SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 19 | Issue 2 Article 15

1968

Constitutional Law--Due Process--Juvenile Court Hearings [*National Bellas Hess, Inc. v. Department of Revenue*, 753 (1967)]

Robert M. Sheahen

future harm.[41] To effectuate such a policy *Fischer* would seem to suggest that the above factors should be considered, and that if in this light accountants may be seen to have breached the duty owed to the public, then accountants should be liable to those injured under the remedial provisions of the common law and the federal securities statutes.

Fischer v. Kletz thus suggests a significant extension of accountants' liability under both the common law and the federal securities regulations. Regarding the common law argument *Fischer* indicates that accountants could be held liable for negligent misrepresentations without the necessity of the plaintiffs' meeting a fictional "gross negligence" standard as construed in *Ultramares.* In the area of the federal statutes *Fischer* again moves forward by suggesting that the plaintiffs could maintain a section 18(a) or rule 10b-5 action and continues the development of a body of law calling for complete disclosure by those in a close relationship with a corporation to foster investor protection.

JOHN Z. SZABO

CONSTITUTIONAL LAW — DUE PROCESS — JUVENILE COURT HEARINGS

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

Important, inevitable, yet inadequate,[1] *In re Gault*[2] inaugurates the institution of constitutional due process requirements in juvenile delinquency proceedings, thus heralding the rebirth of judicial fairness for juveniles while portending the imminent demise of the present juvenile court system in the United States.

As critics have been swift to point out, many of the Warren Court's major decisions[3] have often involved fact situations so appallingly unfair to the individual as to lead to only one conscionable result, notwithstanding the many problems and constitutional pitfalls encountered along the way. *In re Gault* is no exception. In 1964, Gerry Gault was 15 years old, and, as Mr. Justice Fortas implied in the majority opinion, he was a relatively normal, immature lad.[4] Trouble began for him when a neighbor told police the

[41] Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); *see* United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

boy made "obscene"[5] telephone calls to her, an offense punishable in Arizona adult criminal prosecutions by not more than 60 days in jail, a fine not over $50, or both.[6] Criminal prosecution, however, was not the law's tool for handling Gerry's case; rather, because of his youth, the boy was given a juvenile court hearing[7] where, theoretically, a "fatherly judge" might counsel him and determine his "best interest."[8]

Young Gault's "best interest" was not decided to be paternal advice on the ill wisdom of childish prank telephone calls; nor was the prescribed remedy the seeming other extreme of the adult penalty of 60 days in jail.[9] Instead, adjudging the 15-year-old a delinquent, the court in its discretion sentenced him to be confined in the State Industrial School until his 21st birthday.[10] The 6-year

[1] The decision is inadequate in the sense that, since the Court restrained itself to discussing a limited number of issues, many problems are left unsolved. *See* text accompanying notes 31-42 *infra.*

[2] 387 U.S. 1 (1967).

[3] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[4] 387 U.S. at 4-10.

[5] The first amendment issue was ignored. The amendment provides, in pertinent part: "Congress shall make no law . . . abridging freedom of speech . . . ."

[6] ARIZ. REV. STAT. ANN. § 13-377 (1956).

[7] It would not have been different outside of Arizona. "From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico." 387 U.S. at 14.

[8] Outlining the juvenile system's theory and history, Mr. Justice Fortas stated:

> The early conception of the juvenile court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career." *Id.* at 25-26.

Further basic philosophy of the system is offered in a description by the authors of the first juvenile court law:

> [T]he State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime . . . . [H]e may be treated not as a criminal . . . but as a ward of the state, to receive practically the care, custody and discipline that are accorded the neglected and dependent child . . . . Report of the Chicago Bar Committee, as quoted in 2 JUVENILE CT. JUDGES J. 10 (1960).

For a concise appraisal of the juvenile system's theory and its corresponding successes, see Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 801-10 (1966).

[9] ARIZ. REV. STAT. ANN. § 13-377 (1956).

