Chapter 5

Juvenile Justice in an Era of Change

On the morning of June 8, 1964, the Gila County, Arizona sheriff took 15-year-old Gerald Gault and a friend into custody after a Mrs. Cook complained that the boys had made lewd telephone calls to her. The nation's juvenile courts handled such routine matters each day, usually by informal "diversion." If the juvenile admitted the charges, he and the family would reach an agreement with the juvenile officer. Perhaps the juvenile would apologize, receive a warning, provide restitution, perform community service, or submit to a period of supervised probation. If the juvenile fulfilled the agreement, the delinquency case would end without a hearing in front of the juvenile court judge, and of course without appeal.

Gerald's case would be different.

When *In re Gault* reached the United States Supreme Court in 1967, the landmark constitutional decision changed the face of juvenile justice. After operating informally for decades driven by benevolence and protective impulse, the nation's juvenile courts became courts where due process, the rules of evidence and other legal constraints moved more to the forefront. *Gault* called the change "constitutional domestication."[1]

The move toward domestication had been accelerating since 1954, when the United States Supreme Court decided *Brown v. Board of Education*, which unanimously held that racial segregation in the public schools denies equal protection guaranteed by the Fourteenth Amendment. American law had previously hesitated to confer constitutional rights on children in disputes with the state, preferring instead to allow children to be heard through their parents. *Brown*

unmistakably decided that the constitutional rights vindicated were held by the schoolchildren, and not by their parents: "[S]egregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."[2]

Four years later, *Cooper v. Aaron* reiterated that *Brown* had squarely vindicated the rights of the children. *Cooper* rebuffed efforts by Arkansas' governor and legislature to delay implementing *Brown* after violence led President Eisenhower to send federal troops to Little Rock and then federalize the National Guard to assure safe admission of black students to the previously segregated public high school. In an opinion signed by the entire Court, *Cooper* stated emphatically that "delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced." "[L]aw and order," the Court reiterated, "are not here to be preserved by depriving the Negro children of their constitutional rights." By vindicating children's substantive rights, *Brown* and *Cooper* paved the way for *Gault*, which vindicated children's procedural rights.[3]

To juvenile justice professionals seeking to place *Gault* in historical perspective, the "before" and "after" freeze frames presented striking contrasts. Informality had been a hallmark of the nation's juvenile courts for nearly seven decades. In its 1964 brochure describing "Juvenile Delinquency Services," the U.S. Children's Bureau lauded the juvenile court as "the setting for individual justice." "In an informal and friendly atmosphere," the Bureau described, "only those directly concerned are present. In the presence of the youth, his mother, and the court's social worker, the Judge hears the complaint from the police officer and listens to the boy's side." No mention of lawyers, adversary argument or appellate review.[4]

By the mid-1960s, the Warren Court had imposed federal constitutional constraints on state criminal procedure. The Justices turned to delinquency in *Kent v. United States* in 1966, the first Supreme Court decision to evaluate juvenile court procedure. *Kent* was a tantalizing decision overturning a District of Columbia juvenile court order that had transferred to criminal court a 16-year-old charged with housebreaking, robbery and rape. The juvenile court ordered transfer without a hearing, denied defense counsel access to the social and probation reports prepared about the boy, and entered no statement of its reasons for transfer. The procedural shortcuts were no small matter for the defendant, who was convicted and sentenced to thirty to ninety years in prison.[5]

Writing for *Kent's* slender five-member majority, Justice Abe Fortas said that the nation's juvenile courts imposed "the worst of both worlds" on alleged

delinquents, denying both "the protections accorded to adults" and "the solicitous care and regenerative treatment postulated for children." After this stern lecture, the Court left the basis for decision unclear. If the District of Columbia Juvenile Court Act was the sole basis, the decision would have affected only Kent's case and later cases under that act. If the federal Constitution was also a basis, the decision would have affected juvenile courts nationwide. *Kent* held only that the rights in question were "required by the [D.C. Juvenile Court Act] read in the context of constitutional principles relating to due process and the assistance of counsel."[6]

