The Supreme Court and Juvenile Justice

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For so many things I thank the Historical Society profoundly, but place right at the top of my list the delightful opportunity your invitation has given me to read the prior Annual Lectures—interesting, exciting, thoroughly intimidating—touching on the Court's history, its cases, its people, even its wives (the subject of Justice Ginsburg's 1999 lecture). Wholly apart from the Society's many initiatives to preserve the Court's history and increase public awareness of its contributions to our nation, the now nearly three dozen Annual Lectures alone offer an amazing insight into this great institution.

Justice Samuel Alito opened his 2008 lecture by explaining that he chose his subject—the origin of the baseball antitrust exemption—on a dark, cold December day, when thoughts of spring brought to mind thoughts of baseball. Hence he treated us to a session with our Great American Pastime, centered on the Court's 1922 decision, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.*[1]

I too made my choice of subject on a dark, cold December day, contemplating this magnificent spring afternoon, when my favorite sport—ice hockey—would soon be packing its bags for the season. (And wouldn't you know, the New York Rangers were out of it again!) My thoughts thus turned to other arenas and, not surprisingly, settled on the subject of children, a subject that dominated my many sleepless nights as Chief Judge of the State of New York, where—like state courts throughout the country—we have a staggeringly high docket of Family Court cases, touching every aspect of children's lives. Just now in New York (the subject of several scathing reports on our juvenile detention facilities) and in Pennsylvania (the site of a juvenile judge corruption scandal)—indeed, throughout the nation—attention is riveted on juveniles, children accused of what for adults might be criminal conduct. How do we balance today's vexing crime and incarceration statistics with modern developmental science regarding troubled young people? After considerable reflection, my initial plan to address children generally thus narrowed a bit to juveniles, due process,

and the Supreme Court's watershed decision of May 15, 1967, *In re Gault.*[2]

Most Americans know what "Miranda" stands for, even if they're not sure about the origin of custodial warnings. Every law student recognizes Dollree Mapp, John Terry, and Clarence Earl Gideon as important figures in the Supreme Court's criminal procedure cases of the 1960s. Outside the juvenile-justice community, however, how many Americans know the name Gerald Gault? Few, I suspect, are aware that the appeal on young Gerald's behalf struck at the heart of the assumed benevolence of our juvenile courts, agencies, and institutions, and in so doing shook the roots of the juvenile-justice system nationwide. Who is Gerald Gault, and what circumstances led him to the Supreme Court of the United States?

I. The Facts

On June 8, 1964, at about 10 a.m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County, Arizona. At the time of his arrest, Gerald Gault was fifteen years old and serving six months' probation for being in the company of a boy who stole a wallet from a woman's purse. Three years later, in his opinion for a divided Court, Justice Abe Fortas described the events that followed. In reciting the facts and holding, I barely resist the temptation to read his words verbatim—the story as told is fascinating.

The June 8th arrest resulted from a telephone complaint by a neighbor of the boys, Mrs. Cook, following her receipt of a lewd or indecent phone call. In Justice Fortas's words, "the remarks or questions put to [Mrs. Cook] were of the irritatingly offensive, adolescent, sex variety."

When the sheriff picked up Gerald Gault at home and took him to the local Children's Detention Home, his mother and father were both at work. The sheriff left no notice that their son had been arrested and took no other steps to tell them. When his mother arrived home at about six o'clock, Gerald was not there. His older brother was sent to look for him at the trailer home of the Lewis family, and he learned that Gerald was in custody. Gerald's mother and brother went to the Detention Home, where the deputy probation officer, Charles Flagg, who was also superintendent of the Detention Home, told Mrs. Gault "why Jerry was there," and that a hearing would be held in Juvenile Court at three o'clock the following day.

The next day, Officer Flagg filed a petition, supported by his affidavit, without serving the Gaults. Indeed, they did not see the petition until a habeas corpus hearing two months later. The petition recited only that Gerald was a delinquent minor under the age of eighteen in need of the protection of the court, and it sought a hearing and order regarding his care and custody. There was no hint of what he supposedly had done wrong.

Also on June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before Juvenile Court Judge Robert McGhee in chambers. Gerald's father was not present, as he was at work out of the city. Nor was Mrs. Cook, the complainant, at the hearing. No one was sworn, and no record of any sort was made. Information about the June 9 hearing, as well as a June 15 hearing, was drawn entirely from the testimony of the Juvenile Court Judge, Mr. and Mrs. Gault, and Officer Flagg at the habeas corpus proceeding conducted two months later.

It appears that, at the June 9 hearing, Judge McGhee had questioned Gerald about the telephone call, but there was disagreement as to just what he had said that day. His mother later testified that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend, Ronald; Officer Flagg testified that Gerald had admitted making the lewd remarks, but Judge McGhee himself recalled that Gerald "admitted making one of these [lewd] statements." Whatever Gerald's actual testimony

on June 9, Judge McGhee ended the hearing by saying that he would think about it.

Remarkably, Gerald was taken back to the Detention Home, rather than being sent home with his family, and was detained until June 11 or 12, when he was driven home. The record does not disclose why he was kept in the Detention Home or why he was released. On the day of his release, Mrs. Gault received a note signed by Officer Flagg, saying "Mrs. Gault: Judge McGhee has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency." Twice in his writing—once in the facts, once in the analysis—Justice Fortas observed that the officer's note was written on plain paper, not official letterhead.

June 15 Hearing

On June 15, Gerald, his parents, Ronald Lewis and his father, and Officers Flagg and Henderson appeared before Judge McGhee. Witnesses at the later habeas corpus proceeding again differed in their recollections of what Gerald's testimony had been at the June 15 hearing. According to Judge McGhee, while "there was some admission of some of the lewd statements, he didn't admit any of the more serious lewd statements." Again, Mrs. Cook did not attend. Mrs. Gault's request that Mrs. Cook be present was denied. Imagine: throughout this entire course of events, the only person who actually spoke to Mrs. Cook was Officer Flagg—just once, over the telephone.

Also at the June 15 hearing, the probation officer filed a "referral" report, again not disclosed to Gerald or his parents. The report listed the charge as "Lewd Phone Calls." At the conclusion of the hearing, Judge McGhee committed fifteen-year-old Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21—nearly six years], unless sooner discharged by due process of law." Arizona law did not permit an appeal in juvenile cases. A petition for writ of habeas corpus was filed with the Supreme Court of Arizona and referred to the Superior Court for hearing.

At the Superior Court hearing on the petition, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. Asked under what section of the Code he had found the boy delinquent, Judge McGhee answered that Gerald came within the Arizona delinquency statute providing that a "delinquent child" includes one "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof"—here specifically, a section of the Arizona Criminal Code providing that a person is guilty of a misdemeanor who "in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language." Quite a crime! The prescribed penalty, for an adult, was $5 to $50, or imprisonment for not more than two months. For Gerald, a juvenile, the prescribed penalty turned out to be roughly six years.

