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IN RE GAULT — SUPREME COURT FORMALIZES JUVENILE COURT PROCEDURES

In juvenile court proceedings, juveniles have traditionally been denied certain constitutional rights generally guaranteed adults in criminal proceedings. Beginning with the first juvenile court in Cook County, Illinois in 1899,[1] a new philosophy of justice to the juvenile was created in the United States—that the adolescent who broke the law should not be viewed and treated as an adult offender, but rather dealt with in the same manner as a wise and understanding parent would deal with his wayward child. The child was to be considered society's child rather than an enemy of society. He was to be given understanding, guidance and protection. This concept of *parens patriae*[2] became the theoretical basis for rejecting the traditional criminal proceeding and the criminal law adversary procedure. Theoretically, if the child belonged to society and was not the enemy of society, then the interests of the state and the interests of the child were not in conflict but coincided. Since the interests coincided, there was no need for the adversary adjudicatory procedure and the procedural safeguards inherent in it. This philosophy has been incorporated into the case law of forty-two states and into the statutes of the remaining eight[3] and has been the basis for denying juveniles a wide range of procedural safeguards guaranteed in criminal proceedings.

Although juvenile courts have not been established in all fifty states, where established, they have been the subject

[1] *See* Act of April 21, 1899, § 1, [1899] Ill. Laws 131 (repealed 1965; now ILL. STAT. ANN. tit 23, § 2001 (Supp. 1966)).

[2] *See* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 12.

[3] *See* Pee v. United States, 274 F.2d 556, 561 (D.C. Cir. 1959) (Appendix "A"). *See also* Killian v. Burnham, 191 Okla. 248,130 P.2d 538 (1942); *In re* Powell, 6 Okla. Crim. 495, 120 P. 1022 (1912).

of increasing controversy. Many authorities feel that the juvenile has relinquished too many of his rights in exchange for the promise of *parens patriae* treatment. They believe that the concept of "individualized justice" laid down by the original juvenile court act of 1899 should be preserved, but that some of the adult procedural safeguards should be incorporated into juvenile procedures. These authorities are in sharp disagreement as to which safeguards should be incorporated and which should continue to be disregarded in order to assure the perpetuation of the treatment process.

A recent Arizona case, In re *Gault*,[4] considered on appeal to the United States Supreme Court, examined the constitutionality of the juvenile court system. Specifically at issue was whether a state by its juvenile code or statutes may accord a juvenile less than all the due process guarantees available in criminal proceedings. The resulting decision is forcing a major revision of juvenile court procedures throughout the fifty states.

As there was no record of the trial proceedings in the juvenile court, the facts of the case had to be pieced together on appeal. On June 8, 1964, Gerald Gault and a friend were taken into custody pursuant to a call to the police by a neighbor who had received a lewd telephone call. Gerald was then on probation for a previous offense.[5] No steps were taken to advise Gerald's parents of his arrest, and they first learned of it through a neighbor. When Mrs. Gault went to the detention home where Gerald was held, a juvenile probation officer told her the reasons for the arrest and said that a hearing would be held the following day.[6]

A petition was filed on the hearing date, but the petition was not seen by the Gaults prior to the trial court hearing. It did not refer to any factual basis for the charges it contained and alleged only that Gerald was a minor under

[4] 99 Ariz. 181, 407 P.2d 760 (1965), *rev'd*, 87 S. Ct. 1428 (1967).
[5] 87 S. Ct. at 1431-32.
[6] *Id.* at 1432.

the age of eighteen, delinquent and in need of the protection of the court. It prayed for a hearing and an order regarding his care and custody.[7]

On the day of the hearing Gerald, his mother, older brother and a probation officer appeared before the juvenile judge in chambers. The complainant was absent. None of the participants was sworn. No transcript of the proceeding was prepared. From the memory of those present, Gerald's mother recalled that Gerald said he only dialed the number and handed the telephone to his friend; the officer recalled that Gerald admitted making the indecent remarks; and the juvenile court judge remembered that Gerald admitted making one of the lewd statements. No ruling was made and Gerald was returned to the detention home. Two or three days later he was released, no reason being given for the delay in his release.[8]

