic and most Jewish and Protestant parochial schools, because these schools have long met the basic educational standards required under state law. There are, however, some fringe groups that have come into conflict with the state. The two that have had the greatest difficulty are the Amish and certain congregations of Hasidic Jews. See Scalise, The Amish in Iowa and Teacher Certification, 31 ALBANY L. REV. 1 (1967); Comment, The Amish School Controversy in Iowa, 10 ST. LOUIS U.L. REV. 555 (1966); People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct. 1950), aff'd 278 App. Div. 705, 103 N.Y.S.2d 757, aff'd 302 N.Y. 857, 100 N.E.2d 48, appeal dismissed 342 U.S. 884 (1951). In each instance the religious group has felt that separation from the secular community is essential to sound religion and to survival of the body of religious believers itself, and
disciplinary regulations; and procedural due process in the administration of otherwise valid regulations.

Substantive validity of disciplinary regulations. This problem turns on the substantive content of disciplinary regulations, contravention of which may result in disciplinary proceedings. The older case law almost without exception sustained the constitutionality of the standards of dress and conduct invoked by school administrators as a basis for suspension or expulsion from school. Within the past two or three years, however, there has been a renewal of litigation in both federal and state courts, principally concerning (a) restrictions on participation in civil rights efforts, (b) sanctions imposed on married high school students, and (c) limitations on dress and hairstyles.

Efforts to control peaceful expression of opinion by high school or university students have been struck down on first amendment grounds in three recent federal decisions. In *Burnside v. Byars* the court held that an injunction should have issued against high school officials to prevent them from enforcing a ban on "freedom buttons" worn by students. In *Hammond v. South Carolina State College*, a college rule prohibiting "parades, celebrations, and demonstrations" without clearance from college authorities was ruled an invalid prior restraint on freedom of expression. In *Dickey v. Alabama State Board of Education* an injunction issued to force readmission of a student editor who ignored an official ban on student editorials "critical of the Governor of the State of Alabama or the Alabama Legislature," because the student's freedom under

---

has therefore kept its children out of the public schools and in special religious schools in which the teachers have been ineligible for state certification and the curriculum has not met minimum state standards.

Thus far the conflicts have usually been settled administratively, but the time will come when the courts will be confronted with the problem. If a religious group can in fact maintain its separate identity apart from the larger community, then it might be argued that concepts of religious freedom permit atypical forms of religious expression. If, however, young people in fact drift away in significant numbers into secular society and are cultural and vocational misfits when they do, one might conclude that the state should see that they are given whatever education the legislature or state school administrative authority concludes is essential to meaningful participation in society. If the latter view ultimately prevails, the result is, of course, a uniform degree of official coercion or suasion on all segments of society.

---

88 See generally Comment, 37 Colo. L. Rev. 492 (1965); Annot., 11 A.L.R.3d 996 (1967); Comment, 11 Welfare L. Bull. 10 (Jan. 1968).

89 E.g., Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Jones v. Day, 127 Miss. 136, 89 So. 906 (1921); Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

90 363 F.2d 744 (5th Cir. 1966).


the first amendment to communicate on a matter of public interest had been infringed.\textsuperscript{93} It seems clear that in the federal courts students are not second-class citizens where peaceful expression of opinion is concerned.

The increasing rate of teen-age marriages has resulted in regulations in many school districts either requiring a married student to withdraw from high school or limiting participation in extracurricular activities. Though there is some judicial approval of school regulations requiring the student to withdraw,\textsuperscript{94} there is a longer list of decisions holding that it is arbitrary and illegal to deny the right to schooling to one within compulsory school age or granted the right by statute to free public education, simply because of marriage.\textsuperscript{95} However, restrictions on extracurricular activities, which probably reflect the fear that under-age marriages are attractive nuisances, have fared much better; all the decisions have upheld them thus far.\textsuperscript{96} Moreover, if a girl student becomes pregnant, whether married or not, she can be required to withdraw at least until her child is born;\textsuperscript{97} the policy reasons invoked appear to combine concern for the girl's health with an effort to deter pregnancies.

School administrators appear also to prefer short hair, clean-shaven chins and loose and lengthy clothing. In three recent decisions students expelled from school because they refused to shear their Beatle-like locks were denied relief. Each court found that there was a reasonable basis for the regulation, that hairstyles do not constitute a form of expression of opinion, and that the students and their parents suffered no harm from compelled compliance with the regulation.\textsuperscript{98} None of the "beard" cases has yet come into the

\textsuperscript{93} Id. at 616.