Judge McGhee stated that he acted as well under a provision of Arizona's delinquency statute defining a "delinquent child" as one who is "habitually involved in immoral matters." As to the basis for his conclusion that Gerald was habitually involved in immoral matters, Judge McGhee testified that, two years earlier, Gerald had been the subject of a "referral" for stealing a baseball glove from another boy and lying to the Police Department. He recalled there had been no hearing, and no accusation relating to this incident, due to lack of material foundation. The Judge also testified that Gerald had admitted making other nuisance phone calls in the past that were "silly calls, or funny calls, or something like that." The Superior Court dismissed the writ of habeas corpus, and the Arizona supreme court affirmed.

Supreme Court Appeal

Appellants' jurisdictional statement and brief to the Supreme Court of the United States

urged the Court to hold the Juvenile Code of Arizona invalid because, contrary to the Due Process Clause of the Fourteenth Amendment, the Arizona statute allowed a juvenile to be taken from the custody of his parents and committed to a state institution in which basic due-process rights were denied—namely, the right to notice of charges, to counsel, to confrontation and cross-examination; the right against self-incrimination; the right to a transcript of the proceedings; and the right to appellate review.

Arizona's Answer

The State of Arizona answered that it would be the first to agree that a juvenile is entitled to due process of law in juvenile court, but argued that the essential question posed is "what constitutes due process in such a proceeding."[3] The state urged that one must be mindful of the nature of the juvenile proceeding and its devout attempt to avoid an adversarial approach to juvenile problems. Arizona maintained that in the spirit of the traditional juvenile court, its Juvenile Code was framed precisely to protect a child of tender years and provide the child due process of law.

Forty-six years later, it is difficult to understand the legal mind-set that could subject a child and his parents to the state's utterly unfettered discretion—benevolent or not—resulting in Gerald's case in a penalty of nearly six years for commission of a minor offense while on probation for an accessorial, nonviolent act. Indeed, in affirming the Superior Court, the Arizona supreme court pointed out that Arizona's Juvenile Code would even have allowed Judge McGhee to commit Gerald until age twenty-one without *any* further showing of delinquency during his six-month probation period if he felt that served Gerald's welfare and the interests of the state.[4]

In preparing this lecture, I came to understand that, for most of its history leading up to *Gault*, the Supreme Court was not often asked to consider the constitutional rights of children themselves. Rather, children formed the backdrop for the Court's consideration of competing claims regarding their welfare brought by opposing entities such as Congress, the states, parents, and schools. There were, for example, child labor law cases pitting the federal government against the states, and challenges to state authority requiring that schoolchildren recite the Pledge of Allegiance, or prohibiting teaching foreign languages in elementary school, or mandating public education for children not meeting one of several explicit exemptions.

Thus, through the mid-twentieth century, when children appeared at all in Supreme Court cases, more often than not they tended to be the context for adjudication of the rights of others, not their own. Until 1962, the Court had not passed on the legality of code procedures or police practices respecting juveniles. *Gault* and its immediate predecessors put the rights of juveniles center stage. Moreover, it was a time in Supreme Court history of unprecedented procedural reform of federal and state criminal-justice systems. Debate raged about incorporation of the Bill of Rights into the Fourteenth Amendment, about the scope of that amendment's due-process protections, and about the standard of review of due-process challenges to state action. While there was wide agreement that the words "due process of law" applied to the adjudication of juveniles—even the Arizona supreme court agreed that Gerald Gault had a right to due process—what did that encompass?

Answering the Question

In *Gallegos v. Colorado*,[5] just five years before *Gault*, in setting aside a youngster's confession, Justice William Douglas answered that the only guide to the meaning of due process was the "totality of circumstances," including the youth of the petitioner, long detention, failure to send for his parents, failure immediately to bring him before a juvenile court judge, and failure to see to it that he

Gerald Gault, whose delinquency case rose to the Supreme Court in 1967 and became the basis for a landmark decision, is shown here being trained in automotive work.

had the advice of a lawyer or friend.[6] *Gallegos* was followed by *Kent v. United States*,[7] a District of Columbia juvenile proceeding in which Justice Fortas speculated in his writing for the five-Justice majority that juveniles faced with incarceration yet unprotected by the constitutional guarantees afforded adults might "receive the worst of both worlds."[8] A procedural error with respect to waiver of jurisdiction, however, required remand and prevented the Court's giving its full attention to the issue.

The stage thus was set for *In re Gault*—the Supreme Court's first full-fledged foray into juvenile justice, and for Justice Fortas in particular. He not only had tilled the soil in his *Kent* opinion but also as a lawyer some years earlier had successfully represented both Monte Durham in the D.C. Circuit's overturn of the McNaghten Rule (thus allowing for evidence of the science regarding defendant's mental state) and Clarence Earl Gideon in the Supreme Court's monumental right-to-counsel case.[9]

II. The Court's Decision

On May 15, 1967, the Court announced its decision in favor of the Gaults. Justice Fortas wrote for the Court—passionately and at length—joined by Chief Justice Earl Warren and Justices Douglas, Tom Clark, and William Brennan. Justices Hugo Black and Byron White filed separate concurrences. Justice John Marshall Harlan concurred in part and dissented in part. Justice Potter Stewart was the sole dissenter; he would have dismissed the appeal.

I was struck, reading Justice Stephen Breyer's 2009 Annual Lecture on *Dred Scott*,[10]

by his reference to the communicative power of a single word in the Court's extensive writings in that case. The word Justice Breyer highlighted from *Dred Scott* was "calm," as used by Justice Benjamin Curtis in his dissent from the now-infamous Taney writing concluding that "a negro, whose ancestors were imported into the country and sold as slaves" is not entitled to sue as a citizen in the courts of the United States.[11] As Justice Curtis wrote, "a calm comparison" of the words of the Declaration of Independence with the individual acts and opinions of its authors would have shown the error, the utter repugnancy, of the majority's conclusion.[12]

For me, the analogy is to Justice Fortas's description of the Arizona proceedings as a "kangaroo court"[13] —in essence, an out-and-out mockery of justice, the ultimate condemnation of a judicial proceeding. Even more poignantly, he wrote: "The condition of being a boy does not justify a kangaroo court." I think of the high drama of those words, and I think of Justice Stewart's contrasting characterization, in dissent, of *Gault* as an "obscure"[14] Arizona case that was better left to the state's benevolent discretion. Could there be a starker contrast—one side believing that in this case Gerald Gault had received all the process that was due him, the other labeling the proceeding a downright mockery of justice. That contrast, for me, captures the essence of the tension, the dilemma, that persists to this very day: precisely what is encompassed by "due process" in the adjudication of juveniles? Where, and how, and by whom, are the lines to be drawn?