On the day of Gerald's release, Mrs. Gault received a note signed by the probation officer informing her that Judge McGhee of the juvenile court had set a further hearing for June fifteenth. At that hearing Mrs. Gault asked that the complainant be present in order to establish which boy had done the talking. The judge said that complainant did not have to be present at that hearing.[9] At that hearing a probation officer's report was filed although not disclosed to Gerald or his parents. At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the state industrial school by the customary order which committed him for the period of his minority, until twenty-one, unless sooner discharged by due process of law.[10]

[7] *Id.*

[8] *Id.*

[9] *Id.* at 1433. The judge had never spoken to complainant and the probation officer had talked to her only once over the telephone on June ninth.

[10] *Id.* This order is similar to those used throughout the United States to commit a child to an industrial school, training school or reformatory school until the rehabilitative staff of that school feels the juvenile is sufficiently reformed for release.

Since no appeal is permitted by Arizona law in juvenile cases, a writ of habeas corpus was filed with the Arizona Supreme Court which referred the writ to the superior court for hearing. At that hearing, Judge McGhee testified that in arriving at his decision he had taken into account the fact that Gerald was on probation. He testified that Gerald came within the statutory definition of a delinquent.[11] The law which Gerald was found to have violated makes the offense a misdemeanor, the adult penalty for which would be a maximum fine of fifty dollars or imprisonment for two months.[12]

The superior court dismissed the writ and the Gaults sought review in the Arizona Supreme Court. Appellants assigned as error the unconstitutionality of the juvenile code[13] because it does not require that parents and children be appraised of the specific charges, does not require proper notice of a hearing and does not provide for an appeal. It was alleged further that the proceedings and order relating to Gerald constituted a denial of due process of law because of the absence of adequate notice of the charge and hearing; failure to notify appellants of certain constitutional rights, including the rights to counsel and to confrontation and the privilege against self-incrimination; the use of unsworn hearsay testimony; and the failure to make a record of the proceedings.[14]

In affirming the superior court order, the Arizona Supreme Court held that advance notice of the specific charges or

[11] *Id.* at 1433-34. See ARIZ. REV. STAT. § 8-201 (6) (1956), which provides: " 'Delinquent Child' includes . . . (a) a child who has violated a law of the state . . . ."

[12] See ARIZ. REV. STAT. § 13-337 (1956), which provides: "A person who, in the . . . hearing of any woman . . . , uses vulgar, abusive or obscene language, is guilty of a misdemeanor punishable by a fine of not . . . more than fifty dollars, or by imprisonment . . . for no more than two months."

[13] ARIZ. REV. STAT. §§ 8-201 to -239 (1956).

[14] 87 S. Ct. at 1434.

basis for taking the juvenile into custody and for the hearing is not necessary,[15] that the juvenile court has discretion to allow representation of juveniles by an attorney and that due process does not require that a child have right to counsel in delinquency preceedings.[16] It further held that a juvenile court judge is not required to advise the child in delinquency proceedings of a privilege against self-incrimination;[17] that hearsay testimony may be considered, but sworn testimony must be required of all witnesses;[18] that there is no right to an appeal from a juvenile court order;[19] and that the juvenile court has discretion to order or deny the taking of a transcript.[20] The United States Supreme Court found itself in strong disagreement with these findings.