[10] 387 U.S. at 29. In his concurring opinion, Justice Black observed some realities of theoretical care in so-called State correctional institutions:

> As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or more realistically "sentenced" to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punish-

incarceration term was more than 35 times that possible were he but 3 years older. Moreover, a person of age 18 or more threatened with such lengthy deprivation of liberty would have been insulated against such governmental action by numerous constitutional procedural safeguards, including adequate notice of the charges,[11] the right to counsel,[12] the privilege against self-incrimination,[13] and the right to confront witnesses.[14] Again, because he lacked the additional 3 years necessary for possible criminal status as an adult, Gerry Gault got none of these.[15] The complaining neighbor did not even appear at the hearing.[16]

Equipped with this arsenal of facts, the Supreme Court, reversing Arizona's upholding of Gerry's commitment,[17] marked a major milestone on the road to insuring fundamental judicial fairness for children. The initial step foreshadowing the *Gault* breakthrough had been paced off in *Kent v. United States*[18] where, after having declined for years to consider various juvenile court constitutional questions,[19] the Court held that hearings to waive jurisdiction from juvenile courts to adult courts "must measure up to the essentials of due process and fair treatment."[20] In extending this rule to hold

---

ment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penetentiary or jail. *Id.* at 61 (concurring opinion). Even if the State school could provide adequate care, the Court implied that young Gault's home environment was not of the low quality which might warrant State intervention. *Id.* at 28.

[11] U.S. CONST. amend. VI; *see* Central Ry. v. Wright, 207 U.S. 127 (1907).

[12] U.S. CONST. amend. VI; *see* Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[13] U.S. CONST. amend. V; *see* Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964).

[14] U.S. CONST. amend. VI; *see* Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[15] "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment were possible because Gerald was 15 years of age instead of over 18." 387 U.S. at 29. The Arizona Supreme Court justified authorizing juvenile courts "to disregard technical matters of procedure," on the ground that a "delinquent is the child of, rather than the enemy of society;" accordingly, the court affirmed an order dismissing the petition for Gault's release brought by his parents. 99 Ariz. 181, 188, 407 P.2d 760, 765 (1965), *rev'd*, 387 U.S. 1 (1967).

[16] 387 U.S. at 56.

[17] Emphasizing that "the child's welfare is the primary consideration," the Arizona Supreme Court stated that "we find that petitioners were not denied due process of law." 99 Ariz. at 193, 407 P.2d at 768-69.

[18] 383 U.S. 541 (1966).

[19] *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUPREME COURT REV. 167.

[20] 383 U.S. at 562.

procedural safeguards applicable not only to waiver hearings but also to the adjudicatory stage of all juvenile proceedings threatening governmental deprivation of liberty, *Gault* emphatically enunciated the principle that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[21] Where a juvenile in a delinquency hearing is subject to commitment to a State institution, the due process clause of the 14th amendment now requires that States provide the juvenile and his parents adequate written notice of the charges,[22] advise them of their right to counsel[23] and privilege against self-incrimination,[24] and afford them the right to confront witnesses and cross-examine their sworn testimony.[25]

Despite the sweeping revision in general court practice demanded by the opinion, *Gault* does not signify the immediate termination of the juvenile system.[26] Left unquestioned for the moment at least is the constitutional validity of a separate forum for juveniles accused of delinquent behavior,[27] as the Court is appar-

[21] 387 U.S. at 13.

[22] *Id.* at 33.

[23] *Id.* at 41. The Court's holding that the right to counsel adheres in all juvenile proceedings which may result in institutional confinement would seem to make certain the eventual extension of the right to counsel to adults in misdemeanor prosecutions as well as in those involving a felony. Sensing this apparent disparity, Justice Stewart said in dissent: "I find it strange that a Court so intent upon fastening an absolute right to counsel upon nonadversary juvenile proceedings has not been willing even to consider whether the Constitution requires a lawyer's help in a criminal prosecution upon a misdemeanor charge." *Id.* at 78 n.1. It must be pointed out, however, that juvenile commitment is almost always for a minimum of 3 years because of the jurisdiction limitation to children under age 18. Justice Fortas noted, but did not emphasize, this fact of minimum commitment so as to show that *Gault* does not give juveniles a greater right to counsel than adults, considering that the adult right generally adheres where commitment of 1 year or more may result. *Id.* at 37 n.60; *see* Gideon v. Wainwright, 372 U.S. 335 (1963).

[24] 387 U.S. at 55.