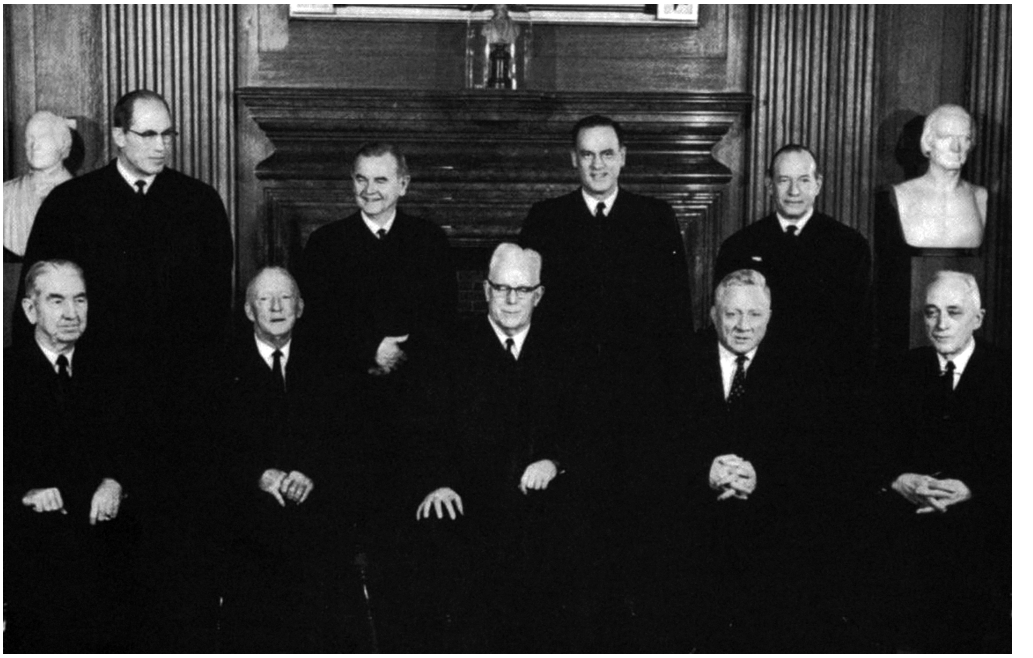
Opening Thoughts

Justice Fortas began his opinion for the Court with the observation that, from the inception of specialized juvenile courts in 1899, jurisdictions had insisted upon wide differences in the procedural rights accorded adults and juveniles, and he recounted at length the history underlying those differences. The early reformers were appalled about the application of adult procedures and penalties to children, who could be given long prison sentences and mixed in jails with hardened criminals. They were convinced that society's role was not simply to ascertain whether the child was guilty or innocent but rather how the child could be treated and rehabilitated, that juvenile court procedures—from apprehension through institutionalization—should be clinical, not punitive. They sought to achieve these ends, without "constitutional grief," by insisting that juvenile court proceedings were not adversarial because the state proceeded in *parens patriae*—in Justice Fortas's view a murky phrase, its historic credentials of dubious relevance, with no presence whatever in the history of criminal jurisprudence.[15]

Civil Proceedings

The reformers, moreover, had argued for the right of the state, as *parens patriae,* to deny a child procedural rights, asserting that, unlike an adult, a child had a right "not to liberty, but to custody."[16] Thus, when a child was delinquent, the state could intervene—not to deprive the child of any rights, because the child had none, but to provide the "custody" to which the child was entitled. For this reason, juvenile proceedings were considered civil, not criminal, and not subject to requirements normally constraining a state seeking to deprive a person of liberty.

Noting that the highest motives and most enlightened impulses motivated this peculiar system for juveniles—a system unknown to our law in any comparable context—Justice Fortas pronounced its constitutional and theoretical underpinnings debatable. However benevolently motivated, unbridled discretion was frequently a poor substitute for principle and procedure. Refusing to succumb to either sentiment or folklore, Justice Fortas declined to credit the claim that juveniles benefited from special procedures applicable to them that offset their denial of normal due process. In his view, due-process standards,



Pictured are the members of the Court who heard the *Gault* case. Justice Abe Fortas (standing at right) wrote the majority opinion, which recognized the rights of juveniles but was careful not to extend to them all the rights of adult defendants.

intelligently administered, would not compel the states to abandon or displace the substantive benefits of the juvenile process.

Justice Fortas next used statistics to dispute the argument that the absence of constitutional protections reduced crime, or that the juvenile system, functioning free of constitutional inhibitions as it had largely done, was effective to reduce crime or rehabilitate offenders. He saw no reason why, consistent with due process, a state could not continue to provide and improve the confidentiality of records of police contacts and court action relating to juveniles where appropriate. He also cited recent studies suggesting that the appearance and actuality of fairness, impartiality, and orderliness—in short, the essentials of due process—would prove the more therapeutic practice for court-involved youth. Indeed, one study had concluded that where stern discipline followed procedural laxness, the contrast could harm a child, who might feel deceived or enticed. Without appropriate due process, even the juvenile who had violated the law might feel unfairly treated and therefore resist rehabilitation.

After reviewing the relevant statistics, Justice Fortas turned to the reality underlying Gerald Gault's appeal. A boy is charged with misconduct and committed to an institution where he may be restrained for years. "It is of no constitutional consequence—and of limited practical meaning—that the institution . . . is called an Industrial School" when it is in actuality "an institution of confinement in which the child is incarcerated."[17] The child's world becomes "'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide."[18] Given this reality, Justice Fortas continued, "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," he declared, in words that have resonated through the decades, "the condition of being a boy does not justify a kangaroo court."[19]

Justice Fortas further observed that where, as here, the juvenile has a home and a family, the judge should have made a careful inquiry as to the possibility that the boy could be disciplined and dealt with by them, despite previous transgressions. Instead, the judge here focused on points that were little different from those relevant to determining any violation of a penal statute. Indeed, "the essential difference between Gerald's case and a normal criminal case [was] that safeguards available to adults were discarded in Gerald's case[, yet] the summary procedure and long commitment was possible because Gerald was 15 years of age instead of over 18."[20]

Defined Rights

Despite the pitch of his writing, Justice Fortas fashioned a holding that recognized for juveniles only some, notably not all, of the rights of adult defendants. He concluded, first, that due process of law required notice of the proceeding equal to that deemed constitutionally adequate for adults. Second, in proceedings that might 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 counsel. Third, the constitutional privilege against self-incrimination was as applicable to juveniles as to adults. Fourth, absent a valid confession, a court cannot determine delinquency or order commitment to a state institution in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with the law and constitutional requirements.[21] Although the Court declined to hold that juveniles were entitled to a transcript of proceedings and to an appeal, Justice Fortas noted that failure to provide an appeal, to record the proceedings, to make findings, or to state the grounds for a juvenile court's conclusion could burden the machinery for habeas corpus, saddle the reviewing court with the need for record reconstruction, and impose upon the juvenile judge the unseemly duty of testifying under cross-examination concerning the hearings before him.[22] The message to the states is clear: Do it anyway.

