

Right to Counsel in Juvenile Court 50 Years After *In re Gault*

Cheryl D. Wills, MD

J Am Acad Psychiatry Law 45:140–44, 2017

People in this society need to realize that these children that were put behind bars, without counsel, are our next leaders.—Gerald “Jerry” Gault, 1994¹

The 20th century U.S. Supreme Court advanced the Constitutional rights of adult criminal defendants. Although far reaching in their impact, these constitutional protections were not afforded to juveniles. For example, the Supreme Court held in *Gideon v. Wainwright* (1963)² that indigent adult defendants in felony cases have a right to counsel as a matter of due process, but did not extend this right to juvenile defendants. Similarly, the Court affirmed in *Miranda v. Arizona* (1966)³ that the Fifth Amendment protects adults, but not juveniles, from self-incrimination during police interrogation.

Youth involved with the courts are processed in a separate judicial system formalized in the late 19th century, which until 1967, lacked many of the due process rights accorded adults, including the right to counsel. Since the establishment of a separate juvenile court system, these courts have been responsible for:

- determining whether a youth charged with a criminal offense actually engaged in the alleged offense;

- defining conditions that may have contributed to a youth’s behavior; and

- crafting an individualized rehabilitation plan for the youth during the disposition or sentencing hearing.⁴

The intent of this nonadversarial system was therapeutic and rehabilitative: juveniles were to be provided with environments and services that would promote prosocial behavior, separate them from adult offenders, and prevent future criminal behavior. Juvenile court proceedings are nonadversarial hearings in which the state acts *in loco parentis*. These proceedings are expected to determine a course of action in regard to the youth’s offense that is in the youth’s best interests. Consequently, juvenile court judges were not expected to adhere to the rules of criminal procedure and juveniles typically were not represented by counsel in court hearings.

In Re Gault and Due Process for Juveniles

An event in Gila County, Arizona, led to sweeping changes in the due process rights accorded youth in juvenile court, including their right to counsel. In February 1964, Gerald “Jerry” Gault was ordered to serve six months’ probation for being with a boy who stole a wallet.⁵ Four months later, Gault, then 15 years old, and his friend Ronald Lewis allegedly made a prank phone call to their neighbor, Mrs. Cook. One boy allegedly told Mrs. Cook that his friend wanted to speak to her. The other boy asked her “Are your cherries ripe today?” and “Do you have big bombers?” (Ref. 5, p 4).

Mrs. Cook recognized the voices of both boys and reported the incident to the Gila County Sheriff’s office. The alleged remarks, later characterized by Justice Abe Fortas as comments of the “irritatingly offensive, adolescent, sex variety” (Ref. 5, p 4), resulted in both boys’ being taken to the local probation office. Two probation officers decided to detain the boys pending a delinquency hearing. A probation officer interrogated Gault that night. The following morning, Gault insisted that he was innocent.

Dr. Wills is an assistant professor of psychiatry at University Hospitals, Case Medical Center, Cleveland, OH. Address correspondence to: Cheryl D. Wills, MD, 5247 Wilson Mills Road, No. 452, Cleveland, OH 44143. E-mail: cwforensic@earthlink.net.

Disclosures of financial or other potential conflicts of interest: None.

On the day Gault was detained, upon returning home from work and determining that her son was not at home and had not completed his chores, Gault's mother learned from Ronald's family that both boys had been arrested and taken to the Children's Detention Home. She was not given a notice of her son's confinement or the charges against him. She went to the facility but was not permitted to have contact with her son. A probation officer told her that a hearing about Gault's case would be held the following day.

On June 9, 1964, the probation officer filed a petition that charged Gault with making lewd phone calls. The Gaults did not receive a copy of the petition. Juvenile Court Judge McGhee held an informal hearing in chambers. Witnesses were not sworn in prior to testifying, and the proceedings were not transcribed or otherwise recorded. Mrs. Cook was not present, and the extent of Gault's involvement in the alleged offense could not be definitively determined. Gault's mother therefore asked that the court arrange for Mrs. Cook to be present at Gault's next hearing.

The judge remanded Gault to the Detention Home. When he was released a few days later, the Gaults received written notification of the next hearing date. Mrs. Cook failed to appear at the second hearing. Despite the questionable veracity of the evidence, the judge committed Gault to a State Industrial School for Boys (a juvenile corrections facility), until his 21st birthday. This six-year sentence was essentially a juvenile life sentence that would deprive Gault of the opportunity to work through the developmental tasks of adolescence at home with a support network of family, educators, friends, and community resources. An adult offender convicted of the same charge would have received a maximum sentence of two months in jail and a \$50 fine.

