

Equal Justice for Juveniles? *In re Gault* After a Half Century

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The Supreme Court's 1967 *In re Gault* decision was the last great battle in the Warren Court's Due Process Revolution (1961-1968), which sought to nationalize criminal procedure by extending protections in the Bill of Rights to the accused and defendants in state criminal courts. Such courts heard more than 99 percent of the criminal cases in the United States. Considered "the Magna Carta for juveniles," *Gault* formally incorporated many of these same procedural safeguards into juvenile court proceedings, including providing assistance of counsel and notice of the charges, the privilege against self-incrimination, and the right to confront and cross-examine witnesses. Placing *Gault* into historical context provides a window into a revolutionary era for constitutional law and its impact on American juvenile justice. This history illuminates the importance of procedural due process, especially the Sixth Amendment's guarantee of assistance of counsel.



Dillon, Colorado, public defender Sommer Specter testifies during a meeting of the Juvenile Defense Attorney Interim Committee, at the state capitol in Denver, July 30, 2013. "If your child's liberty is at stake, they should have access to counsel," said Patricia Puritz, the executive director of the National Juvenile Defender Center. (AP Photo/Brennan Linsley)

The Beginnings of the Juvenile Court

This history began with the invention of the juvenile court in the United

States at the turn of the twentieth century. Progressive Era reformers, such as Jane Addams, spearheaded the crusade to establish a separate court system

to handle the cases involving abused, neglected, and delinquent children. The first one opened its doors in Chicago, Illinois, in July 1899. These new courts were designed primarily to divert the cases of children accused of breaking the law from the criminal justice system, so that juvenile court personnel could treat them as children, rather than punishing them as criminals. As Addams later explained,

There was almost a change in *mores* when the Juvenile Court was established. The child was brought before the judge with no one to prosecute him and with no one to defend him—the judge and all concerned were merely trying to find out what could be done on his behalf. The element of conflict was absolutely eliminated and with it, all notion of punishment as such with its curiously belated connotation.

The progressive paradigm for juvenile justice thus emphasized the needs of children and downplayed formal procedural requirements because the juvenile court was not supposed to be an adversary system like the adult criminal justice system. By the mid-1920s, the progressive paradigm had spread across the nation, and until the *Gault* decision, defense counsel and prosecuting attorneys were largely absent from American juvenile courts.

Some prominent critics challenged the legal fiction that juvenile courts treated but did not punish children.

In *Criminal Justice in America* (1930), Dean Roscoe Pound of Harvard Law School pointed out that “it remains true that our legal treatment of delinquents is not preventative but is punitive in its conception and administration.” One needed only to visit a “juvenile reform school,” which were often mini-prisons that neither reformed nor schooled their inmates, to confirm this fact. Although numerous lawsuits challenged the constitutionality of depriving children of liberty without following the same due process standards required in criminal courts, they were largely unsuccessful until the Warren Court’s Due Process Revolution, which included such iconic decisions as *Mapp v. Ohio* (1961), which applied the exclusionary rule to states; *Gideon v. Wainwright* (1963), which required states to provide assistance of counsel to indigent defendants accused of felonies unless they competently and knowingly waived this Fifth Amendment right; and *Miranda v. Arizona* (1966),

which required the police to inform accused persons of their right to remain silent during police questioning.

Gideon and Juvenile Justice

The *Gideon* decision, even though it applied only to the criminal justice system, turned out to be a cause for the transformation of American juvenile justice. *Gideon* affirmed that the state had to supply counsel to defendants who were charged with a felony and could not afford legal representation. The Supreme Court had to determine that this constitutional protection existed in state criminal courts before a litigant could successfully raise this issue regarding a client in juvenile court. Otherwise, a litigant would have been asking the Supreme Court to interpret the U.S. Constitution to include a procedural due process right in the juvenile court that was not constitutionally mandated for defendants in criminal court. Only after the *Gideon* decision did it make sense to raise the

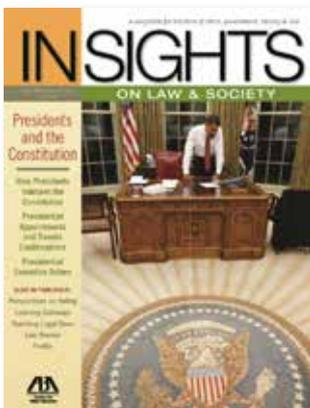
constitutional question of whether juvenile courts also had to supply assistance of counsel to those who could not afford an attorney.