All in all, Justice Fortas's writing was what the Pennsylvania supreme court later called "a sweeping rationale and a carefully tailored holding."[23] Significantly, Justice Fortas did not explicitly join the debate regarding the extent to which appellants' due-process claims were cognizable against the state of Arizona by virtue of the Fourteenth Amendment's incorporation of the Bill of Rights, though his opinion for the Court appears to adopt "selective incorporation."

At the other extreme, Justice Stewart, in dissenting, criticized the Court for using this "obscure" Arizona case to impose criminal trial restrictions upon thousands of juvenile codes and juvenile courts throughout the nation.[24] Justice Stewart saw the decision as both unsound as a matter of constitutional law and unwise as a matter of judicial policy. The Arizona courts had found that Gerald Gault's parents knew of their right to counsel and right to subpoena, cross-examine, and confront witnesses; that they knew the possible consequences of a finding of delinquency; and that Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.

Defined Danger

There was thus, in Justice Stewart's view, no need in this case for the Court to decide any of those issues, and—even more important—a distinct danger that the Court's decision equating juveniles with adults would simply invite a long step backward into the horrors of the nineteenth century. He gave one pointed example in text—a twelve-year-old boy charged with murder was hanged to death, after adult criminal

court proceedings that were in the view of the New Jersey courts "all very constitutional"—and he footnoted a second example, where a death sentence was upheld for a ten-year-old convicted on his own confession of killing his bedfellow.[25]

Plainly, like Justice Fortas, Justice Stewart was passionate about the subject, but he would have left well enough alone, in the capable and caring hands of the state juvenile courts, fearing that this was just a terribly wrong step for the Supreme Court to take.

A powerful, portentous difference—but hardly the end of the debate among the *Gault* Justices. Would that there were only two sides to every story! The writings of Justices Harlan and Black centered on the third side to the *Gault* story and the fourth: proper interpretation of the Due Process Clause of the Fourteenth Amendment as applied to the states.

In Justice Harlan's view, concurring and dissenting, the majority had both gone too far and fallen short in assessing the procedural requirements of the Fourteenth Amendment, and perhaps worst of all, it had failed to identify with any certainty the standards to be applied.[26] Justice Harlan suggested three criteria to measure procedural due-process requirements in juvenile court proceedings. First, to assure fundamental fairness, no more restrictions should be imposed than are imperative; second, the restrictions imposed should preserve, as far as possible, the essential elements of the state's purpose; and finally, the restrictions chosen should permit later orderly selection of additional protections that might ultimately prove necessary. In this way, the Court could guarantee the fundamental fairness of the proceeding, yet permit the states to continue development of an effective response to juvenile crime.[27]

A Middle Ground

Measured by the standard of fundamental fairness, Justice Harlan proposed a sort of middle ground, underscoring that there were compelling reasons to defer imposition of additional requirements. The Court could avoid imposing unnecessary restrictions and escape dependence upon classifications that could prove to be illusory. Moreover, he observed that both juvenile crime and juvenile courts were under earnest study throughout the country—as continues to this day, I might add—and he feared that by imposing rigid procedural requirements, the Court could inadvertently discourage state efforts to find better solutions and thus hamper enlightened development of the juvenile court systems. Provision of notice, counsel, and a record, in his view, would permit orderly efforts to determine later whether more satisfactory classifications could be devised and, if so, whether the Fourteenth Amendment required additional procedural safeguards. In that Gerald and his parents were not provided adequate notice, they were not advised of their right to counsel, and no record was maintained of the proceedings, Justice Harlan concluded that Gerald had been deprived of his liberty without due process of law.

Justice Black's View

Justice Black essentially agreed with Justice Stewart's dissent that the Court should not have passed on the issues presented because they were not squarely presented, but he also felt obliged to weigh in on "due process." He joined in the majority view that juvenile courts had failed their purpose. The Arizona law had denied the Gaults and their son the right to notice, right to counsel, right against self-incrimination, and right to confront witnesses. They were entitled to all of these rights, not because fairness required them, but because those rights were specifically granted them by the Fifth and Sixth Amendments, made applicable to the states through the Fourteenth Amendment.[28]

Justice Black's words principally were directed to what he viewed as Justice Harlan's misreading of the Due Process Clause to allow

the Court "'to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings' 'in a fashion consistent with the "traditions and conscience of our people."'" He saw nothing in its words or history to permit such interpretation, and argued that "'fair distillations of relevant judicial history'" were no substitute for the words and history of the clause itself. Justice Black maintained that the phrase "due process of law" had through the years evolved as the successor in purpose and meaning to the words "law of the land" in Magna Carta, and that nothing done since the Magna Carta intimated "that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, or to fit the 'decencies' of changed conditions, or to keep their consciences from being shocked by legislation, state or federal."[29]

Freedom in this nation, Justice Black warned, would be far less secure the very moment that judges could determine which safeguards "'should' or 'should not be imposed' according to their notions of what constitutional provisions are consistent with the 'traditions and conscience of our people.'" Judges with such power, even while professing "'to proceed with restraint,' will be above the Constitution, with power to write it, not merely to interpret it"—"the only power constitutionally committed to judges."[30]

Having previously voiced his support for "full incorporation" of the Bill of Rights through the Fourteenth Amendment, Justice Black noted that the *Gault* case concerned Bill of Rights amendments; that the "procedure" power Justice Harlan had claimed for the Court related "solely to Bill of Rights safeguards"; and that Justice Harlan had also claimed for the Court "a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of what fits tradition and conscience." Because Justice Black did not believe that the Constitution vested "such power in judges, either in the Due Process Clause or anywhere else," his vote to invalidate the Arizona law was not on the ground that it was "unfair," but rather on the ground that it violated the Fifth and Sixth Amendments, imposed on the states by the Fourteenth Amendment.[31]

And there it is, five views of the law, each expressed with intensity and authority—in all, eighty-one power-packed pages of the **U.S. Reports**.

I close this discussion of the *Gault* writings with a personal recollection from my own treasured years at the New York State Court of Appeals. In instances where a case fractured our court and generated several separate writings, often I would ask myself: In finally, absolutely and definitively resolving this case before us, hasn't the court now given good solid support for every possible conclusion? In *Gault*, I believe the answer clearly is yes.

III. Gault's Trail in the Supreme Court

No surprise, then, that the decision has had an interesting life in the Supreme Court since May 15, 1967. And I use the word "interesting" advisedly, having been told by a friend that "interesting" is most appropriate to describe a bad blind date. In short, it's a transparent attempt to avoid a frank answer.