Gault did not have legal representation at either hearing and was not told that he had a right to counsel, regardless of his ability to pay. His family sought the assistance of Arizona American Civil Liberties Union (ACLU) attorney Amelia Dietrich Lewis, who agreed to represent him. Mrs. Lewis had practiced law in the New York juvenile justice system before she relocated to Arizona.⁶

Arizona statutes did not permit appeals in juvenile court proceedings, so Mrs. Lewis filed a petition for a writ of *habeas corpus*. Notifications of both Gault's detainment and charges against him were presented

at this hearing. Conflict regarding whether Gault had admitted to making the phone calls persisted. Although Gault, his mother, and the probation officer who interrogated Gault insisted that Gault had not confessed, Judge McGhee insisted that Gault had confessed to him.

Gault's *habeas corpus* petition was denied by both the Superior Court of Arizona and the Arizona Supreme Court. With the support of the ACLU and other legal resources, Attorney Lewis and her co-counsel, New York University law professor Norman Dorsen, appealed the case to the U.S. Supreme Court. The Court had to decide a narrow question: what constitutional due process rights must be accorded to juveniles facing delinquency proceedings that could result in confinement in a state institution?

In an eight-to-one decision, the Court reversed and remanded the appellate court decision. Justice Abe Fortas authored the majority opinion, stating that Gault's alleged behavior could have resulted in a significant curtailment of his liberty by confining him for the remainder of his juvenile life. This deprivation of liberty would have deprived Gault of traditional access to family, friends, education, and recreation and placed him at the mercy of nonparental custodians and staff. For this reason, Justice Fortas stated, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" (Ref. 5, p 13). The Court ruled that, similar to the constitutionally protected due process rights accorded to adults, Gault was entitled to:

- timely and specific notice of charges for the youth and his parent/guardian;
- notification of the youth and his parent/guardian of the right to assistance of legal counsel;
- protection of the youth's privilege against self-incrimination;
- the opportunity to confront and cross-examine accusers; and
- a recording of the trial proceedings.

The Court observed that in the matter of *Gault*, "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure" (Ref. 5, p 18). This flawed process results in the child's receiving "the worst of both worlds; that he gets neither the protections accorded

to adults, nor the solicitous care and regenerative treatment postulated for children” (Ref. 5, p 18). The Court was particularly concerned about the random quality of Gault’s adjudication because, “under our Constitution, the condition of being a boy does not justify a kangaroo court” (Ref. 5, p 28).

By granting due process rights to youth in juvenile court who face possible institutional confinement, *In re Gault* is said to have criminalized juvenile court proceedings. However, in *Gault*, the U.S. Supreme Court did not grant all of the constitutional protections available to adult criminal defendants to juveniles who pass through juvenile court. For example, the Court has also held that juveniles do not have a Sixth Amendment right to a trial by jury, although the states are free to grant one (*McKeiver v. PA*, 1971).⁷ In this case, Justice Harry Blackmun, writing for the majority, said that the Court granted juveniles mandatory minimum procedural rights in *In re Gault* to preserve the accuracy of the juvenile court’s fact-finding mission. Given the unique nature of juvenile justice hearings, which, the Court said, are neither criminal nor civil, juries are not essential to that mission.

Gault’s Effect on Juvenile Court Procedure

The *Gault* decision introduced aspects of criminal trial procedure into juvenile court proceedings. Perhaps the most significant of these was the right to counsel. For the first time since its creation, the juvenile court system was required to involve juvenile defense attorneys in the adjudication process. Unfortunately, implementation of the *Gault* provisions has been slow, in part because the changes challenged the therapeutic philosophy of juvenile courts.

In addition, the Supreme Court did not address how the mandated changes in juvenile court procedure would be budgeted and funded. The cost to hire and train juvenile defense attorneys and to provide budgets for investigations, witness procurement, psychiatric and education assessments, and other salient resources can be prohibitive for budget-strapped juvenile court systems. Georgetown Law School professor Wallace J. Mlyniec stated:

Juvenile indigent defense systems across the country are . . . [for the most part] chaotic, under-funded, disenfranchised, county-by-county hybrids of public defenders, appointed counsel, [and] contract attorneys, [supplemented by] the occasional law school clinical program or non-profit law center” [Ref. 8, p 6].

Right to Counsel

Despite problems in implementation of the provision of rights to juveniles, *Gault* affirmed the juvenile’s right to counsel regardless of ability to pay. This arguably is the most significant aspect of the *Gault* decision. The Institute of Judicial Administration, American Bar Association, and National Advisory Committee for Juvenile Justice and Delinquency Prevention have taken the position that children cannot represent themselves effectively in delinquency cases.^{8,9} The National Juvenile Defender Center also has taken the position that akin to the role of a defense attorney in adult criminal court, the role of the juvenile defense attorney is to represent the expressed interests of the juvenile at every stage of the proceedings.¹⁰ However, a youth’s expressed interests can differ substantially from the youth’s best interests, which requires consideration of the opinions of judges, parents, probation officers, educators, health care professionals, and others.