\textsuperscript{94} State ex rel. Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).


\textsuperscript{98} Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Ferrell v. Dallas Independent School Dist., 261 F. Supp. 545 (N.D. Tex. 1966); Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). In \textit{Ferrell} and \textit{Leonard} the courts ignored the fact that the students were in musical groups earning income, so that short hair might well have affected bookings.
courts; since Negro groups often view beards as cultural symbols, it can be anticipated that the freedom of expression element will loom larger in those instances, on the analogy to Burnside v. Byars,\textsuperscript{90} than in the Beatle haircut situations.

It should also be noted that while litigation of these regulations in state courts rests on state statutes and constitutional provisions, there is an additional hurdle that must be overcome in litigating the issue in federal court. There, it is necessary to establish not only that the action in question violates state law, but that there is some independent federal constitutional or statutory ground.\textsuperscript{100} The first amendment cases\textsuperscript{101} are an obvious illustration of an independent federal ground; other bases invoked for federal intervention include the Federal Civil Rights Act\textsuperscript{102} and constitutional vagueness.\textsuperscript{103}

In summary, many of the cases that will arise can be disposed of on the grounds of procedural fairness discussed below. Since, however, suspension or expulsion even with due process is acceptable only to the degree that the underlying standard is constitutionally or legislatively valid, most expulsion cases inevitably will require an examination of the rule invoked to justify the school administrator's actions. It is entirely possible that a controlling principle may be laid down in the future that a school regulation to be enforceable must bear directly on health and safety within the school, and not be based on some undefined concept of morality or propriety embraced by an administrator or local school board. The limits of permissible regulation will in effect be defined by analogy from other areas of public regulation of private conduct.\textsuperscript{104}

\textit{Procedural due process in the administration of valid regulations}. The final problem is the scope of procedural due process in the course of disciplining, suspending and expelling students.\textsuperscript{105} The procedural protections being sought, and granted, are essentially those required by Gault—notice, the opportunity to be heard, counsel and confrontation; only the equivalent to self-incrimination

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{90} 363 F.2d 744 (5th Cir. 1966), \textit{supra} note 90 and accompanying text.
\item \textsuperscript{100} See Ferrell v. Dallas Independent School Dist., 261 F. Supp. 545, 550-51 (N.D. Tex. 1966). Exhaustion of state remedies is also required.
\item \textsuperscript{101} See cases cited in notes 90-92 \textit{supra}.
\item \textsuperscript{103} See Cohen v. Mississippi State Univ. of Agriculture and Applied Science, 256 F. Supp. 954 (N.D. Miss. 1966).
\item \textsuperscript{104} Compare Griswold v. Connecticut, 381 U.S. 479 (1965)\textsuperscript{a} (concerning contraceptive advice to married couples) with State v. Social Hygiene, Inc., 156 N.W.2d 288 (Iowa Sup. Ct. 1968) (on regulation of devices vending contraceptives).
\item \textsuperscript{105} See generally, Comment, 14 \textit{KAN. L. REV.} 108 (1965); Annot., 58 A.L.R.2d 903 (1958).
\end{itemize}
\end{footnotesize}
seems not to be of current concern in disputes between students and administrators.

The past decade has seen the emergence of limited case authority requiring that before a student can be expelled or suspended from a public school or university, due process requires that there be notice and some form of hearing, even though both may be extremely informal. The question is whether the decision in *Gault* will be invoked by analogy to accelerate the tendency to intervene.

A recent decision suggesting that it will is *Madera v. Board of Education*. When Victor Madera was requested to appear for a so-called guidance conference, his mother took the letter to a legal aid office already acting for him in a family court delinquency proceeding. An attorney from that office asked to attend the conference, but was refused admittance. The federal district court ordered that the attorney be permitted to attend any guidance conference because it could "ultimately result in loss of personal liberty to a child or in a suspension which is the functional equivalent of his expulsion from the public schools or in a withdrawal of his right to attend the public schools." The court of appeals reversed. But it is interesting to note that the potential applicability of *Gault* to disciplinary proceedings was in effect assumed by the appellate court, even though quite clearly no "commitment to an institution in which the juvenile's freedom is curtailed" was directly involved. Instead, the court emphasized language in *Gault* suggesting that its requirements do not apply to early stages of proceedings involving juveniles, and likened the guidance conference to a preliminary conference and