A few months later, juvenile court judge James D. Clemens of Bowling Green, Missouri correctly predicted that "the next Supreme Court decision . . . will likely declare what *Kent* now only implies." In 1967, the Supreme Court indeed removed doubt about the Constitution's role as the ultimate source of procedural rights in delinquency proceedings. With Justice Fortas again writing for the majority, the Court decided *Gault*, which was later called "the Magna Carta for juveniles" by Chief Justice Earl Warren and "the charter of juvenile justice" by Solicitor General Rex E. Lee. *Gault* held that in the adjudicatory phase of delinquency proceedings, Fourteenth Amendment due process guarantees juveniles a number of specific protections that the Bill of Rights guarantees defendants in criminal court. The juvenile court's atmosphere was no longer, as the U.S. Children's Bureau had put it only three years earlier, purely "informal and friendly."[7]

Gault was not the first Supreme Court decision to confer federal constitutional protections on juvenile offenders. The Court's earlier decisions, however, had concerned children tried in criminal, not juvenile, courts. *Gault* was the Supreme Court's first decision to review delinquency procedure through a purely constitutional lens, and it remains the Court's most celebrated and influential juvenile justice decision.[8]

The watershed case began quietly enough. When the sheriff picked up Gerald Gault and his friend on Mrs. Cook's complaint, Gerald's parents were at work and the sheriff left no notice at the home advising that the boy had been taken into custody. After the parents searched and found their son at the local children's detention home that night, they were advised that the juvenile court would hold a hearing the very next day.

The relaxed procedures that followed were not unusual in the day-to-day operations of many of the nation's juvenile courts. At the hearing, Gerald's arresting officer filed a delinquency petition that the boy's parents had not yet seen, and indeed would not see for more than two months, long after the juvenile court had already found him delinquent. Without reciting any factual basis for the charge, the petition stated only the bald conclusion that Gerald was "a

delinquent minor." At the hearing, the Gault family was unrepresented by counsel. The complainant Mrs. Cook was not present. No witness was sworn. No transcript or record was made, and the court filed no memorandum of the proceedings. When the hearing concluded, the judge said simply that he would "think about it."

At a second hearing less than a week later, the juvenile court received a probation report on Gerald, which the boy and his parents did not see. Despite a request by Gerald's mother that Mrs. Cook appear for questioning, the complainant remained absent. The judge said her presence was unnecessary, and he never even communicated with her. The court committed the fifteen-year-old to the state industrial school until he turned twenty-one, unless discharged earlier by the court. When pressed, the judge could not clearly identify the criminal code section underlying the delinquency charge.

Barely a week after the sheriff picked him up, Gerald had received as much as six years' confinement in a state training school, apparently for an offense that carried only a fifty dollar fine and a maximum of two months' imprisonment if committed by an adult. State training schools were little better than prisons by that time, but the Arizona Supreme Court was not moved. The court continued the teenager's confinement because it viewed the juvenile court as "a protecting parent rather than a prosecutor." Due process constraints impeded the "effort to substitute protection and guidance for punishment," and juvenile court discretion was "necessary to achieve the individualized consideration of the child which is as valid an objective today as it was 60 years ago when the juvenile court movement began."[9]

The United States Supreme Court thought differently. Attacking the lax procedures that produced Gerald's commitment, Justice Fortas stated forcefully that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," and that "the condition of being a boy does not justify a kangaroo court." Attacking unrestrained application of the *parens patriae* doctrine, the Court concluded that juvenile court history had demonstrated that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." The absence of due process in delinquency cases, the majority continued, had often produced "inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[10]

Gault's narrow but unequivocal holding tempered *parens patriae* with Fourteenth Amendment due process. In any delinquency proceeding in which a juvenile may be committed to a state institution, due process requires that the juvenile and the parents or guardian be given written notice stating the charges with particularity, at the earliest practicable time, sufficiently before the hearing to permit reasonable opportunity to prepare; that the juvenile and parents be notified of the juvenile's right to be represented by retained counsel, or by

court-appointed counsel if they cannot afford counsel; and that the juvenile be afforded the privilege against compulsory self-incrimination, and the rights to confront and cross-examine accusers.[11]

Delinquency cases remained civil proceedings after *Gault*, but with substantial criminal overtones grounded in constitutional protection. Because due process guarantees fundamental fairness, juvenile justice professionals were left to wonder whether the Court would extend *Gault* to confer other constitutional rights on alleged delinquents. Some extension seemed inevitable.