[25] *Id.* at 57. The Court declined to rule whether due process requires States to provide transcripts of juvenile hearings and an appellate review procedure, explaining that reversal had already been reached for other reasons and that States have not yet been held constitutionally required "to provide appellate courts or a right to appellate review at all." *Id.* at 58, *citing* Griffin v. Illinois, 351 U.S. 12, 18 (1956). The view that "the Court has gone too far in some respects, and fallen short in others," was expressed in the concurring opinion of Justice Harlan who stated, "the court must maintain a written record . . . adequate to permit effective review on appeal or in collateral proceedings." 387 U.S. at 72.

[26] For a discussion of some initial changes in practice required by the decision, see JUVENILE COURT DIGEST, June, 1967.

[27] The problem considered by the Court was restricted to determining the impact of the due process requirement upon the adjudicatory stage of juvenile court proceedings. Suggested, however, was an omen of possible extinction of the juvenile system: "The constitutional and theoretical basis for this peculiar system is — to say the least — debatable." 387 U.S. at 17. The Court also hinted that a thorough discussion of the problem may be forthcoming: "We do not in this opinion consider the impact of these con-

ently willing to allot America's juvenile justice system a last chance to help cure its own ills. The Court set down the rule demanding factfinding fairness as the minimum necessary to take the child out of the world where he gets the worst of both systems,[28] and to place him in a judicial atmosphere where he may still receive any special benefits contained in the juvenile system yet not be denied the adult system's procedural safeguards.[29]

No inconsistency with the basic philosophy of the separate system for juveniles emanates from application of constitutional protections to juvenile proceedings. On the contrary, implementation of due process concepts will help readjust the once-clear focus on the original view that a child needs greater safeguards than an adult when governmental deprivation of liberty is threatened. Prior to the creation of the separate system children were tried in the same forum as adults and were accorded equal protection against the State. In forming juvenile courts to save youthful offenders from the austerity and harshness of the adult criminal system, "the legislative intent was to enlarge, *not* to diminish, these protections."[30]

"Individualized justice,"[31] the platitudinous hallmark of juvenile treatment theory, will not be eliminated by the *Gault* decision, which applies to only the factfinding hearing, but leaves unchanged procedures allowable in preadjudication treatment[32] of juveniles and postadjudication disposition.[33] Therefore, as long as the fact of de-

stitutional provisions upon the totality of the relationship of the juvenile and the state." *Id.* at 13.

[28] *Id.* at 18 n.23; *see* Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7.

[29] Acknowledging that there are "aspects of the juvenile system relating to offenders which are valuable," the Court stated: "But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication." 387 U.S. at 22. It is generally true, however, that reputed values such as avoidance of "criminal" classification, confidentiality of police records, and guidance from kindly judges, have limited beneficial effect and may well be pretension rather than fact. *See* Note, *supra* note 8.

[30] *In re* Poff, 135 F. Supp. 224, 225 (D.D.C. 1955).

[31] "The aim of the court is to provide individualized justice for children." 99 Ariz. at 188, 407 P.2d at 765; *see* Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719 (1962).

[32] The juvenile system is therefore not required at this time to adhere to guidelines set down in Miranda v. Arizona, 384 U.S. 436 (1966). Among the questions unanswered is whether a juvenile is competent to waive effectively his right to counsel. *See In re* Butterfield, 61 Cal. Rptr. 874 (Ct. App. 1967), where a California appellate court held a juvenile's formal and literal waiver of counsel ineffectual as not made with an intelligent understanding of its consequences. *But cf.* People v. Lara, 36 U.S.L.W. 2220 (Cal. Sup. Ct. Oct. 17, 1967).

[33] As stated by the Court, "nor do we here rule upon the question whether ordinary

linquency is found in accordance with prescribed standards, *Gault* does not dictate how well a State must treat a child before or after the hearing itself. The theoretical fatherly judge is not precluded from dismissing procedural principle and dispensing his own brand of individualized justice.

Failure of the Court to set down procedural guidelines for the postadjudicatory stage of the juvenile process is undoubtedly looked upon as a major shortcoming in the eyes of those who view unregulated sentencing as the most menacing cloud over the juvenile justice landscape.[34] As the Court itself made abundantly clear, a juvenile judge's power is too often reflected in "unbridled discretion" which results in "unfortunate prescriptions of remedy."[35] Such discretion, "however benevolently motivated, is frequently a poor substitute for principle and procedure."[36] Moreover, greater harm than good may be caused by sentencing at an allegedly friendly, informal hearing.[37] Noting that "informality has no necessary connection with therapy,"[38] the Court further pointed out studies observing adverse effects on children when a proceeding's laxness is followed by sharply contrasting stern institutional discipline.[39]

Though recognizing the fatherly judge figure as more rhetoric than reality and the friendly, informal hearing as more hostile than hospitable, the Court did not feel *Gault* the proper case to take requisite measures to abolish the Star Chamber aspects of child sen-

---

due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child." 387 U.S. at 27.