---

106 However, public school personnel who interrogate or search in order to obtain evidence of a crime, particularly for the purpose of turning it over to police or prosecutor, are almost certainly engaged in "state action" within the fourteenth amendment. If so, the evidence to be admissible in any criminal prosecution against a student (or teacher) would have to meet constitutional requirements for search and seizure, *Mapp v. Ohio*, 367 U.S. 643 (1961); cf. *See v. City of Seattle*, 387 U.S. 541 (1967) (search warrant required for fire inspection without consent); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (search of employee's desk without consent violated right of privacy), or interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966); *see In re Gault*, 387 U.S. 1 (1967). The applicability of search and seizure exclusionary rules to juvenile delinquency proceedings, and of all constitutional evidentiary rules to other kinds of juvenile proceedings, is one of the matters left for subsequent resolution under *Gault*.


110 386 F.2d at 788 (*quoting from In re Gault*, 387 U.S. 1, 31 n.48 (1967)).
not an adjudicational hearing.\textsuperscript{111} Therefore, it did not come within the penumbra of \textit{Gault}.

The tendency to use judicial language in contexts that the judges originally responsible for it never contemplated is great enough that in the future \textit{Gault} will very probably constitute the authority for subjecting school administrative activity to due process requirements if the outcome is an immediate termination or suspension of the claim to an education, whether primary, secondary or collegiate.\textsuperscript{112}

\section*{III. Developing Standards in Welfare Administration}

Judicial activity has been least evident in the area of welfare administration. Here too, however, there has been an increase in litigation concerning (a) investigative activities; (b) restrictions on eligibility; and (c) hearing procedures.\textsuperscript{113}

\textit{Restrictions on investigative activities.} One of the sorest points in welfare administration has been the nocturnal raid to determine if there is an unauthorized male present.\textsuperscript{114} The ostensible goal has been to ensure that all family income is accounted for, but in fact enforcement appears to be infected by a considerable degree of dominant middle class morality. The constitutionality of these searches without prior judicial authorization is doubtful after the 1967 administrative search decisions of \textit{Camara v. Municipal Court}\textsuperscript{115} and \textit{See v. Seattle}\textsuperscript{116} which forbid administrative intrusions onto property unless there is either valid consent or a judicial warrant. It seems unlikely that refusal to permit entry can properly

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{111} \textit{In re Gault}, 387 U.S. 1, 31 n.48 (1967).
\item \textsuperscript{112} \textit{In Goldwyn v. Allen}, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), a high school student was caught cheating on an examination and was denied the right to take any further examinations. Relying on \textit{Gault} the court held that the Department of Education deprived the student of her rights by imposing sanctions based solely on a letter of the acting principal without a hearing at which she might defend herself with the aid of an attorney.
\item \textsuperscript{113} For a somewhat fuller treatment, see George, \textit{The Implications of Gault for Welfare Administration}, 2 \textit{Family L.Q.}, June 1968, at —.
\item \textsuperscript{115} 387 U.S. 523 (1967) (private premises).
\item \textsuperscript{116} 387 U.S. 541 (1967) (commercial premises).
\end{itemize}
\end{footnotesize}
be made on ostensible basis for refusing or withholding benefits, since that is difficult to distinguish from the judicial sanctions for non-cooperation that *Camara* and *See* invalidated.

The problem was presented in an interesting way in *Parrish v. Civil Service Commission*.\(^\text{117}\) Parrish was fired from his position as a social caseworker for insubordination after he refused to participate in a raid on the homes of suspected welfare cheaters. Though the lower courts upheld the discharge, the California Supreme Court ordered reinstatement because he had been ordered to engage in unconstitutional activity, and insubordination could be premised only on an unjustified refusal to obey a lawful order.\(^\text{118}\)

The principal remedy, however, has come through administrative reforms. The Department of Health, Education and Welfare has amended its *Handbook of Public Assistance Administration*\(^\text{119}\) to require after July 1, 1967, that states receiving federal welfare subsidies adopt "policies and procedures for determination of eligibility that ... will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights."\(^\text{119}\)\(^\text{120}\) The amendment continues:

States must especially guard against violations in such areas as entering a home by force, or without permission, or under false pretenses, making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers, or papers, to seek clues to possible deception.\(^\text{121}\)

The result should be a modification of past abuses.\(^\text{122}\)

**Improper restrictions on eligibility.** Certain conditions attached to welfare grants by administrative action are under attack in the courts. In a California decision,\(^\text{123}\) the welfare agency was held to


\(^{118}\) In an action now pending, plaintiffs in a class action are asserting that it is unconstitutional to threaten to withhold welfare benefits unless consent is given to a search. Bradley v. Ginsberg, 67 Civ. 3047 (S.D.N.Y., filed Aug. 10, 1967), noted in 10 Welfare L. Bull. 8 (Oct. 1967).