Children's rights were a particular concern of Justice Fortas during his three and a half years on the Court. He wrote the majority opinions not only in *Kent* and *Gault*, but also in *Tinker v. Des Moines Independent Community School District*, the 1969 decision that upheld the First Amendment rights of schoolchildren to wear black armbands to class to protest the Vietnam War. *Gault's* 59-page majority opinion reviewed decades of psychological and sociological research and spoke in exuberant language that clearly transcended the narrow holding. Justice Fortas likely perceived his juvenile justice mosaic as a work in progress.[12]

Time ran out on Justice Fortas before the Court could extend *Gault*. In June of 1968, a lame-duck President Johnson nominated him to succeed Earl Warren as Chief Justice, but the nomination quickly ran into trouble and was withdrawn in October. In April of 1969, Justice Fortas resigned following disclosure that while he was on the Court he had accepted a fee from a foundation controlled by a former client who was under federal investigation for securities fraud. New Justices began replacing the Warren Court members who had produced the *Kent-Gault-Tinker* trilogy.

The Supreme Court soon had second thoughts about wholesale importation of constitutional criminal rights into delinquency proceedings. In 1970, the Court held that due process requires application of the criminal beyond-a-reasonable-doubt standard of proof in these proceedings, rather than the ordinary civil preponderance-of the-evidence standard. But a year later, the Court held that due process does not require a jury trial in delinquency proceedings. States remained free to guarantee juvenile court jury trials by statute or state constitutional mandate, but Missouri is not among the handful that have done so.[13]

Justice Fortas explicitly limited *Gault's* holding to delinquency cases, and indeed only to the adjudicatory phase, but the case's reverberations could not be so easily confined. Not only did *Gault's* broad language and rationale sensitize courts and legislatures to apply a constitutional litmus test to all aspects of the delinquency process; *Gault's* influence also spread to the other categories of juvenile court jurisdiction. Now that due process guaranteed alleged delin-

quents a measure of constitutional formalism in juvenile court, should parties in abuse and neglect, status offense, and adoption proceedings receive something less? Like many other states, Missouri began extending *Gault* without waiting for the Supreme Court.

Expanding the Right to Counsel

Informality and due process are not necessarily incompatible in the juvenile court, which treats children and their families at delicate moments in their lives. Judge Andrew Jackson Higgins, a juvenile court judge from 1960 to 1964 who later sat on the state Supreme Court, recalls a case that illustrates the point. One day a twelve-year-old boy appeared in his rural Clinton County juvenile court for truancy. No matter what his parents or the authorities did, they could not get him to stay in school. Judge Higgins found the boy quiet and respectful but noticed he was wearing an old, beat-up pair of shoes with the soles coming off. Sensing that classmates' teasing was at the root of the boy's truancy, Judge Higgins had the juvenile officer take him to a nearby shoe store and buy him a pair. The boy returned to court beaming a half hour later, promised to return to school and was never truant again.[14]

In Missouri's rural and metropolitan areas alike, juvenile court proceedings were quite informal before *Gault*. National observers sometimes said that the nation's rural juvenile courts operated more informally than their urban counterparts, but the distinction can be overstated. Even small town juvenile court judges received training at juvenile conferences and seminars and sought to follow the law while adapting their courtrooms to local conditions. In smaller Missouri counties, some juvenile court judges did not wear robes, for example, but witnesses were sworn and testimony was recorded. In cases alleging less serious offenses, some judges held hearings in their chambers or the jury room rather than in the courtroom and questioned the witnesses freely, but they conducted proceedings in a structured way. Appeals from juvenile court determinations remained scarce.[15]

The constitutional right most immediately affected by *Gault* was the right to counsel, which the nation's juvenile courts had not taken seriously. From a nationwide survey of juvenile court judges, researchers determined in 1964 that lawyers represented children in less than 5% of cases that went to hearing.[16]

The record had been somewhat better in Missouri. The 1957 juvenile court act went no further than to assure youths the right to representation before they were committed to a state training school. Many juvenile court judges had anticipated *Gault*, however, and considered counsel important even before the

Supreme Court spoke. In some circuits, children often appeared with counsel while juvenile officers presented their cases without legal assistance. In the northwestern circuits, parents often appeared in juvenile court with retained counsel when they felt they needed representation to protect their interests. Judge Higgins had a practice of assuring that parents and children appear with counsel in delinquency cases that could lead to criminal-type sanctions. If the parties could not afford retained counsel, he would often assign a local volunteer lawyer.[17]