In their brief to the Supreme Court, appellants urged that the Juvenile Code of Arizona be held invalid as being contrary to the due process clause of the fourteenth amendment. They argued that it allows a juvenile to be taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the juvenile court has virtually unlimited discretion, and in which these basic rights are denied: 1) notice of the charges; 2) right to counsel; 3) right to confrontation and cross-examination; 4) right to a transcript of the proceedings; and 5) right to appellate review.[21]

Notice of Charges

Appellants urged that proceedings before the juvenile court constituted a denial of constitutional rights because of failure to provide adequate notice of the hearings. No notice was given to Gerald's parents when he was taken

[15] 407 P.2d at 767.
[16] *Id.*
[17] *Id.* at 767-68.
[18] *Id* at 768.
[19] *Id.* at 764.
[20] *Id.* at 768.
[21] 87 S. Ct. at 1434-35.

into custody. The only written notice ever received by Gerald's parents was the note from the probation officer notifying them of the second hearing.[22]

The Arizona Supreme Court had denied appellants' claim that there was inadequate notice. That court stated that "Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home."[23] The Arizona court held that because "the policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past,"[24] due process did not require advance notice of the basis for a juvenile's arrest. It held that "the infant and his parent or guardian will receive a petition only reciting a conclusion of delinquency. But no later than the initial hearing by the judge, they must be advised of the facts involved in the case. If the charges are denied, they must be given a reasonable period of time to prepare."[25]

Speaking for the majority, Mr. Justice Fortas said:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." It is obvious . . . that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the procedure approved by the court below.[26]

Notice, therefore, to be sufficient to satisfy due process must be in writing, stating the specific charges to be considered at the hearing, and must be given sufficiently in advance of the hearing to allow the child and his parents or guardian time to prepare a defense.

[22] *Id.* at 1445.
[23] 407 P.2d at 768.
[24] *Id.* at 767.
[25] *Id.*
[26] 87 S. Ct. at 1446 (footnote omitted).

RIGHT TO COUNSEL

Appellants' second contention was that the hearings before the juvenile court were constitutionally defective because the court did not advise Gerald or his parents of their right to counsel, the hearings were held in the absence of counsel, and no express waiver of these rights was given by the child or his parents.[27]

The majority of cases on right to counsel in juvenile court hold that a juvenile has neither the right to counsel nor the right to be advised that he has such a right. The theory behind this denial was expressed by the Supreme Court of California in *People v. Dotson.*[28] That court extolled the virtues of the *parens patriae* philosophy and stated:

> It is only when by such lack of representation of the minor undue advantage is taken of him or he is otherwise accorded unfair treatment resulting in a deprivation of his rights that it can be said he has been denied due process of law.[29]

The two leading cases in favor of right to counsel in juvenile courts are In re *Poff*[30] and *Shioutakon v. District of Columbia.*[31] In the *Poff* case, the district judge held that a juvenile's right to counsel was grounded in due process. The judge agreed that juvenile proceedings were aimed at providing the care and guidance normally furnished by parents, but stated:

> [W]here the child commits an act, which act if committed by an adult would constitute a crime, then due process in the Juvenile Court requires that the child be advised that he is entitled to the effective assistance of counsel, and this is so even though the Juvenile Court in

[27] *Id.* at 1447.
[28] 46 Cal. 891, 299 P.2d 875 (1956).
[29] 299 P.2d at 877.
[30] 135 F. Supp. 224 (D.D.C. 1955).
[31] 236 F.2d 666 (D.C. Cir. 1956).

> making dispositions of delinquent children, is not a criminal court.[32]

The court in *Shioutakon* not only concluded that the juvenile had a right to counsel but also a right to be advised of his right to counsel.[33]

In resolving the controversy over right to counsel in juvenile court, the Supreme Court stated:

> A proceeding where the issue is whether the child will be found "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceeding against him."[34]

The Court stated that there has been an increasing recognition of this view and that in at least one-third of the state statutes there is a guarantee of the right to be represented by counsel, to be advised of the right, or to have a public defender assigned in juvenile court proceedings. The Court further noted that the President's Crime Commission had recently recommended that counsel be appointed wherever coercive action is expected.[35]

[32] 135 F. Supp. at 227; *accord,* Shioutakon v. District of Columbia, 236 F.2d 666, (D.C. Cir. 1965) ("[t]hat there is a need for such representation to protect the child's interests is apparent . . . . Clearly a child cannot, without the aid of counsel, competently decide whether he should exercise this right.")