The U.S. Supreme Court had appointed the prominent Washington lawyer Abe Fortas to represent Clarence Earl Gideon. Fortas successfully litigated the case, convincing all nine justices that the Sixth Amendment’s right to assistance of counsel extended to defendants charged with felonies in state courts. Writing for the Court, Justice Hugo Black declared that precedents, reason, and reflection all required the justices to “recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.” He elaborated:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

The *Gideon* decision affirmed the idea that American criminal justice was an adversary system that required both prosecuting and defense attorneys in order to assure a fundamentally fair

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process. As Justice Black pointed out, it would have been unthinkable for either a state or the federal government to proceed in a criminal trial without legal representation.

Yet most juvenile courts at this time still functioned without either prosecuting or defense attorneys. Juvenile courts were not only procedurally less formal than criminal courts, but also culturally different places. The National Council of Juvenile Court Judges estimated, for example, that approximately one out of every four juvenile court judges surveyed in 1963 were not lawyers. Council President Judge Orman Ketcham noted that “a lack of legal training was not a handicap in the past decades,” but would be in the future because the due process revolution was likely to change the role of the juvenile court judge.

Equal Justice for Juveniles

The following year, the Annual Conference of Juvenile Court Judges invited Chief Justice Earl Warren to address their meeting. In his talk titled “Equal Justice for Juveniles,” Warren noted that there were two opposing camps in the debate about the proper role of juvenile courts. “In one camp,” he explained, “are those who maintain that the juvenile court, as a court of law, must surround the juvenile with all the legal processes which would be available to him were he tried as an adult.” The other camp believed that the “social, emotional, educational, health and economic needs” of the child “are paramount and the task of the court is to meet these requirements without concerning itself too greatly with legal niceties.” Although Warren would not say how he would rule on issues that might come before the Supreme Court, he reminded the judges that they had to protect “basic constitutional rights.” He added, “I think lawyers can be most useful and helpful to the [juvenile] court.”

In 1965, Fortas, a close friend and adviser to President Lyndon Johnson, won U.S. Senate confirmation to serve as an associate justice on the Supreme Court. Warren assigned Fortas, the

successful litigator of *Gideon*, to write *Kent v. United States* (1966) and *Gault* (1967), the Court’s first and most significant decisions, respectively, to address American juvenile justice.

Kent was the tremor that preceded *Gault*. *Kent* addressed statutory requirements in the District of Columbia for transferring a case from juvenile court to the adult criminal justice system. Although the Court did not use this case to make constitutional law, Fortas’s majority opinion explicitly endorsed the mounting critiques by civil libertarians of the theoretical foundations undergirding the juvenile court as well as its actual performance. These critics questioned whether the doctrine of *parens patriae* (the state as parent) justified denying children the same due process safeguards that the Supreme Court required in the criminal justice system. “There may be grounds for concern,” Fortas declared, “that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”

In re Gault

Fortas’s skepticism in *Kent* about the doctrine of *parens patriae* set the stage for *In re Gault*, the Arizona case that the justices used to extend the due process revolution into juvenile court. In 1964, juvenile court Judge Robert E. McGhee had sentenced 15-year-old Gerald Gault, who was accused of making an obscene phone call, to serve an indeterminate sentence at the state’s juvenile reformatory. Thus, Gerald could potentially spend six years in prison. By contrast, an adult who committed the same crime could have received only a maximum sentence of 60 days in jail and have been ordered to pay a \$50 fine. Norman Dorsen, who litigated *Gault* for the American Civil Liberties Union (ACLU), considered the case the logical extension of *Gideon*. After the court announced its decision in *Kent*, Dorsen never doubted that the Supreme Court, during this revolution-ary era of extending due process protec-

tions, would determine that juveniles had the right to assistance of counsel during juvenile court trials.

At the beginning of his oral argument before the high court, Dorsen meticulously walked the justices through the informal legal process that ultimately led to Gerald’s incarceration at the Arizona Industrial School for Boys, which was popularly known as “desert Devil’s Island.” Remarkably, only two justices briefly interrupted Dorsen during the first 11 minutes. Justice Potter Stewart asked whether Gerald had received notice of the charges against him. Justice Fortas asked what the maximum penalty under Arizona law was for an adult convicted of making lewd phone calls and how this compared to Gerald’s punishment. Dorsen explained that Gerald could potentially be incarcerated for six years, whereas an adult could have been sentenced to only 60 days in jail and fined. He had confirmed Fortas’s damning critique of modern juvenile justice in *Kent*.