Such volunteer service was also common in other parts of Missouri before *Gault*, and it continued afterwards. As guardians ad litem in abuse and neglect cases, young lawyers in the Cape Girardeau area involved themselves with the children, saw to it that they went to school and did their homework, and monitored their foster care placements. "I could not have asked for better people to help the children," Judge Marybelle Mueller recalled gratefully years later. The juvenile courts had no funding for assigned counsel, so lawyers served without compensation. This was more than two decades before the American Bar Association strongly urged lawyers to provide volunteer service for children in the juvenile justice system.[18]

Lawyers represented children and parents regularly in the St. Louis City and County juvenile courts before *Gault*. In St. Louis city, Judge Theodore J. McMillian strongly supported legal representation for children and did what he could to assure counsel. The city juvenile court maintained a list of practicing lawyers, including ones without experience in juvenile matters, and required them to accept assignments representing indigent juveniles. Louis W. McHardy, the city's director of court services in the 1960s, recalls that the assignment process increased the local bar's support for the juvenile court when lawyers saw its work first-hand.[19]

The appointment process also helped lead to creation of the statewide public defender system. In 1971, the legislature provided for public defenders in fourteen circuits and for compensated appointed counsel in other circuits, though the legislation did not reach indigent delinquents in juvenile court. In 1975, Chief Justice Robert E. Seiler called for extending the statewide system to juvenile cases "to avoid a constitutional crisis" after *Gault*. The legislature extended the system to juvenile cases in 1976, though Chief Justice Seiler reported that the system was not yet adequately funded. Three Chief Justices reported that chronic underfunding persisted throughout the 1980s.[20]

Gault did not produce change overnight. In 1972, the Missouri Law Enforcement Assistance Council (MLEAC) found that children in a few circuits were still not represented by counsel before or during juvenile court hearings. In some circuits, counsel appeared for children charged with felonies and other serious offenses, but not always in less serious matters. At the same time,

juvenile officers in the smaller counties had no lawyer on staff. Beginning in the late 1960s, the metropolitan areas provided juvenile officers staff attorneys and other counsel, while officers in the smaller counties continued to prepare, research and argue their own cases, except often in termination of parental rights proceedings. In TPR proceedings, smaller juvenile offices often asked the court to assign counsel because the stakes were so high.[21]

One writer examined 367 delinquency case files from the Jackson County juvenile court's 1970 term and found all juveniles represented by counsel. At the arraignment hearing, juveniles were told they had the right to an attorney, and that one would be appointed if the juvenile or the family could not afford one. The writer reported that in the 123 delinquency and status offense proceedings he observed, the juvenile's counsel questioned the prosecutor's witnesses or otherwise directly participated in every case, but raised objections to the prosecutor's questioning in only four. The writer's overall impression was that even with lawyers, proceedings remained informal.[22]

For a few years after *Gault*, the right to counsel in Missouri's juvenile courts remained dependent on local practice. On November 29, 1968, a special committee of Missouri juvenile court judges and lawyers familiar with juvenile court practice began drafting Rules of Practice and Procedure in Juvenile Courts. The special committee, appointed by the Supreme Court, was chaired by juvenile court Judge Henry A. Riederer of Kansas City. When the Rules became effective in 1976, the right to counsel was a centerpiece.[23]

Missouri's new Rules granted parties the right to representation by counsel in all proceedings. The General Assembly also imposed broad obligations on the juvenile courts to appoint guardians ad litem (who might or might not be lawyers) to represent children in most abuse, neglect and adoption proceedings. The right to representation remained undiminished even after the United States Supreme Court's 1981 decision in *Lassiter v. Department of Social Services*, which may have permitted retreat from the broad right conferred by the rules and statutes. *Lassiter* held that due process does not require appointment of counsel for parents in all termination of parental rights proceedings, but rather permits trial courts to determine the need for counsel on a case by case basis.[24]

The new Rules required the juvenile court to appoint counsel for an indigent juvenile on request before a petition invoking the court's jurisdiction was filed, or after filing when necessary to assure a full and fair hearing. After a petition was filed, the Rules also required the court to appoint counsel for an indigent parent or guardian on request if appointment was necessary to assure a full and fair hearing. Legislation in 1976 authorized juvenile courts to order reimbursement from parents or guardian later found to have the ability to pay for representation. Finally, the Rules remained true to *Gault* by requiring juvenile courts to permit counsel reasonable time to prepare.[25]