Some juvenile court judges have circumvented youth’s right to counsel by permitting juveniles to waive that right. In some juvenile courts in Maryland, Louisiana, Florida, Ohio, and Kentucky, more than half of youth waived their right to counsel, and these waivers were accepted by the court.⁸ A youth can waive counsel without understanding that the right, if voluntarily waived, can impede the youth’s defense and result in a more severe outcome. When adults are adjudicated in criminal court, judges “are reluctant to grant a waiver unless the accused understands the nature of the charge and its statutory requirements, the range of punishments, the possible defenses and circumstances of mitigation, and other facts necessary to defend against the charges” (Ref. 8, p 7).

Some jurisdictions routinely fail to notify indigent youth and their families that they are eligible to receive legal assistance at no cost.^{8,11} Indigent youth who have provided for themselves and negotiated the world without family and community support may opt to waive counsel because they view themselves as self-sufficient and are not accustomed to receiving assistance from others; however, these youth may not understand their rights. Although the waiver of legal representation in criminal court must be knowing, voluntary, and intelligent,^{8,11,12} there is no way to know whether the youth’s waiver is similarly informed in juvenile court in the absence of counsel.

Juvenile waiver of counsel, resulting in self-representation of a youth in court, can occur without consideration of the youth's developmental, physical, and mental health, or intellectual ability. In criminal court the standard for competence to represent oneself is higher than the standard for competence to proceed with trial.¹³ A youth can waive the right to counsel in juvenile court even though that youth lacks the capacity to proceed with adjudication, especially when the youth lacks a defense attorney to interview the youth, identify the problem, and raise the concern about adjudicative competence in court.

The matter of whether a juvenile is competent to proceed without counsel becomes more complex when a youth lacks sufficient maturity to understand the implications of involvement in the legal system. Developmental immaturity is not considered a mental disease or defect under the *Dusky* standard for competency to stand trial in criminal court.¹⁴ Most states have not determined how developmental immaturity should be weighed during adjudicative competency determinations.¹⁵ Although defense attorneys have estimated that 1 in 10 juveniles they represent lack adjudicative capacity because of immaturity, the attorneys raise the point in fewer than half of cases.¹⁶

In addition, *In re Gault* did not address a right to legal representation for youth during juvenile court dispositional hearings. Legal outcomes for youth who waive counsel and represent themselves could be unfairly punitive. The involvement of competent defense counsel in these proceedings has the potential to improve youth's outcomes by facilitating assessments and proffering expert testimony that offers insight into the individualized rehabilitation needs of youthful offenders (including psychiatric and other medical services, supervision, educational services, and recreational programs).

The Outcome for Jerry Gault

Gault's problems did not end when the U.S. Supreme Court decided the case. The Arizona Superior Court did not retry the case or close the file. Attorney Lewis petitioned to have the delinquency adjudication case dismissed and expunged but was not successful. Gault was not permitted to enlist in the U.S. Army because a 1968 criminal background check revealed that he had "a possible active file" (Ref. 1, p 17). He eventually was permitted to enlist after his

juvenile court records were destroyed in 1969, in accordance with Arizona law. Gault worked several jobs, got married, became a father, had a grandchild, and retired from the Army after serving 23 years.¹⁷

In 2007, Gault, who rarely spoke about his case in public, credited his attorney Amelia Lewis and his wife with saving his life. At that time, he was pursuing an education certificate.¹⁷ On August 6, 2014, the Honorable Judge Peter J. Cahill of the Arizona Superior Court in Gila County vacated Mr. Gault's June 15, 1964 delinquency adjudication.¹ Although justice for Gault was delayed by half a century, resulting in significant emotional challenges that demeaned him and derailed his aspirations, it ultimately was not denied.

Fifty Years After Gault

The public outcry that followed the *Gault* decision included concerns that juveniles were being coddled rather than held accountable for violating the law. This, along with an increase in violent offenses committed by juveniles during the drug epidemic of the 1980s, placed pressure on politicians, who responded by passing harsher laws in regard to juvenile offenders. Tough-on-crime legislation facilitated trying juveniles as adults in criminal court for a greater number of offenses and at younger ages.¹⁸

However, in the 21st century, a growing body of scientific evidence about the developmental immaturity of the adolescent brain along with concerns about the societal standards for common decency have been cited by the U.S. Supreme Court in its decisions to render juveniles who commit homicides ineligible for capital punishment¹⁹ and for automatic sentences of life without parole.²⁰ The APA (among others) signed onto *amicus* briefs in these cases, emphasizing that adolescents lack the executive functioning or maturity to appreciate the wrongfulness or consequences of their criminal acts.