Warren assigned Fortas to write the Court’s majority opinion in *Gault*. The most remarkable feature of Fortas’s exceptionally long opinion was his use of social science, including drawing from the recently released *Report by the President’s Commission on Law Enforcement and the Administration of Justice* (1967), to condemn the modern juvenile court as an ineffective and ill-equipped institution that severely punished young offenders. Significantly, the *Gault* decision put to rest the legal fiction that juvenile courts only protected but did not punish children. During oral argument, for example, Fortas flatly rejected the distinction built into the progressive paradigm that classified juvenile offenses as “delinquency” instead of crime. Fortas viewed this issue from the perspective of an incarcerated juvenile. As he explained, “I don’t get anywhere by trying to solve the problem in terms of the use of a word like *crime or not a crime*. The question that we are dealing with here are proceedings in which persons may be deprived of liberty and put

in a place for 24 hours a day, they're in custody. You can call it a crime or call it a horse, they are still deprived of liberty."

Juvenile courts, as Fortas emphasized, punished children when they sent them to "industrial schools" that were, in reality, prisons. As law professor Franklin Zimring has noted, since *Gault*, constitutional law has recognized "that those who administer juvenile court delinquency dockets are in the business of punishing adolescent law violators." *Gault*, as many commentators at the time pointed out, had begun a cultural revolution to instill constitutional values into a court system that had functioned for decades without lawyers.

The proponents of legalization, such as Judge Ketcham and Charles Schnitsky of the New York Legal Aid Society, predicted that bringing lawyers into juvenile court would ultimately benefit children, the legal profession, juvenile courts, and society. But some opponents of legalization cautioned that it would undermine the rationale for a separate juvenile court to handle cases of youth crime and might lead to the abolition of the juvenile court.

In his dissenting opinion in *Gault*, Justice Stewart voiced such concerns. He questioned the constitutional logic and wisdom of the majority's opinion. As he explained, "I find it strange that a Court so intent upon fastening an absolute right to counsel upon nonadversary juvenile proceedings has not been willing to even consider whether the Constitution requires a lawyer's help in a criminal prosecution upon a misdemeanor." Stewart predicted that *Gault*, by transforming juvenile court proceedings nationwide into adversarial arenas, threatened to shatter the progressive

paradigm. Converting "a juvenile proceeding into a criminal prosecution," he cautioned, might "invite a long step backwards into the nineteenth century." "In that era," he explained, "there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was [in 1828] that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional."

The Half Century Since *Gault*

In the half century since *Gault*, no state, as Stewart feared, has abolished its juvenile courts. But the U.S. Supreme Court during the 1970s stopped short of requiring juvenile courts to become procedurally indistinguishable from criminal courts. Most significantly, in *McKeiver v. Pennsylvania* (1971), the Burger Court held that the Sixth Amendment's requirement for jury trials does not apply to juvenile court proceedings. Yet the Supreme Court did require juvenile courts to use the same "beyond a reasonable doubt standard" as criminal courts (*In re Winship*, 1970), and held that the prohibition against double jeopardy (*Breed v. Jones*, 1975) attaches during juvenile court proceedings. The state, for example, cannot prosecute a child for the same crime in juvenile court and adult court.

Even though *Gault* held that children have the right to assistance of counsel during adjudicatory hearings in juvenile court, juveniles can and often waive this right. Since the 1980s, developmental

experts have questioned whether adolescents are competent to make this decision. Many of them contend that children and adolescents require the assistance of counsel to decide whether they require the assistance of counsel. And, as the recent "Kids for Cash" scandal in Pennsylvania revealed, bad state actors can take advantage of children who waive this constitutional right. As that scandal revealed, Judge Mark Ciavarella, Jr. pressured children to sign away their right to counsel. He then found them guilty and sentenced them to serve time in a private facility. The judge, as it turned out, had been accepting bribes from the facility's co-owner.

The National Juvenile Defender Center is using the 50th anniversary of *Gault* to promote its longstanding campaign "to ensure that every child has an effective attorney in America's juvenile courts." The existence of this campaign itself demonstrates that the Supreme Court can only make constitutional promises to children. It requires many others, especially committed advocates at the local and state level, to secure equal justice for juveniles. ●

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Hearing Due Process *In re Gault*

Teachers can have their students "listen" for procedural due process safeguards that Norman Dorsen, Gerald Gault's lawyer, highlights during the first 10 minutes of his Oral Argument before the U.S. Supreme Court on December 6, 1966. Afterwards, the students could discuss how the procedural safeguards that Dorsen mentions might have benefited Gault during his initial court appearances. The audio of Dorsen's Oral Argument is available free through the Oyez Project at: <https://www.oyez.org/cases/1966/116>.

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