Like most other states, Missouri permits children and other parties to waive the right to counsel in juvenile court proceedings. Juveniles in Missouri may waive the right only with the court's approval, and may withdraw the waiver at any stage of the proceeding. The effects of waiver loom large in the states that permit it. A recent national study of selected jurisdictions reported that because juveniles routinely waive the right to counsel in delinquency proceedings, relatively few alleged delinquents actually appear with counsel. In their 1990 study prepared for the Governor's Juvenile Justice Advisory Group and the Missouri Department of Public Safety, Professor Kimberly Kempf-Leonard and her associates found that only 41.5% of Missouri urban black youths and 39% of urban white youths charged with violent offenses had counsel in juvenile court, and only 1.1% of rural black youths and 11.5% of rural white youths.[26]

A 2000 study of three Missouri circuits (one urban, one suburban and one rural) sheds further light on waiver in juvenile court cases charging felonies. The study found that representation by legal counsel was "relatively uncommon" in all three. In processed felony cases, counsel represented 75% of juveniles in the urban circuit, 25% of juveniles in the suburban circuit, and 18% of juveniles in the rural circuit. Consistent with prior national studies, the Missouri study also found that among felony referrals handled either informally or through petitions, out-of-home placement was more likely to occur if the youth had an attorney, even when other relevant legal and individual factors were the same. Researchers do not know whether this evident adverse effect is attributable to the inexperience of many counsel who handle juvenile matters, or to some other factor, such as a greater tendency to appoint counsel in more difficult cases.[27]

The 1990 Kempf-Leonard study found that rural and urban Missouri juvenile courts still differed in their perceptions of *Gault*. "Rural courts seem to adhere to traditional, pre-Gault, juvenile court *parens patriae* criteria in their handling of youths. Urban courts appear more legalistic in orientation and process cases more according to offense criteria." The state's urban juvenile courts may be more formal than their rural counterparts, but *Gault* and the swift pace of later developments undeniably changed the nation's juvenile courts dramatically from the days when they were territory alien to lawyers.[28]

The Privilege Against Compulsory Self-Incrimination

Even before *Gault* fashioned its constitutional holdings, a juvenile's right to remain silent found meaningful expression in Missouri's juvenile court act. In *State v. Arbeiter*, decided seven months before *Gault*, the state Supreme Court reversed the first degree murder conviction of a fifteen-year-old whom police

had interrogated at length following his arrest. The interrogation violated the juvenile court act's requirement that arrested juveniles be taken "immediately and directly" to the juvenile court or a juvenile officer. *Arbeiter* recognized the need for community protection, but suppressed the confession because juveniles were "best proceeded against on a rehabilitative basis under special procedures [in the juvenile court act] for the benefit of the child."[29]

By applying the constitutional right to remain silent in delinquency proceedings, *Gault* imported the United States Supreme Court's year-old decision in *Miranda v. Arizona*. In an adult criminal proceeding, *Miranda* held that the prosecution may not use statements stemming from custodial interrogation unless the defendant received the now-familiar warnings that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of retained or appointed counsel.[30]

The federal and state courts have applied *Miranda* in delinquency proceedings. Missouri is one of only a handful of states with statutes that provide alleged delinquents greater protections than the decision's constitutional holding requires. Missouri's "juvenile Miranda" statute and court rule permit juveniles to waive the right to remain silent only where they are also informed of the right to communicate with a parent, relative, lawyer or other adult interested in his welfare, or to have the adult present during questioning.[31]

The Growth of Federal Juvenile Justice Legislation

The Social Security Act of 1935 was Congress' first sustained foray into child protection, which previously had been the responsibility of state and local authorities without direct influence from Washington. By the time *Gault* established federal standards thirty-two years later, the Act was a prominent feature of the national landscape. In the early 1970s, Congress began passing acts, including these, with federal standards that directly affected decisionmaking in the nation's juvenile courts.

The Child Abuse Prevention and Treatment Act of 1974

As it did in the Social Security Act more than a generation earlier, Congress sometimes conditioned federal funding on state compliance with standards mandated by federal legislation. Once Missouri qualified for federal funding, the General Assembly would periodically enact legislation assuring continued compliance with later congressional amendments and federal agency regulations. In 1987, the United States Supreme Court upheld federal funding mandates as proper exercises of Congress' spending power.[32]