[34] Unregulated juvenile sentencing is an invitation to exercise judicial whim and caprice, according to the National Crime Commission:

> And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967).

For an earlier dissimilar view, see Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L. & C. 339 (1921).

[35] "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." 387 U.S. at 19-20.

[36] *Id.* at 18.

[37] In 1921 it was recognized: "The undisciplined minds of the juveniles and most of the parents who come before the court cannot make clear distinctions between proceedings that are really friendly and paternal and those that are hostile, when the results may be alike in depriving them of liberty." Waite, *supra* note 34, at 345.

[38] 387 U.S. at 39 n.65.

[39] *Id.* at 26.

tencing[40] and insure sorely needed fundamental fairness at the disposition stage of the juvenile process.[41] Therefore, since due process is not yet required in sentencing, it is possible that the next Gerry Gault, though provided with all safeguards now demanded by the Court, may still be found delinquent and arbitrarily sentenced to 6 years in a State institution.[42]

As a converse to the view that *Gault* left too many problems unsolved and stopped too short, it is conceivable that the Court created problems and went too far by insisting upon any constitutional procedure whatsoever in the juvenile system. For despite the current system's myriad of shortcomings and the apparent necessity of *Gault* to herald the coming of correction, it does not necessarily follow that inquisition, discretion, and individualized justice must be placed on a theoretical plane substantially lower than adversity, rigid procedure, and structured sentencing. The problem with a system based on the former concepts is that it has failed — not that it must fail.[43] The day may come when public clamor for a suc-

[40] "In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. . . .'" *Id.* at 18. In 1967, even after *Gault*, a Cuyahoga County, Ohio, juvenile case was suggestive of Star Chamber arbitrariness and unfairness. A 14-year-old British citizen, expelled from a public junior high school for noncompliance with the school principal's concept of proper student hair length, was sentenced to the juvenile detention home on the ground of "truancy." The boy's father, who also wore his hair long, vehemently denounced the juvenile court's mistreatment of his son, claiming: (1) the judge was wholly without constitutional justification in jailing the boy; (2) the judge summarily rejected a request to allow the boy to be privately tutored rather than incarcerated; (3) in disregard for the confidentiality of juvenile court proceedings, the judge had actually invited reporters and cameramen, thus engendering a massive wave of publicity; (4) though inviting the news media, the judge failed to inform the British Consulate of the hearing; (5) the boy was given an insufficient standard form warning of *Gault*-prescribed constitutional rights; and (6) despite the publicity, no transcript of proceedings was made, thus perhaps precluding effective appellate review. Interview with Ernest Towner, father of Carl Towner, in Cleveland, Ohio, Oct. 25, 1967.

[41] Not only was this not the proper case to set disposition guidelines but it also was improper to go so far as to reach the issues of self-incrimination, confrontation and cross-examination, according to the concurring opinion of Mr. Justice White. "[T]his case is a poor vehicle for resolving a difficult problem." 387 U.S. at 65.

[42] ARIZ. REV. STAT. ANN. § 8-201 (1956). Notwithstanding the Court's approval of wide discretion to determine punishment in Williams v. New York, 337 U.S. 241 (1949), it is difficult to justify fully a juvenile judge's vast dispositionary power. The *Williams* decision referred to discretion "in determining the kind and extent of punishment to be imposed within limits fixed by law." 337 U.S. at 246. When the punishment limit fixed by law is 60 days in jail, as in *Gault*, it would surely be repugnant to the *Williams* principle to impose a 6-year sentence on the ground that the offense's name had been changed from "made obscene telephone call" to "is a delinquent." Even minimal application of due process and equal protection concepts would seem to dictate that juvenile courts be restricted to imposing on a child no greater penalty than an adult might incur "within limits fixed by law" for the same offense.