[33] 236 F.2d at 670.

[34] 87 S. Ct. at 1448 (footnotes omitted).

[35] *Id.* at 1449. In further support of its position, the Court quoted W. Sheridan, STANDARDS FOR JUVENILE AND FAMILY COURTS; PREPARED IN COOPERATION WITH THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY. NATIONAL COUNCIL OF JUVENILE COURT JUDGES 57 (1966): "As a component part of a fair hearing required by due process guaranteed under

The Court concluded that, although Mrs. Gault testified at the habeas corpus hearing that she knew she could have appeared with counsel at the juvenile hearing, this knowledge was not a waiver of the right to counsel. Both she and Gerald had a right to be expressly advised that they might retain counsel and to have discussed with them whether they did or did not choose to waive the right; and, if they were unable to employ counsel, they were entitled to appointed counsel unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an intentional relinquishment of the right. [36] Mr. Justice Fortas, speaking for the majority, stated:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[37]

PRIVILEGE AGAINST SELF-INCRIMINATION, RIGHT TO CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES

Appellants urged that the writ of habeas corpus should have been granted because the privilege against self-incrimination was not observed and because the rights of confrontation and cross-examination in the juvenile court hearings were denied.[38]

The leading case concerning a juvenile's privilege against self-incrimination was *People v. Lewis*,[39] in which a judg-

the 14th amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel."

[36] 87 S. Ct. at 1451.

[37] *Id.*

[38] *Id.* at 1451-52.

[39] 260 N.Y. 171, 183 N.E. 353 (1932), *overruled, In re* W., 19 N.Y.2d 55, 277 N.Y.S.2d 675, 225 N.E.2d 102 (1966).

ment of delinquency and a commitment to a state industrial school were based solely upon the confession of a fifteen-year-old child who was not advised of his right against self-incrimination. The Court of Appeals of New York affirmed the juvenile court, holding that, since it was not a criminal proceeding, there was neither the right to nor the necessity for the procedural safeguards prescribed by the constitution and statutes for criminal cases. Thus, there was no privilege against self-incrimination.[40]

In ruling on the *Gault* case, the Arizona Supreme Court stated:

> We think the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination.[41]

Reviewing the lower court proceedings, the Supreme Court determined that there was conflict and uncertainty among the witnesses at the habeas corpus proceeding. The juvenile judge, the probation officer and Mr. and Mrs. Gault disagreed as to what Gerald did or did not admit.[42] "Neither Gerald nor his parents was advised that he did not have to testify or make a statement, or that an incriminating statement might

[40] A finding of delinquency based upon admissions by a child in the course of juvenile proceedings has been upheld in numerous instances. *See In re* Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (1947); State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951); *In re* Broughton, 192 Mich. 418, 158 N.W. 884 (1916); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954). *Contra,* Hampton v. State, 167 Ala. 73, 52 So. 659 (1910); *Ex parte* Tahbel, 46 Cal. App. 755, 189 P. 804 (1920); State v. Ireland, 81 Mont. 144, 262 P. 172 (1927); State v. Hutton, 81 Mont. 143, 262 P. 172 (1927); State v. Freeman, 81 Mont. 132, 262 P. 168 (1927); People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 296 (1944).

[41] 407 P.2d at 767-68.

[42] 87 S. Ct. at 1452.

result in his commitment . . . ."[43] The primary evidentiary basis for his commitment was his admission. Soundly rejecting the Arizona Supreme Court's ruling on the privilege against self-incrimination, the Court stated:

> It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive.[44]

The Court seemed greatly influenced by the recent New York Family Court Act which provides that the juvenile and his parents must be advised at the start of the hearings of his right to remain silent. The New York Act also requires that police must attempt to communicate with the juvenile's parents before questioning him.[45] The Court noted that in In re *W.*,[46] the New York Court of Appeals held that the privilege against self-incrimination was applicable to juveniles and required the exclusion of involuntary confessions. That court said that the holding in *People v. Lewis*[47] was no longer authority, specifically having been overruled by statute.[48]

The Supreme Court concluded that:

> [C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.[49]

[43] *Id.*
[44] *Id.* at 1454.
[45] N. Y. FAMILY COURT ACT § 741 (McKinney 1963).
[46] 19 N.Y.2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966).
[47] 260 N.Y. 171, 183 N.E. 353 (1932).
[48] 19 N.Y.2d at 62, 277 N.Y.S.2d at 680, 224 N.E.2d at 106.
[49] 87 S. Ct. at 1455-56.