\(^{120}\) *Handbook of Public Assistance Administration*, supra note 119, at pt. IV, § 2220, item 1.

\(^{121}\) *Id*. at pt. IV, § 2230, item 1.

\(^{122}\) See generally Comment, 10 Welfare L. Bull. 13 (Oct. 1967).

\(^{123}\) County of Contra Costa v. Social Welfare Bd., 229 Cal. App. 2d 762, 40 Cal. Rptr. 605 (1964). This case holds that the refusal of a mother to take a polygraph test for the purpose of identifying the father of her illegitimate child is not as a
have no power to condition benefits on submission to a polygraph test requested by the district attorney for use in a paternity proceeding.

In another recent case, the court ruled that the fact a family had illegitimate children could not be made the sole basis for a refusal of admission to public housing; a similar action in Alabama was terminated as moot when the housing authority withdrew its eviction notice.

Residence requirements for eligibility to receive public assistance have been declared unconstitutional in four recent federal district court opinions. The basis in part has been the equal protection clause and in part a finding that the restriction constitutes an unconstitutional limitation on interstate travel. Other similar cases are pending, and the Supreme Court has granted review.

A three-judge federal district court panel in Alabama has ruled unconstitutional an Alabama regulation terminating aid for families with dependent children (AFDC) if there is a “father substitute” in the home or cohabiting with the mother in or out of the home, and has enjoined its further invocation as a basis for denying benefits. The constitutional rationale was once more the equal protection clause, but the court also noted that the Alabama regulation in effect embodied a plan previously disapproved by the Department of Health, Education and Welfare. The court observed:

It should be noted that there is no vested right for anyone to receive public financial assistance; neither the United States nor the Alabama Constitution requires Alabama to grant financial assistance to needy dependent children. However, once Alabama undertakes to pro-

matter of law a refusal of reasonable assistance as required by California statute. Therefore, aid to her daughter could not be discontinued.

However, the county expressly conceded that “to force every individual welfare applicant or recipient to undergo a polygraph examination as a condition of present or continued eligibility would be improper.” Id. at 766.

vide a statutory program of assistance, it must do so in conformity with the constitutional mandate of equal protection. Alabama cannot pick and choose the mothers and children it will aid through the use of some classifications which are not rationally related to the purpose of the applicable statutes.\textsuperscript{131}

In a recent New York case, the court of appeals overturned a conviction of a welfare recipient based on his “wilfull act designed to interfere with the proper administration of public assistance. . . .”\textsuperscript{132} He had refused to accept work for which he was physically qualified.\textsuperscript{133} The court held that the statute comprehends only a fraudulent act designed to obtain benefits and that a refusal to work cannot be classed as fraud.\textsuperscript{134} Nor can children be used as a means of punishing adult misconduct. A New Jersey administrative ruling\textsuperscript{135} states that AFDC assistance cannot be denied to the children because a parent has committed welfare fraud, even though the parent might receive some “tangential benefit” from a grant to the children.

It may therefore be anticipated that restrictions on welfare eligibility based other than on factors of age and income will be systematically attacked in state and federal courts, and that the invocation of other considerations than these two, either directly or indirectly, will be invalidated.\textsuperscript{136}

\textbf{Right to a hearing.} There is increasing concern about the want of a requirement of a hearing before welfare benefits can be withdrawn.\textsuperscript{137} Efforts are under way to test the procedures used in California and Mississippi,\textsuperscript{138} and there have been changes in administrative practices in a few states. For example, administrative rulings in New Jersey and the District of Columbia have required that there be a high standard of proof, “beyond a reasonable doubt” in New Jersey and “reasonable and substantial evidence” in the District of Columbia, before the “man in the house rule” can be in-

