

## ***In re Gault* at 40: Still Seeking the Promise**

For nearly 70 years, the juvenile court in America operated with almost no constitutional oversight, and without the required presence of lawyers, except, near the end of that period, in a very few jurisdictions like New York and the District of Columbia. Indeed, the juvenile justice process was left largely untouched even in the early phases of the “Warren Court revolution” that transformed criminal procedure, despite the fact the U.S. Supreme Court had addressed the peculiar vulnerability of youth during police interrogation. (*Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 370 U.S. 49 (1962).) As the 1960s progressed, however, both the Court and the broader society had to respond to growing questions about the continued viability of the juvenile court’s informality and treatment focus in the absence of a full regard for due process. Many critics from the right end of the political spectrum complained that this “kiddie court” was not fully capable of dealing with the “new” and “more dangerous” delinquent youths of that era, while their adversaries on the left urged with equal fervor that the court was ignoring juveniles’ rights without providing treatment and rehabilitation. In spite of these dual concerns, the landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), had almost no immediate impact on proceedings in juvenile courts, or even on the existence of a right to the assistance of counsel for children before the court. In 1966, however, the Supreme Court finally addressed the fundamental fairness of the juvenile court’s process in *Kent v. United States*, 383 U.S. 541 (1966), a case from the District of Columbia ultimately decided on the basis of D.C. statutory law. However, in referring to the importance of the right to counsel, Justice Abe Fortas said “the right to representation by counsel is not a formality. It is

not a grudging gesture to a ritualistic requirement. It is of the essence of justice.” (383 U.S. at 561.) Just one year later, the Court handed down the historic decision in *In re Gault*.

### ***In re Gault***

In *In re Gault*, (387 U.S. 1 (1967)) Justice Fortas again wrote the opinion for the Court and he preliminarily ruled—surprisingly for the first time—that children are persons within the meaning of the Fourteenth Amendment and, thus, are protected by its Due Process Clause. He went on to state that Gerald Gault’s constitutional rights had been violated in several important respects during his juvenile court proceedings in Arizona, including that since he was charged with an act of delinquency that could result in a loss of liberty he should have been advised of the right to the assistance of counsel. Justice Fortas said, in very dramatic terms, that “it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” (*In re Gault, supra*, at 27-28.) He went on to elaborate on the central importance of the right to counsel developed in *Gideon* and reinforced by *Kent*. A proceeding wherein a child may be found “delinquent” and subjected to a loss of liberty for years is comparable in seriousness to a felony prosecution. The Court concluded that a juvenile

needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the 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 proceedings against him” . . . [T]he assistance of counsel is essential . . . for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

(*Id.* at 36–37.)

In the years following *Gault*, states moved to implement the right to counsel, but few have defined it as an absolute right by requiring that the juvenile have the advice of an attorney before the



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right to counsel can be waived, or by prescribing an “unwaivable” right to counsel. Studies by Professor Barry Feld and the Government Accounting Office (GAO) reveal that many juveniles waive their right to a lawyer. (Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443, 458 (1990); Barry C. Feld, *In re Gault Revisited: A Cross State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 396, 400-01 (1988); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. L. & CRIM. 1195, 1217-19 (1989); United States Government Accounting Office, *JUVENILE JUSTICE: REPRESENTATION RATE VARIES AS DID COUNSEL’S IMPACT ON COURT OUTCOMES* (1995).) Other studies that followed *Gault* have also revealed serious deficiencies in the quality of representation for juveniles even where lawyers are provided, especially for indigent youths. (Richard A. Lawrence, *The Role of Legal Counsel in Juveniles’ Understanding of Their Rights*, JUV. & FAM. COURT J. 54, 56-57 (Winter 1983-84); JANE KNITZER & MERRIL SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN* (1984).)

### **Congress speaks and the ABA answers**

Responding to these concerns, Congress recognized the importance of effective legal representation of juveniles when it reauthorized the Juvenile Justice and Delinquency Prevention Act in 1992. A year later, the federal Office of Juvenile Justice and Delinquency Prevention awarded one of its first grants for the improvement of juvenile defender services to the Juvenile Justice Center of the American Bar Association, which used it in collaboration with the Youth Law Center and the Juvenile Law Center to establish a project “to build the capacity and effectiveness of juvenile defenders through increasing *access* to lawyers for young people in delinquency proceedings and enhancing the *quality* of representation those lawyers provide.” (A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 4 (1995) [hereinafter *Call for Justice*].) That report highlighted the gross inadequacies of America’s systems for providing effective counsel to youth in delinquency cases. It reiterated the call of the 1993 report of the ABA’s Presidential Working Group on

the Unmet Legal Needs of Children and Their Families, *America’s Children at Risk: A National Agenda for Legal Action*, for the juvenile justice system to make greater efforts to fulfill the right to competent counsel. That 1993 report concluded that many of the problems that plague the juvenile justice system—including appalling conditions in confinement, inappropriate transfer to adult court, overrepresentation of children of color, and inadequate health and educational services—could be remediated if every child accused of a crime was well represented by competent counsel knowledgeable about juvenile justice issues and committed to furthering that child’s interests at all points in the juvenile justice process.