The Court had been urged to take the position "that the juvenile . . . should not be advised of [his] right to silence because confession is good for the child [and part] of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process."[50] The Court rejected this position stating that recent evidence pointed to the fact that confessions by juveniles did not aid in furthering their treatment and that, "where children are induced to confess by 'paternal' urgings on the part of officials and the confession is followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished."[51]

The Court dealt with the issues of confrontation and cross-examination only briefly. However, the justices made it clear that they were disturbed by the fact that the juvenile court had committed Gerald on little evidence other than his own admissions. They pointed out that there was nothing apart from Gerald's own statement upon which a judgment of delinquency could be based. There was no sworn testimony and Gerald did not receive the opportunity to confront the complainant. Commenting on the Arizona Supreme Court's requirement of sworn testimony only from those officially related to the juvenile court, the Supreme Court stated that in the absence of a valid confession, received only after proper advice to the juvenile of his rights, that confrontation and sworn testimony by witnesses present before the accused with an opportunity for cross-examination must be available in order to support a judgment of delinquency.[52] The Court thus reiterated the position it had taken in the leading case of *Kent v. United States*.[53]

[50] *Id.* at 1456.
[51] *Id.* (footnotes omitted).
[52] *Id.* at 1459.
[53] 383 U.S. 541 (1966). Due to the severity of the offense, the juvenile court waived its right to try the youth as a juve-

APPELLATE REVIEW AND TRANSCRIPT OF PROCEEDINGS

Appellants urged that the Arizona statute was unconstitutional under the due process clause because it gave no right to an appeal from a juvenile court order. The Arizona Supreme Court had ruled that there was no right to an appeal, and, concomitantly no right to a transcript of proceedings since its purpose was urged to be for the taking of an appeal.[54]

Unlike the constitutional guarantees in the Bill of Rights, such as the right to counsel and the privilege against self-incrimination, the right of appeal is not a "right" in the constitutional sense. The Supreme Court has held that denial of appeal in a state criminal case does not offend the Constitution.[55] There are numerous state court decisions holding that the right to a review of juvenile court proceedings is not essential to due process of law but is a matter of legislative grace.[56]

The Supreme Court again declined to rule that an appeal was guaranteed by the Constitution, stating:

> In view of the fact that we must reverse the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus for other reasons, we need not rule on this question in the present case or upon the failure to provide a transcript or recording of the hearings—or, indeed, the failure of the juvenile court judge to state the grounds for his conclusion.[57]

nile and the juvenile was tried in an adult court to assure procedural protection. The court stated: "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony. . . ." *Id.* at 554.

[54] 87 S. Ct. at 1459.

[55] *See, e.g.*, Kohl v. Lehlback, 160 U.S. 293 (1895).

[56] *See, e.g.*, Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1929); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943). *See also* 31 AM. JUR. *Juvenile Courts* §§ 87, 90 (1958).

[57] 87 S. Ct. at 1460.