[43] An Ohio juvenile court judge has attributed lack of success to a paucity of finan-

cessful juvenile court system, springing from the continually increasing concern over the juvenile delinquency crisis, coerces the legislatures into providing the economic resources necessary for efficient facilities with qualified personnel. Should that day arrive, its horizon might well be shining with sufficient legal and behavioral expertise to make implementation of true individualized justice a practical possibility. But the chance looms virtually nil that the informal juvenile justice system can ever be resurrected because of the *Gault* Court's intense fastening of its rationale to the Constitution.[44]

In light of the grave necessity for correcting the juvenile system's abysmally inept response to the juvenile delinquency dilemma, the prospect is unlikely that *Gault* will be considered a judicial millstone rather than a milestone.[45] It now appears clear that, absent an astronomic increase in juvenile court quality generally, the Court may extend *Gault* principles in future decisions to engulf all requirements of due process, thus permanently cementing the constitutional stone on the tomb of arbitrary juvenile justice.[46] Perhaps the first of these anticipated decisions will be *In re Whittington*[47] in which the Court is expected to determine whether due process requires juvenile rights to bail, to speedy trial by jury, and to fact determination on proof beyond a reasonable doubt.[48] Now that the Court is firmly entrenched in the juvenile rights field, hopefully not too long a time will pass before the proper case is found for an attack on the citadel of caprice known as the disposition stage of the

---

cial support from the public: "The problems of the juvenile court arise from the failure of society to provide the necessary facilities and personnel with which to achieve the aims of its social welfare philosophy rather than from any shortcomings in the court's legal procedures." Whitlatch, *The Juvenile Court — A Court of Law*, 18 W. RES. L. REV. 1239, 1249 (1967).

[44] Mr. Justice Stewart lamented in dissent that by imposing constitutional restrictions the Court's opinion "serves to convert a juvenile proceeding into a criminal prosecution." 387 U.S. at 79. Likewise, Mr. Justice Harlan's concurring opinion implied a strong fear of an inescapable entanglement of the juvenile system and formal adversity. *Id.* at 65-78.

[45] Dramatizing the impact of due process denial, the Court noted that one of every five persons arrested for serious crimes in 1965 was under the age of 18. In that year, 601,000 children came before juvenile courts. *Id.* at 20 n.26.

[46] *See* note 27 *supra.*

[47] (Unreported, Fairfield Co. Ohio Ct. App.), *cert. granted*, 36 U.S.L.W. 3143 (U.S. Oct. 10, 1967).

[48] However, the trend toward raising child offenders to a procedural rights level equal with adult criminals has not been reflected in two post-*Gault* lower court decisions. *See In re* Wylie, 36 U.S.L.W. 2040 (D.C. Cir. July 18, 1967) (proof beyond reasonable doubt unnecessary); Commonwealth v. Johnson, 36 U.S.L.W. 2187-88 (Pa. Super. Ct. Oct. 3, 1967) (no juvenile right to trial by jury).

juvenile process. A thorough elucidation of procedural guidelines for the preadjudicatory and postadjudicatory treatment of youthful offenders is rendered mandatory as a logical successor to the *Gault* decision.

Gault saps at least some strength from the power of arbitrary juvenile judges and makes it less likely that juveniles like Gerry Gault will be capriciously denied their freedom. Their chance of being treated as fairly as juvenile court founders envisioned is increased greatly as procedure supplants discretion in the juvenile system. Accordingly, *Gault* does not pull the juvenile justice process backward[49] but serves to propel it forward to approach America's adult criminal justice system — a system of procedure immensely improved during the 75 years in which the juvenile discretionary system has failed.

ROBERT M. SHEAHEN

[49] However, Mr. Justice Stewart dissented that imposition of "the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century." 387 U.S. at 79. Objection can be made to the dissent's implication that the adult system is still adhering to 19th-century criminal processes. Unquestionably, the behavioral scientists would suggest a possible inaccuracy in the conception that the object of the adult system is punishment while the juvenile system's object is treatment. Twentieth century advances have generally caused an agreement that deterrence and rehabilitation is the two-pronged goal of both adult and juvenile systems. With the progress made in other areas, it is probably not wholly defensible to give sole applause to the juvenile system for "bringing us out of the dark world of Charles Dickens . . . ." *Id.* Without the existence of the separate forum the Oliver Twists might have suffered more injustice in the days before the adult system grew up; but the separate forum today can cause the Gerry Gaults injustice resembling the 19th-century system, whereas a single forum might insure fairness at every stage of the proceeding.