Though *Gault* is a landmark of juvenile justice, it has in fact shown up in a variety of Supreme Court cases—even in the 1969 affirmance of Timothy Leary's conviction for drug trafficking.[32] Just a moment's diversion to touch on those cases before returning to the appeals involving juveniles.

Plainly, throughout the ensuing decades *Gault* has had a role in the Supreme Court's articulation of the contours of constitutional procedural protections in criminal cases, underscoring that due process and fair trial are flexible concepts that require identifying and accommodating the interests of individuals and society.

Outside the world of procedural rights in criminal cases, the Court has invoked *Gault* in shaping rights relative to summary court-martials, prison discipline, civil commitments

of mental patients and the like—a category roughly definable as "quasi-criminal" cases—like the juvenile delinquency proceeding in *Gault* itself, in some respects akin to criminal cases, in others not. Here the Court has drawn significant distinctions, depending on the nature of the proceeding, exemplified in 1984, in *Allen v. Illinois*, by Justice William Rehnquist's narrowing of *Gault*'s majestic declaration that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty."[33] At issue in *Allen* was the Illinois Sexually Dangerous Persons Act, which could result in indeterminate commitment to a maximum-security psychiatric institution. In concluding that the loss of liberty does not equate a proceeding with a criminal prosecution for purposes of the Sixth Amendment, the Court carved out as determinative the state's interest in treating sexually dangerous persons under its *parens patriae* as well as police powers, which of course went the other way in *Gault*.

That brings to mind another majestic declaration from Justice Fortas's pen that has undergone refinement by the Supreme Court: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[34] From among the several noncriminal Supreme Court decisions citing *Gault*, I am drawn especially to the abortion and birth-control cases citing Fortas's powerful words in attempting to define the extent of state power to regulate the conduct of minors not constitutionally regulable when committed by adults. As Justice Lewis F. Powell observed in 1979 in *Bellotti v. Baird*,[35] upholding a Massachusetts statute requiring parental consent for underage abortions, those words are only the beginning of the very difficult analysis that must be made, necessarily recognizing the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the important parental role in child-rearing. Thus, although children may be protected by the same constitutional guarantees against governmental deprivations as are adults, the Court since *Gault* has made clear that the state is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, sympathy, and parental attention. A delicate balance indeed.

Scope of Due Process

And that perception returns us to the subject of the day: precisely what is encompassed by procedural "due process" in adjudicative proceedings involving juveniles, who may face removal from home and years of commitment to a state institution? What has been *Gault*'s trail, first in later Supreme Court decisions addressing that question, and then finally—and briefly—in the world beyond the Supreme Court?

Wouldn't you know, the very next juvenile due-process case to arrive at the Supreme Court—some have suggested an even more significant case, in that it signaled how the Court would actually apply *Gault*—came from my own former court, the New York State Court of Appeals: *In re Winship*,[36] in 1970. I have to admit that, as a judge, it seemed to me that once *certiorari* was granted, the judges of the court under review should themselves have the option to present the appeal to the Supreme Court. (Just joking.) Take my word for it: no one on Earth has researched more exhaustively or feels more strongly for affirmance than the majority writer, no one more strongly for reversal than the dissenter. Talk about passionate—they would do a phenomenal job!

Reasonable Doubt

In *Winship*, it was the state court dissenter, Chief Judge Stanley Fuld, who ultimately prevailed in the Supreme Court, extending incorporation into juvenile proceedings of additional federal procedural rights not explicitly found in the Bill of Rights, the reasonable-doubt standard—and by the way, in so doing, making the reasonable-doubt standard part of

the Due Process Clause guarantees for adults as well. In Justice Brennan's stirring words for the majority, "We made clear [in *Gault*] that civil labels and good intentions [to save the child] do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'"[37]

Justices Harlan and Black—one concurring, one dissenting—continued their debate regarding the proper scope of the Due Process Clause. While reemphasizing that there was no automatic confluence between criminal due process and juvenile due process, Justice Harlan in this instance agreed with the majority that the reasonable-doubt standard was an expression of fundamental procedural fairness, merely requiring juvenile court judges to be more confident in their belief that the youth did the act charged.[38] Justice Black, rejecting the reasonable-doubt standard, reiterated his view that the explicit language of the Bill of Rights, and not any individual judges' notions of "fairness," should define due process of law.[39]

And a new voice—Chief Justice Warren Burger, joined by Justice Stewart—dissented from what he saw as "the further straitjacketing of an already overly restricted" juvenile justice system. He lamented (as Justice Stewart had done in *Gault*) that each step the Supreme Court took toward adding rights was turning the clock back to the nineteenth century, pre–juvenile court era. In his words, "What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from the Court." Like Justice Fortas in *Gault*, Chief Justice Burger also drew from the animal kingdom to express his fear that, by adding greater judicial formalism to juvenile court proceedings, the Supreme Court was "'burn[ing] down the stable to get rid of the mice.'"[40] Oh, my!

The Ensuing Decades

So how in the ensuing decades have the "kangaroo" and the "mice" fared in the Supreme Court of the United States? Are juvenile adjudication proceedings more like criminal cases, or not? And what is the standard for determining the process due: totality of the circumstances, fundamental fairness, strict incorporation, selective incorporation of the Bill of Rights, or something else? Which has prevailed—*Gault*'s "sweeping rationale," or its "carefully tailored holding," or the informality, flexibility and breathing room of the beneficent juvenile courts? Each camp, you recall, had ardent advocates in *Gault*.

There was not long to wait for an answer. In *McKeiver v. Pennsylvania*,[41] in 1971, the Court drew the line at the right to jury trials in juvenile adjudications, fixing the standard of review as Justice Harlan's "fundamental fairness" and limiting the concept of fundamental fairness to rights associated with the fact-finding process. Juveniles, Justice Harry Blackmun wrote, are entitled to some but by no means all of the constitutional rights accorded to adult criminal defendants; trial by jury is not a necessary component of accurate fact-finding, and requiring jury trials would effectively remake juvenile proceedings into full-blown adversarial contests. In denying the enlargement of due process to include the right to trial by jury, the Court's majority underscored the need to maintain what it called the intimacy of the juvenile proceeding, expressing reluctance to curtail the opportunity for states to experiment further and seek in new and different ways the elusive answers to the problems of the young, through fairness, concern, sympathy, and paternal attention. Only Justice Douglas, joined by Justices Black and Marshall, dissented, seeing acceptance of the juvenile as a person entitled to the same protection as an adult—including the right of trial

by jury—as "the true beginning of the rehabilitative process."[42]

I highlight just a couple of the Court's subsequent decisions touching on juveniles.