In addition, as noted above, budgetary restrictions for defense attorney training and compensation have presented a barrier to access for indigent juveniles who need competent legal representation. In response to this problem, the National Juvenile Defender Center will commemorate the 50th anniversary of the *Gault* decision, on May 15, 2017, by introducing a nationwide reform plan. This plan is intended to ensure that every juvenile who appears in juvenile court will be represented by a well-trained juvenile defense attorney who will advo-

cate for the youth from arrest to postdisposition (or sentencing).²¹

Conclusion

Many changes in juvenile court adjudication have been implemented since *In re Gault* was decided half a century ago, one of the most significant of which has been the recognition of the right to counsel, even for indigent juvenile defendants. *In re Gault* is considered a landmark case and is taught in law school, as well as in forensic and child psychiatry residency training programs. The case was one of the first steps in rectifying some of the problems in the juvenile justice system that had long been recognized.

Gault's fate was decided by a juvenile court judge who set arbitrary criteria for juvenile culpability. Although *Gault* requires that juvenile court proceedings be recorded, to facilitate further case review when necessary, the Supreme Court did not use the case to set the legal standard for juvenile culpability. That standard, beyond a reasonable doubt, was determined by the Supreme Court in *In re Winship*.²²

The constitutional protections accorded to juveniles in court do not preclude the juvenile court system from serving as a vehicle for offender rehabilitation. The system can interface with other developmentally informed systems of care, including mental health, education, and social services, to ascertain information about the strengths and rehabilitation needs of each offender. Child psychiatrists participate in this process by assessing youth and making recommendations that are conducive to emotional wellness, prosocial behavior, effective supervision (from caretaker coaching to residential placement), as well as academic and occupational attainment. Hopefully, the utilization of child forensic psychiatric consultation services by the juvenile court system will increase in the next half century.

References

1. In the Matter of Gerald Gault: 51 Years Later. Presented at the 2015 Annual Conference of the National Association of Women Judges, October 7–11, 2015, Salt Lake City, UT. Program notes, October 9, 2015. Available at: <https://www.nawj.org/uploads/pdf/conferences/CLE/Gerald%20Gault%20NAWJ%20%2051%20Years%20Materials.pdf/>. Accessed November 30, 2016
2. Gideon v. Wainwright, 372 U.S. 335 (1963)
3. Miranda v. Arizona, 384 U.S. 436 (1966)
4. Mack J: The juvenile court. Harv L Rev 23:119–20, 1909
5. In re Gault, 387 U.S. 1 (1967)
6. Saxon W. Amelia Lewis, 91, Victor in Case That Changed Juvenile Justice. N.Y. Times, November 19, 1994, Available at: <http://www.nytimes.com/1994/11/19/obituaries/amelia-lewis-91-victor-in-case-that-changed-juvenile-justice.html/>. Accessed November 15, 2016
7. *McKeiver v. PA*, 403 U.S. 528 (1971).
8. Mylniec WJ: In re Gault at 40: The right to counsel in juvenile court: a promise unfulfilled. Crim L Bull 44:371–412, 2008
9. IBA-AJA Standards for Juvenile Justice, Annotated Edition, 1996. Available at: http://www.americanbar.org/groups/criminal_justice/pages/JuvenileJusticeStandards.html/. Accessed November 30, 2016
10. Sterling RW: Role of Juvenile Defense Counsel in Delinquency Court. [location?]National Juvenile Defender Center (NJDC), and United States of America, (2009). Available at: <http://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf/>. Accessed November 30, 2016
11. Berkheiser ME: The fiction of juvenile right to counsel: waiver in juvenile courts. Fla L Rev 54:577–686, 2002
12. Johnson v. Zerbst, 304 U.S. 458 (1938)
13. Indiana v. Edwards, 554 U.S. 164 (2008)
14. Dusky v. U.S., 362 U.S. 402 (1960)
15. Wills CD: Psycholegal aspects of juvenile delinquency, in Psychology, Law, and the Wellbeing of Children. Edited by Miller M, Chamberlain J, Wingrove T. New York: Oxford University Press, 2014 pp 33–49
16. Viljoen JL, McLachlan K, Wingrove T, et al: Defense attorneys' concerns about the competence of adolescent defendants. Behav Sci & Law 28:630–46, 2010
17. Elliott D: Gault Case Changed Juvenile Law. All Things Considered. National Public Radio, May 19, 2007. Available at: <http://www.npr.org/templates/transcript/transcript.php?storyId=10279166/>. Accessed October 25, 2016
18. Wills CD: Caring for juveniles with mental disorders in adult corrections facilities. Int Rev Psychiatry 29:25–33, 2016
19. Roper v. Simmons, 543 U.S. 551 (2005)
20. Miller v. Alabama, 132 S. Ct. 2455 (2012)
21. Defending children's rights. 50 Years of Gault. Available at: <https://gaultat50.org/>. Accessed November 30, 2016
22. In re Winship, 397 U.S. 358 (1970)