### **The right to counsel in the states**

A recent series of assessments under the auspices of the ABA Juvenile Justice Center, a project of the ABA, and the National Juvenile Defender Center, its free-standing successor, in collaboration with state groups in Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington, have found comparable shortcomings in those states to those identified in *Call for Justice*. (The individual state assessments may be found online at [www.njdc.info/assessments](http://www.njdc.info/assessments).) These evaluations of the delivery of defense services to children charged with delinquency in the representative states bear out many of the conclusions reached in the national report a decade before. The promise of *Gault* is still not being kept. *Gideon*’s trumpet has been silenced or muted in many juvenile courts across America.

### **A reason for hope**

The remarkable activities of the ABA Juvenile Justice Center and the National Juvenile Defender Center as its successor give cause for hope that the promise of *Gault* can yet be kept and the trumpet of *Gideon* can now be heard. The Center has greatly increased its activities in the past decade and a half. It sponsors regional juvenile defender centers with energetic staff, training sessions, and computer listservs. Beginning in 1997 it began holding an annual juvenile defender leadership summit to bring people together to learn defender skills and network. It has published several insightful reports and a *Juvenile Defender Delinquency Notebook* was published and has been updated and improved in 2006. The Center’s publications, including the *Notebook* and the resource guides from each of the

Summits may be accessed as PDF files at [www.njdc.info/publications](http://www.njdc.info/publications). The National Juvenile Defender Center's mission is "to ensure excellence in juvenile defense and promote justice for all children." This statement clearly reinforces what the American Bar Association articulated more than two decades earlier in the IJA-ABA *Juvenile Justice Standards on Counsel for Private Parties*. The realization of these goals will go a long way towards realizing the promise of *Gault* after more than 40 years. However, that realization will require a massive exercise of will.

Much needs to be done to achieve effective systems for delivering meaningful representation services to indigent persons charged with either crime or delinquency, and that is only the starting point. In recent years, several states have taken more concrete steps to ensure high quality representation for juveniles in delinquency proceedings by promulgating standards of practice for lawyers practicing in juvenile courts.

### **Performance standards**

These standards range from North Carolina's one-page definition of *The Role of Defense Counsel in Juvenile Delinquency Proceedings* ([www.aoc.state.nc.us/www/ids/](http://www.aoc.state.nc.us/www/ids/) and then click on "Juvenile Defender" and then click on the title) and California's two-page pamphlet on *Effective Representation of Children in Juvenile Delinquency Court* ([www.courtinfo.ca.gov/programs/cfcc/pdffiles/EffRepChildrenBro.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/EffRepChildrenBro.pdf)) to the more elaborate documents developed in the District of Columbia (*Attorney Practice Standards for Representing Juveniles Charged with Delinquency or as Persons in Need of Supervision*, [www.dccourts.gov/dccourts/docs/0413a.pdf](http://www.dccourts.gov/dccourts/docs/0413a.pdf)), Georgia (*Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Cases*, [www.gpdsc.com/resources-juvenile-main.htm](http://www.gpdsc.com/resources-juvenile-main.htm) and click on the title),

Massachusetts (*Performance Guidelines Governing the Representation of Indigent Juveniles in Criminal Cases*, [www.mass.gov/cpcs/manuals/pmanual/MANUALChap3.pdf](http://www.mass.gov/cpcs/manuals/pmanual/MANUALChap3.pdf)), Ohio (*Standards of Representation of Clients in Juvenile Delinquency Cases*, [www.capital.edu/adoption/LR/docs/Ohio\\_defender\\_standards.pdf](http://www.capital.edu/adoption/LR/docs/Ohio_defender_standards.pdf)) and Virginia (*Standards of Practice for Juvenile Defense Counsel*, [www.publicdefender.state.va.us](http://www.publicdefender.state.va.us) and then click on title and go to pages 40-61). Other states with some level of standards, even if only governing caseloads in juvenile court, include Indiana, Oregon, Texas, and Washington. The development, promulgation, and enforcement of such performance standards should greatly enhance the quality of representation in juvenile cases. The more expansive of these standards generally call for interdisciplinary support services and particularized training in youth development and juvenile law, among other more generic trial advocacy and negotiation skills. They dictate lower caseloads to allow for earlier representation of juveniles at detention hearings and, in some instances, during intake, and to allow for more time to develop a well-thought-out dispositional plan, perhaps in conjunction with a dispositional specialist. They urge attorneys to spend more time with their youthful clients, developing trust and simply explaining the legal process in developmentally appropriate terms. They recognize that the lawyer practicing in juvenile court needs to develop expertise in the range of educational and mental health disabilities of young people, and the laws that define the special rights of those who are so disabled. The skills described here are just the tip of the iceberg, but they may serve to illustrate that keeping the promise of *Gault* may go well beyond simply heeding the clarion call of *Gideon*. Anniversaries are nice to commemorate, but they also remind us of how much more needs to be done before a real celebration can take place. ■