\begin{itemize}
  \item \textsuperscript{131} Id. at 40.
  \item \textsuperscript{132} People v. Pickett, 19 N.Y.2d 170, 278 N.Y.S.2d 802, 225 N.E.2d 509 (1967).
  \item \textsuperscript{133} N.Y. SOCIAL WELFARE LAW § 145 (McKinney 1966).
  \item \textsuperscript{134} People v. Pickett, 19 N.Y.2d 170, 278 N.Y.S.2d 802, 225 N.E.2d 509 (1967).
  \item \textsuperscript{136} Cf. Reich, \textit{The New Property}, 73 YALE L.J. 733 (1964).
\end{itemize}
voked. The New York Board of Social Services has proposed new rules of practice for welfare agencies that would require prompt determination, a hearing, access to material necessary for preparation, the right to representation, and review by an independent agency. Transmittal 77 amending the HEW Handbook of Public Assistance Administration also (a) requires states to “inform applicants about the eligibility requirements and their rights and obligations under the program,” (b) demands that decisions declaring a person ineligible for benefits be “based on facts,” meaning “statements about eligibility requirements that have been substantiated by observation, or written records, or other appropriate means,” and (c) requires written notice of the reason for the action in specific and not conclusory terms. Because of the importance of federal funds to state welfare programs, this should have considerable effect.

The United States Supreme Court may soon require this under the Constitution. In Thorpe v. Housing Authority, the Court had before it a state court decision affirming the right of the housing authority to evict a tenant from public housing, apparently because of her election as president of a tenants' organization; she claimed that she was constitutionally entitled to notice of the reasons for terminating the lease and a hearing. While the case was pending, the Department of Housing and Urban Development (HUD) issued a circular to local authorities operating in part on federal funds, stating that “it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.” The HUD circular required local officials to keep records of evictions and the bases for them, and summaries of conferences. Since Mrs. Thorpe was still in the housing because of an injunction in her favor issued by the North Carolina Supreme Court, the United States Supreme Court remanded the matter for whatever action local authorities might wish to take under the HUD requirements. The North Carolina Court, however, did nothing, on the

---

140 10 WELFARE L. BULL. 9 (Oct. 1967) (summarizing the proposed changes).
141 Supra note 119, at pt. IV, § 2230, item 2.
142 Id. at pt. IV, § 2230, item 3.
143 Id. at pt. IV, § 2220, item 5d, pt. IV, § 2230, item 5d.
144 386 U.S. 670 (1967).
146 Quoted in Thorpe v. Housing Authority, 386 U.S. 670, 762 (1967).
ground that the HUD directive was not retroactive and thus had
nothing to do with the Thorpe eviction. The Supreme Court once
more has granted review. The Court's initial interest may have
been based on the free speech implications of the eviction, but the
specific concern manifested is over the procedures surrounding the
eviction. If, as may well be the case, the Court requires notice, con-
frontation and hearing, and perhaps the right to representation, the
earlier Gault decision offers an analogy. Whatever the specific hold-
ing in Thorpe, it is evident that procedural due process is quickly
being established as an element of welfare administration.

IV. THE FUTURE OF THE DOCTRINE

We are obviously witnessing the beginning of a new phase in
the development of constitutional doctrine. In the initial phase, when
the substantive norms and procedural systems of the common law,
civil and criminal, began to break down as the nation grew and
the population became increasingly concentrated in the cities, legis-
latures enacted new statutes to cope with new problems. Out of this
legislative activity came expanded criminal codes, juvenile court
legislation, mental health commitment proceedings, and a patchwork
of welfare and public assistance legislation, much of the latter in
response to federal grants-in-aid. Public regulation replaced private
concern. Though each new statutory system was attacked in the
courts, the basis of the attack was the legitimacy of the legislative
entry into the field, and the emphasis was on whether taxpayers or
property owners were deprived of their property without due
process of law, or whether the legislation was an improper delega-
tion of legislative power or an unwarranted interference with tradi-
tional judicial powers. For the most part, however, the courts
acknowledged that legislatures could properly act to meet new prob-
lems, whatever the increased costs to the taxpayer.

New systems, however, quickly mature into permanent estab-
ishments, and the basic motivation to help individuals tends to be
displaced by an insistence on bureaucratic regularity. Class distinc-
tions that Americans profess not to exist, but that nevertheless
operate everywhere, become reflected in the daily operation of the
system; public employees still remain people, and their personal
expectations and prejudices color public administration itself. Those
with influence and means, or those who succeed in enlisting the
patronage of the influential, are treated in a preferred way, while

others without means or influence are subject to official whim. The result is a magnification of racial and economic stratification in the community. The new step in evolution reflects the use of the powers of one part of the governmental structure, chiefly the judiciary, to control administrative excesses in other parts of that structure. Putting the matter another way, the first phase of legislative activity was concerned with assistance to classes or groups; the new phase of judicial activity has fairness in the individual case as its objective.