Again in *Breed v. Jones*,[43] in 1975, the Court weighed in on the side of the benevolent, "intimate"[44] state juvenile-justice experiment, noting that although the system had fallen short of the high expectations of its sponsors, it still offered broad social benefits that can survive constitutional scrutiny. Here the Court spoke unanimously in extending to juveniles the protection against double jeopardy in transfer proceedings to the adult court system. The Court was not persuaded that requiring transfer proceedings to be held prior to adjudicatory hearings would unduly strain juvenile court resources, yet on the other hand the added protection would promote fundamental fairness. *Breed* was the first case where the Court reached a unanimous conclusion in striking the "due process" balance, and the last to add to the balance specific constitutional protections for the juvenile.

A Fateful Day

For me, the ambivalence regarding troubled young people is well illustrated by two decisions handed down the very same day—June 20, 1979. In one, *Fare v. Michael C.*, the Court reversed the California supreme court, concluding that a sixteen-year-old knowingly waived his constitutional rights—including the right to counsel and right against self-incrimination—when he asked to see his probation officer,[45] provoking Justice Thurgood Marshall's ringing invocation in his dissent of *Gault*'s admonitions regarding confessions by minors.[46] But in the second case decided that day, *Parham v. JR*, the Court reversed a three-judge District Court for the Middle District of Georgia, concluding that Georgia procedures for admitting a child for treatment to a state mental hospital on parental consent were constitutionally insufficient to satisfy the child's substantial liberty interest in not being unnecessarily confined.[47] Significantly, both lower courts learned on June 20, 1979 that they had gotten it wrong—the first erred too much on the side of the child, the second too much on the side of the state. A fine balance indeed!

In 1984, in *Schall v. Martin*,[48] the balance tipped even further away from *Gault*'s "sweeping rationale" and toward the broad discretion of state juvenile courts, the Court through Justice Rehnquist grounding its conclusion on what Justice Fortas two decades earlier had disparaged as the "murky" soil of *parens patriae*.[49]

In *Schall*, a facial challenge to provisions of New York's Family Court Act, the issue was pretrial detention for a class of youngsters based on a finding of serious risk that they might commit what would be a crime before the return date. Both the district court and the Second Circuit had held in favor of the juveniles, because the statute was administered in such a way that detention served as punishment imposed without proof of guilt established in accordance with the requisite constitutional standard. The six-Justice Supreme Court majority, however, concluded that preventive detention serves a legitimate state interest, and that (recognizing the state's superior *parens patriae* interest) the procedural safeguards were sufficient to authorize the detention of at least some juveniles charged with crimes. As Justice Rehnquist wrote, "[t]he harm suffered by the victim of crime is not dependent on the age of the perpetrator."[50] On the other side, championed with equal fervor, are the countervailing considerations articulated by Justice Marshall—including bodily restraint of the juvenile for presumptively innocent conduct, stigmatization, and the feeling of young detainees that society at large views them as hostile and "irremediably 'delinquent'"—all tipping toward a more rigorous constitutionally guaranteed liberty interest for the juveniles.[51]

I conclude these few highlights from Supreme Court history invoking *Gault* with the Court's 1993 decision in *Reno v. Flores*,[52] involving a facial challenge by a class of

Gault shakes hands with Norman Dorsen, the lawyer who argued his case. Dorsen later became general counsel and then president of the American Civil Liberties Union, arguing or appearing as amicus in countless cases before the Supreme Court, including *Gideon v. Wainwright*, the Pentagon Papers case and the Nixon Tapes case. Gault was his very first argument in this Chamber.

unaccompanied alien juveniles held in custody by what was then the Immigration and Naturalization Service, pending deportation proceedings, pitting any liberty interest arising from custodial detention on the one hand against the state interest in preserving and promoting the welfare of children on the other. Here again, the balance tipped in favor of the state. In joining Justice Antonin Scalia's opinion upholding institutional custody, Justice Sandra Day O'Connor meticulously traced the path of decisions involving children generally, from *Gault* in 1967 to *Santosky v. Kramer*[53] in 1982, concluding that, where a juvenile has no responsible adult available, where the government does not intend punishment, and where the conditions of custody are decent and humane, there is no constitutional violation.[54] That conclusion evoked the dissent of Justice John Paul Stevens, joined by Justice Blackmun: "If the Government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that detention in fact serves that interest."[55]

The world changes. The Court changes. Technology changes—the Geralds of today no doubt texting, tweeting, twittering (hopefully not sexting) instead of telephoning. And the struggle to strike a balance endures.

IV. *Gault*'s Legacy

Often courts are left wondering how things actually turned out for the flesh-and-blood human beings before them. In Gerald's case, we are fortunate enough to know. He spent his career in the Army and throughout his life has

Gault spent his entire career in the Army. In 2007, he described the impact of his case: "Then I had no rights. But now my children, the children of the community, children of the world have rights."

remained an upstanding member of the community. Asked about the impact of his appeal, he responded: "Then I had no rights. But now my children, the children of the community, children of the world have rights. They have rights to an attorney, and to be able to question their accuser. . . . I feel it was well worth the fight. And I think my folks do, too. I really do."[56]

Interesting. What do you think, I wonder? Fortunately, I am in a position today, in this exalted Chamber, where I do not have to answer any questions. And by the way, neither do you. But I do believe that *Gault* has been a good subject for the Annual Lecture of the Supreme Court Historical Society. Here's why.

First, of course, the case unquestionably marks an important chapter in the history of the Supreme Court of the United States. Although *In re Gault*, unlike *Gideon v. Wainwright*,[57] never inspired a popular film starring the likes of Henry Fonda, the case has generated a great deal of activity and commentary.[58]

But second, the subject of juvenile justice commands extraordinary public interest today. In New York alone, the Department of Justice has recently concluded a two-year investigation by documenting brutal instances in our juvenile detention facilities, where many nonviolent first-time young offenders are housed, threatening to sue the state if the shortcomings are not addressed.[59] Our Governor's Task Force has its juvenile-justice recommendations;[60] our chief judge has his.[61] Front-page stories across the nation have addressed a whole host of issues involving adolescents—from zero-tolerance school-discipline policies,[62] to family cycles of self-destruction, to heavy racial disparities,[63] to the devastating impact of the current economic crisis on already troubled teenagers. Efforts are under way to find innovative policy and practice models, a response both to the growth of punitive reactions by the states (including transfers to the adult criminal-justice system) and to the inarguable statistical correlation

between juvenile incarceration and, not greater rehabilitation, but rather, higher recidivism rates.

Contemporaneously, but certainly not coincidentally, scientific research on adolescent development—the neurological, psychological, and behavioral differences between children and adults—has burgeoned.[64] Surely the field has come a long way since 1967, when the Court's focus was less on the unique vulnerability of adolescents and more on the procedural protections of our Constitution. The literature on adolescent brain development and related issues is voluminous today. Most recently, in *Graham v. Florida*,[65] the Court's rejection of life without parole as a violation of the Eighth Amendment, Justice Anthony Kennedy drew from those sources, referencing in particular juveniles' impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. Where will this new science take the Court next? Though we now have proved scientifically what we have always known instinctively about kids, still we struggle to strike a good balance between their rights and their wrongs.