The Court did point out, however, that failure to provide for an appeal, failure to transcribe proceedings, and failure to state grounds for decision in juvenile court places a heavy burden upon a court when a juvenile seeks to obtain review in a subsequent habeas corpus proceeding.[58]

MOTIVATING FACTORS

With the majority of state statutes and decisions supporting the informal process in the juvenile courts,[59] the question arises as to why the Supreme Court, through the *Gault* decision, reversed sixty-eight years of tradition and formalized juvenile court procedures. In 1965, persons under eighteen accounted for about one-fifth of all arrests for serious crimes,[60] and over one-half of all arrests for serious property offenses.[61] In the same year 601,000 children under eighteen, or two percent of the total population of that age, came before juvenile courts.[62] About one out of nine youths will be referred to a juvenile court in connection with a delinquent act, other than a traffic offense, before he is eighteen.[63] Self-report studies reveal that perhaps ninety percent of all young people have committed at least one act for which they could have been brought to juvenile court.[64]

The Court appeared greatly influenced by the National Crime Commission Report and other studies. In commenting on these studies, the Court said:

> It is claimed that juveniles obtain benefits from

[58] *Id.*

[59] *See* Pee v. United States, 274 F.2d 556, 561 (D.C. Cir. 1959) (Appendix "A").

[60] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN FREE SOCIETY 55 (1967).

[61] *Id.* at 56.

[62] JUVENILE COURT STATISTICS - 1965, CHILDREN'S BUREAU STATISTICAL SERIES, No. 85, at 2 (1966).

[63] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 60.

[64] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 60.

> the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process .... [T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings as that reported in an exceptionally reliable study of repeaters or recidivision conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia. The Commission's Report states: "In fiscal 1966 approximately 66 percent of the 16-and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI Study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before."[65]

The Court pointed out that one could hardly conclude from the above figures that the absence of constitutional safeguards in the juvenile process was effective to reduce crime or rehabilitate offenders. It believed that features of the juvenile system, considered to be of unique benefit, could yet be preserved alongside procedural safeguards. The Court emphasized that the decision to require constitutional adherence in the proceeding did not affect the valuable treatment of juveniles separate from adults following adjudication; thus present rehabilitative programs were not affected. It was further pointed out that the "criminal stigma" need not be applied as a result of these charges. Likewise, state statutes providing that "adjudication of the child as a delinquent shall not operate as a civil disability, or disqualify

[65] 87 S. Ct. at 1441 (Court's footnotes omitted).

him from civil service appointment" are not affected by the application of due process requirements.[66]

Thus, the Supreme Court has taken the position that the guarantee of fairness, impartiality and orderliness, the essentials of due process, may be a more therapeutic attitude so far as the juvenile is concerned.

CONCLUSION

The effects of the *Gault* decision are becoming highly noticeable in the juvenile courts of our land. Courts in some states, reluctant to give up the informal process, are increasing their unofficial handling of children in order to maintain informality. Courts may attempt to preserve informality by the use of a written form whereby the parent consents to accept help for the child from a court probation counselor who holds "unofficial" conferences with the child, thus deferring the necessity for a formal hearing. In such a procedure, a question may arise as to whether waiver by the parents is effective to waive the rights of the child. It may be in the child's best interest that he be provided a formal hearing with all the guarantees of the *Gault* decision.

A remaining gray area is the question of whether a child *must* have an attorney in juvenile proceedings. The *Gault* decision states only that the right to be notified expressly of right to counsel is guaranteed and, if counsel is denied, the right to have one appointed if the child is from an indigent family is further guaranteed. The President's Crime Commission Report, quoted in the *Gault* decision, recommends that an attorney "be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[67] Recent interviews with juvenile court judges indicate that many are interpreting the Court's mandate as requiring that the child *must* have an attorney where his incarceration is a possibility. As a result,

[66] *Id.* at 1441-42.

[67] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 60, at 85.

some are providing a public defender.[68] Certainly, provision for guaranteed representation through a public defender should provide effective protection to the juvenile and avoid a possible reversal on this ground.