The path of evolution in the new phase is already reasonably well-defined. In criminal procedure, the initial effort was to cure a few gross abuses in the system. In recent years the Supreme Court has dealt with almost every detail of the criminal trial and has sought to regulate the details of police investigation as well. But it would appear that the final step in judicial reformation of criminal procedure will be use of the equal protection clause, principally in the context of representation by counsel, subsidy of defense preparation, and review, to eliminate as far as possible the factor of means as the determinant of the ultimate outcome of a prosecution. This effort to provide constitutional equality can of course be only partly successful; there is already a shortage of attorneys to represent defendants, and there are some parts of the law enforcement process, particularly the discretion exercised by police and prosecutor whether to arrest or prosecute, that are exceedingly difficult to control and that will continue to be invested to a degree by class and racial distinctions. But the fact that more and more attorneys appear in criminal cases cannot help but imbue judges and law enforcement personnel with a sense of caution. As indicated earlier, though the primary concern will continue to be with procedures, inevitably there will be a re-evaluation of the substantive norms invoked through them.

Therefore, the direction of evolution is clear from the criminal procedure field. Gault places an official constitutional imprimatur on

140 E.g., Rochin v. California, 342 U.S. 165 (1952) (brutality in obtaining evidence); Brown v. Mississippi, 297 U.S. 278 (1936) (trial court use of confession known to have been coerced); Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use by prosecution of false evidence); Moore v. Dempsey, 261 U.S. 86 (1923) (mob-dominated trial).
the same investigation into juvenile court processes; within a decade all aspects of juvenile court procedure and substantive standards will no doubt be thoroughly revamped, either by legislative action to forestall constitutional review or through judicial mandate. Specht v. Patterson,162 Pate v. Robinson153 and Baxstrom v. Herold154 may be the early warnings that an examination of mental health procedures is about to begin. The fact that welfare norms in Shapiro v. Thompson155 and hearing procedures in Housing Authority v. Thorpe156 are now to be considered by the Supreme Court suggests that constitutional regulation of the welfare fields is imminent. If welfare standards and procedures are subject to revision on constitutional grounds, it can be only a matter of time until school regulations are also reviewed. The importance of Gault, in short, does not lie as much in the specific changes it decrees for juvenile delinquency proceedings as it does in the judicial intervention in protective processes it symbolizes.

At the same time, it is evident that amplified judicial supervision of essentially social processes exposes the judiciary to a greater degree of public criticism and even hostility than it has usually experienced. As long as judicial doctrines affect only litigants or govern only judicial proceedings themselves, public interest in them is transient or non-existent. If, however, citizens feel that new decisions threaten cherished abstractions,157 that dangerous elements are no longer controlled,158 or that a sharp increase in tax rates has been dictated,159 they are likely to react sharply against the courts that have brought this about. A general acceptance of concepts like fairness, justice or due process of law may prove to be wanting if the result of invoking those concepts in a particular case is to free an undesirable from official control or to increase public expenditures on him. Continuous creation in an expanding universe may be the

152 386 U.S. 605 (1967), supra note 50 and accompanying text.
153 383 U.S. 375 (1966), supra note 57 and accompanying text.
154 383 U.S. 107 (1966), supra note 56 and accompanying text.
157 For example, the concept of freedom to buy and sell property. The Supreme Court holding that California's "Proposition 14" denied equal protection to minority purchasers and renters in Reitman v. Mulkey, 387 U.S. 369 (1967), does not eliminate the prejudice that underlay the majority vote in the referendum that adopted the outlawed rule.
158 This of course underlies fears of "crime in the streets" and "handcuffing the police." The question is not whether these fears are rational or objectively sustainable; rather, it is the citizens' belief that these conditions exist as a result of judicial decisions which is important.
159 This is an obvious result of changes in welfare law administration or of decisions declaring a right in involuntary mental patients to have qualified treatment.
inevitable outgrowth of the American system of a written constitution authoritatively interpreted by a federal judiciary; it may also be the most desirable flowering of the judicial process. But the entry of judicial power into these new fields presages a difficult period in the history of the American judicial system.