Clearly juvenile justice remains a critical subject today, the best idea by far being delinquency prevention—early intervention, social services to keep kids in their schools and with their families, education rather than incarceration, an idea we all can be part of. It's the children's future to be sure—but it's our future, our nation's future too.

And finally, yes, I do agree with Gerald Gault that it was worth the court battle. A full century after the Fourteenth Amendment was adopted, the Supreme Court in *Gault* for the first time recognized the constitutional status—the "personhood"—of juveniles, and for the first time put a spotlight on what always must be special about our specialized juvenile-justice system, given both its subjects and its objects. That is a powerful message.

Of only one thing am I certain: that the absolute last word on the enormously complex and consequential subject of juvenile justice—as opposed to the absolute last word of this lecture—has yet to be spoken.

Epilogue

Gerald Gault's counsel at the Supreme Court, Norman Dorsen (a former law clerk to Justice Harlan), later became general counsel and then president of the American Civil Liberties Union (ACLU), arguing or appearing as amicus in countless cases before the Supreme Court, including *Gideon v. Wainwright*,[66] the *Pentagon Papers* case,[67] and the *Nixon Tapes* case.[68] *Gault* was his very first argument in this Chamber. Dorsen is currently Counselor to the President of New York University and the Stokes Professor of Law at NYU School of Law, where he has taught since 1961 (coincidentally, when I was a student there). President Bill Clinton awarded Dorsen the Eleanor Roosevelt Medal for contributions to human rights in 2000, and in 2007 the Association of American Law Schools presented him with its triennial award for "lifetime contributions to the law and to legal education."[69]

Amelia Dietrich Lewis was an Arizona cooperating attorney with the ACLU who represented the Gaults at the state habeas corpus proceeding and in the Arizona supreme court. Her representation had focused chiefly on parental custody rights, but with the entry of the ACLU it shifted to the due-process rights of juveniles. A pioneer among women lawyers, Ms. Lewis was admitted to the New York Bar in the 1920s and worked in the New York City juvenile justice system until 1957, when she moved to Arizona. When she sat for the Arizona bar examination, only one other woman was taking the exam—Sandra Day O'Connor. Ms. Lewis received an award from the American Bar Association for her work on *Gault* and practiced law until she was eighty-nine years of age. She died two years later, in 1994.[70]

Frank A. Parks, an assistant attorney general in Arizona, represented the state on the brief and in oral argument. Parks had been admitted to the Arizona bar the prior year. He

left to join a private litigation firm in 1967, the same year the Supreme Court decided *Gault*, and developed a specialty in medical-malpractice defense litigation. He cofounded the Sanders and Parks law firm in 1973 and served as its president until 1984. He was the recipient of the 1999 Arizona Medical Association Distinguished Service Award. Mr. Parks is now retired.[71]

Following the Supreme Court victory, Gerald Gault was released from confinement, having been detained for close to three years. A year later, he joined the Army and spent his career there, rising to the rank of sergeant. According to Professor Dorsen, Gault apparently has a spotless record and is an upstanding member of his community.[72]

Later interviewed about his landmark case, Gault reminisced: "Lord, here I am, I didn't do anything wrong. I'm in court being tried, and now I'm being sentenced until I'm 21 years old. I didn't know what to think. Looking back, I was really dazed about it . . . The first time being pulled away from Momma and Daddy—it kind of put me in shock . . . I seen my folks later that evening at the . . . juvenile hall . . . Mom and daddy talked to me. They told me exactly what they were doing, and why they were doing it and how they were going about it . . . I figured right then, hey, if my folks are willing to fight like that and get that worked up about it, I should too."[73]

When the "dean of boys" at Fort Grant State Industrial School called to tell him that he had won his case and would be released, and that there were reporters waiting to interview him, Gerald asked why reporters wanted to talk to him. The "dean" said, "Your case went all the way to the Supreme Court. Juvenile cases don't do that." Gerald replied, "Wow! I guess one did . . ."[74]

ENDNOTE

*Supreme Court Historical Society Annual Lecture, June 7, 2010. The author thanks Marjorie McCoy, former Deputy Clerk of the Court of Appeals of the State of New York, for partnering with her in this endeavor. From the first moment to the last, their constant exchange of ideas, comments, and drafts added immeasurably to the joy of preparing and presenting this lecture. Additionally, she thanks Shari Graham, a valued colleague at the firm Skadden, Arps, Slate, Meagher & Flom, for her assistance in preparing the lecture for publication.

[1]*Federal Baseball Club of Baltimore v. Nat'l League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

[2]*In re Gault*, 387 U.S. 1 (1967).

[3]Brief for the State of Arizona, *In re Gault*, 387 U.S. 1 (1967) at 8.

[4]*In re Gault*, 99 Ariz. 181, 193 (1965).

[5]*Gallegos v. Colorado*, 370 U.S. 49 (1962).

[6]*Gallegos*, 370 U.S. at 55. As an aside, I note that in my years as a judge on New York State's high court, I came to appreciate that the amorphous, highly deferential "totality of the circumstances" test most often—but obviously not always—translated into "conviction affirmed."

[7]*Kent v. U.S.,* 383 U.S. 541 (1966).

[8]*Kent,* 383 U.S. at 556.

[9]*Durham v. United States*, 214 F.2d 862 (1954); *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also Christopher P. Manfredi, **The Supreme Court and Juvenile Justice** (Lawrence: University Press of Kansas, 1998), pp. 58, 74.

[10]Stephen G. Breyer, "A Look Back at the *Dred Scott* Decision," 35 *Journal of Supreme Court History* 110 (2010).

[11]*Dred Scott v. Sandford*, 60 U.S. 393, 430 (1857).

[12]*Dred Scott*, 60 U.S. at 574.

[13]*In re Gault*, 387 U.S. at 28.

[14]*In re Gault*, 387 U.S. at 78.

[15]*In re Gault*, 387 U.S. at 16.

[16]*In re Gault*, 387 U.S. at 17.

[17]*In re Gault*, 387 U.S. at 27. As a matter of fact, I might add, this Industrial School later did become an Arizona state prison for male convicts.

[18]*In re Gault*, 387 U.S. at 27.