A further question left unanswered is whether a minor can waive his right to counsel or must this be allowed only if the parents agree. In the *Gault* case the court shed some light on a possible answer when it stated: "They [Gerald and his parents] had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right."[69] The language used by the Court raises an inference that waiver requires the joint agreement of both parent and child. On the other hand, a leading case on this issue, *McBride v. Jacobs*,[70] indicates that the juvenile alone may effect a waiver. The court in *McBride* held that, where a waiver of right to counsel is relied upon, the juvenile court must affirmatively find as a fact that by reason of "age, education, and information, and all other pertinent facts," the minor is able to and did make an intelligent waiver; but where the Court finds for any reason that the alleged juvenile offender is not capable of waiver of right to counsel, the parent may waive, provided the court finds no conflict of interest between the juvenile and his parent.[71]

The Court's decision in *Gault* left unsettled the question of police procedures with juveniles. In regard to adults it is now held that the right to be advised of right to counsel and the right against self-incrimination are guaranteed from the time of arrest and thereafter.[72] From the language in

[68] The Juvenile Court of Tulsa County, Oklahoma, has recently acquired a public defender in accordance with this theory.
[69] 87 S. Ct. at 1451.
[70] 247 F.2d 595 (D.C. Cir. 1957).
[71] *Id.* at 596.
[72] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

Gault, a similar conclusion may be drawn with regard to juveniles. The Court in *Gault* has said that "the Fifth Amendment, applicable to the states by operation of the Fourteenth Amendment, is unequivocal and without exception [applicable to juveniles]."[73] The *Escobedo v. Illinois*[74] and *Miranda v. Arizona*[75] decisions guarantee an adult, at the moment he is taken into custody or otherwise deprived of his freedom in any significant way, that he must be advised of his right to silence; he must be advised that any statement he makes may be used as evidence against him; and he must be advised that he has a right to the presence of an attorney either retained or appointed at any stage of an interrogation by law enforcement officers. The decisions in the *Escobedo* and *Miranda* cases were drawn from an interpretation of the fifth amendment. By a parity of reasoning, if *Gault* has endowed juveniles with all of the rights of the fifth amendment, then the guarantees of *Escobedo* and *Miranda* are available to juveniles from the moment they are taken into custody. Progressive police and court probation departments, with eyes toward prevention of future difficulties concerning these rights, should perhaps take the position that the court has implied that juveniles must be advised of these rights at the time of arrest and thereafter.

Perhaps the most compelling issue which the Court did not resolve is the question of desirability of present indeterminate sentences for juveniles. The Court avowed its concern that Gerald Gault could be confined for a period up to six years for an offense that drew only a maximum adult penalty of two months. However, the Court left the question of the confinement period undecided as that question was not before it.[76] Some reformists may attempt to limit sentences for juveniles in the same manner as they are limited

[73] 87 S. Ct. at 1454.
[74] 378 U.S. 478 (1964).
[75] 384 U.S. 436 (1966).
[76] 87 S. Ct. at 1444.

for adults. In such an attempt, however, two important factors should be considered. First, it should be remembered that juveniles accumulate a record with the juvenile court while on probation, and it is this accumulation or history of delinquency for which they are committed rather than for any single act. Second, the usual effect of the juvenile court commitment is not incarceration until majority or age twenty-one, but rather commitment for a period of about nine months.[77]

The *Gault* decision has ended the *parens patriae* doctrine in all juvenile procedures except final disposition after adjudication. In doing so, a wonderful ideal which has endured for three-quarters of a century disappears from the American scene. Many who feel they have acted in behalf of the child with caution, objectivity and concern for his rights will not relinquish the doctrine easily. Mr. Justice Stewart who registered the single dissent to the *Gault* opinion is doubtless one of these persons. The majority, however, felt that too much damage was being rendered children by misguided good intentions, and thus the ideal of the *parens patriae* could never be achieved.

Even so, there is still room for individualized rehabilitative treatment following adjudication, and the new safeguards should strengthen the decisions of our juvenile courts.

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[77] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CORRECTION IN THE UNITED STATES 80 (1967). This report states: "The length of stay for children committed to state training facilities ranges from 4 to 24 months; the median length of stay is nine months . . . . [T]hree-fourths of the total, housing nine-tenths of the institutional population - have an average length of stay of six months to a year."

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