[19]*In re Gault*, 387 U.S. at 27–28.
[20]*In re Gault*, 387 U.S. at 29.
[21]The right against self-incrimination and the rights to confrontation and cross-examination provoked Justice White's concurrence, on grounds that the record was inadequate and those holdings unnecessary. *In re Gault*, 387 U.S. at 64 (White, J., concurring).
[22]*In re Gault*, 387 U.S. at 58.
[23]*In re Terry*, 438 Pa. 339, 345 (1970).
[24]*In re Gault*, 387 U.S. at 78.
[25]In re Gault, 387 U.S. at 80. Indeed, the Ohio Association of Juvenile Court Judges (joined in by the Kansas Association of Probate and Juvenile Judges) and *amicus curiae* argued in support of affirmance.
[26]*In re Gault*, 387 U.S. at 65.
[27]*In re Gault*, 387 U.S. at 71–72.
[28]*In re Gault*, 387 U.S. at 59, 60–62.
[29]*In re Gault*, 387 U.S. at 62.
[30]*In re Gault*, 387 U.S. at 63.
[31]*In re Gault*, 387 U.S. at 63–64.
[32]*Leary v. United States*, 395 U.S. 6, 54 (1969) (Stewart, J., concurring).
[33]*Allen v. Illinois*, 478 U.S. 364, 372 (1984).
[34]*In re Gault*, 387 U.S. at 13.
[35]*Bellotti v. Baird*, 443 U.S. 622 (1979).
[36]*In re Winship*, 397 U.S. 358 (1970).
[37]*In re Winship*, 397 U.S. at 365–66.
[38]*In re Winship*, 397 U.S. at 375 (Harlan, J., concurring).
[39]*In re Winship*, 397 U.S. at 377 (Black, J., dissenting).
[40]*In re Winship*, 397 U.S. at 376.
[41]*McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).
[42]*McKeiver*, 403 U.S. at 566 (Douglas, J., dissenting).
[43]*Breed v. Jones*, 421 U.S. 519 (1975).
[44]*McKeiver*, 403 U.S. at 545.
[45]*Fare v. Michael C.,* 442 U.S. 707 (1979).
[46]*Fare,* 442 U.S. at 728.
[47]*Parham v. J.R.*, 442 U.S. 584 (1979).
[48]*Schall v. Martin*, 467 U.S. 253 (1984). See also Janet Fink, "Determining the Future Child: Actors on the Juvenile Court Stage," in F. Hartmann, ed., **From Children to Citizens, The Role of the Juvenile Court** II, 271 (Springer-Verlag 1987), describing *Schall v. Martin* as the Court's "most significant retrenchment from Gault." The entire chapter—Chapter 15—is a terrific reference.
[49]*In re Gault*, 387 U.S. at 16.
[50]*Schall*, 467 U.S. at 264–65.
[51]*Schall*, 467 U.S. at 291 (Marshall, J., dissenting).
[52]*Reno v. Flores*, 507 U.S. 292 (1993).
[53]*Santosky v. Kramer*, 455 U.S. 745 (1982).
[54]*Flores*, 507 U.S. at 315-319 (O'Connor, J., concurring).
[55]*Flores*, 507 U.S. at 343 (Stevens, J., dissenting) (emphasis in original).
[56]National Juvenile Defender Center, "Gault at 40," Interview with Gerald Gault, available at http://www.njdc.info/gaultat40/gault_interview.php (last accessed March 1, 2011).
[57]Gideon v. Wainwright, 372 U.S. 335 (1963).
[58]"The Promise of *In re Gault*: Promoting and Protecting the Right to Counsel in Juvenile Court," 60 *Rutgers L. Rev.*, an entire issue of stimulating articles commemorating *Gault*'s fortieth anniversary, exemplifies the bountiful commentary the case continues to generate.
[59]Letter, Loretta King, Acting Assistant Attorney General, to the Honorable David A. Paterson, Governor of N.Y., Aug. 14, 2009, Department of Justice, available at http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_findlet_08–14–2009.pdf (last visited Feb. 12, 2011) (detailing Department of Justice's investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center).
[60]Governor David Paterson's Task Force on Transforming Juvenile Justice, "Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State," Dec. 14, 2009, Vera Institute of Justice, available at http://www.vera.org/paterson-task-force-juvenile-justic-report (last visited Feb. 12, 2011).

[61]Jonathan Lippman, "Reforms Proposed for Juvenile Justice," *New York Law Journal*, May 3, 2010, at 11.

[62]American Bar Association Juvenile Justice Committee, "Zero Tolerance Policy," Feb. 2001, American Bar Association Juvenile Justice Policies, available at http://www.abanet.org/crimjust/juvjus/zerotolreport.html (last visited Feb. 12, 2011).

[63]USHRN Working Group on Juvenile Justice, "Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," Feb. 2008, available at http://www.juvenilejusticepanel.org/resource/items/U/S/USHRNWGroupJJUSFailureICERD08.pdf (last visited Feb. 12, 2011).

[64]The mounting literature on juvenile crime and punishment, particularly the scientific data, is simply breathtaking. Professor Jeffrey Fagan's eighty endnotes accompanying his excellent article, "The Contradictions of Juvenile Crime and Punishment," in 139 Daedalus, *Journal of the American Academy of Arts and Sciences* 3: 43, 57–61 (summer 2010), offer a good sample of the ongoing research.

[65]*Graham v. Florida*, 130 S.Ct. 2011 (2010). As Mark Hansen wrote recently, Justice Kennedy said "no recent data provided reason to reconsider the Roper decision and its observations about juveniles. If anything, he said, the evidence has become stronger and more conclusive in the five years since. Scientists say research demonstrates what every parent of a teenager probably knows instinctively: that even though adolescents may be capable of thinking like adults, they are mentally and emotionally still children." Mark Hansen, "What's the Matter with Kids Today: A Revolution in Thinking about Children's Minds Is Sparking Change in Juvenile Justice," *ABA Journal* 50, 52 (July 2010). The author speculates regarding ramifications of the new research for juvenile justice generally.

[66]*Gideon v. Wainwright*, 372 U.S. 335 (1963).

[67]*New York Times Co. v. United States*, 403 U.S. 713 (1971).

[68]*United States v. Nixon*, 418 U.S. 683 (1974).

[69]Norman Dorsen, biographical sketch, *NYU Law*, available at https://its.law. nyu.edu/facultyprofiles/profile.cfm?section = bio& personID = 19885 (last visited Feb. 12, 2011).

[70]Wolfgang Saxon, "Amelia Lewis, 91, Victor in Case That Changed Juvenile Justice," *New York Times*, Nov. 19, 1994, available at http://www.nytimes.com/1994/11/19/obituaries/amelia-lewis-91-victor-in-case-that-changed-juvenile-justice.html (last visited Feb. 12, 2011).

[71]Frank A. Parks, Attorney Profile, Sanders & Parks P.C., available at http://www.sandersandparks.com/Bio/FrankParks.asp (last visited Feb. 12, 2011).

[72]Norman Dorsen, "Reflections on In re Gault," 60 *Rutgers L. Rev.* 1, 10 (Fall 2007).

[73]National Juvenile Defender Center, "Gault at 40," Interview with Gerald Gault, available at http://www.njdc.info/gaultat40/gault_interview.php (last accessed March 1, 2011).

[74]*Id.*