

Criminal Law Bulletin

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Foreword: The Legacy of *Gault*

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Some seventy years after the establishment of specialized juvenile courts in this country, [FN1] the United States Supreme Court issued an opinion which forever transformed the direction and substance of the nation's juvenile justice system. [FN2] A fifteen-year-old boy named Gerald Francis Gault adjudicated a juvenile delinquent following a lewd and indecent call made by him and a friend, Ronald Lewis, to the boy's neighbor, Mrs. Cook, resulted in a sentence which would have placed Gerald Gault in an Arizona state industrial school for what is today called "juvenile life." [FN3] Upon reviewing the boy's case, the Supreme Court in a landmark decision recognized the due process rights of minors by applying the provisions of the Fourteenth Amendment and the Bill of Rights to juveniles. Justice Abe Fortas commented that the reality of juvenile court was that "the child did not receive the worst of both world ... he gets the protection afforded to adults, nor the solicitous care and regenerative treatment postulated for children." [FN4]

The symposium articles represent a touchstone of sorts identifying where we are today, nearly forty years after the Gault decision. Much of the attention of the Supreme Court has been focused on very specific aspects of children's rights, rather than the more broad based approach taken by the Court at the time of Gault. This may be a natural evolutionary process where the Court initially identifies the legal doctrine which supports a rights-based analysis, but then slowly focuses its attention on more specific individual rights over the passage of time, such as the rights of minors to terminate pregnancies, the ability of school systems to conduct searches and seizures on school premises, or the exposure of children to the death penalty. Many issues remain unresolved following Gault, not the least of which is the process of transferring children from specialized juvenile courts into adult criminal court systems. [FN5] Perhaps most importantly, debate continues over the most fundamental question of designing juvenile justice systems: should it focus on retribution or rehabilitation? [FN6]

In his article entitled *Placing Children's Rights in Historical Perspective*, [FN7] Steven Mintz suggests five overlapping phases in which the rights of children evolved in the United States: pre-Civil War, post-Civil War decades, the Progressive Era through the Great Depression, the 1960's through early 1970's, and the 1970's through the present. Mintz argues that reforms adopted during one historic period were often rejected by subsequent reformers as detrimental to children, unintended consequences of reform movements are the antithesis of what was anticipated, and expansion of children's rights has often expanded institutional autonomy, autonomy of adult providers such as attorneys, caseworkers, and juvenile judges, but not through similar expansion of children's participation or roles in foster care, adoption, or visitation.

Mintz identifies three legal principles evolving during the pre-Civil War era as touchstones of more contemporary children's rights theories. The best interests of the child, the tender years doctrine, and *parens patriae* opened the door to tremendous judicial discretion in deciding child welfare issues, maternal placement cases, and parental custody rights. Not following English common law, American colonies provided limited recognition of adoptions for children, culminating in Massachusetts' 1851 adoption law.

Between 1790 and 1840, Mintz identifies institutionalization as a cost-effective response and rescue to the increase in numbers of dependent children. Vast expansion in the numbers of public orphanages from the early eighteenth century until more than 100,000 children were placed by the early 1900s in as many as 1,200 orphanages nationwide. In addition to orphanages, houses of refuge for delinquent and homeless children came into existence, then evolved into so-called reform schools during the 1840s.

Following the Civil War, the divorce rate in the U.S. was recognized as the highest among Western nations, and the birth rate of native-born whites fell below that of immigrants and non-whites, prompting governmental protection of children from abuse and neglect. The Gilded Age reformers managed to separate Native American children from their families only to be placed in boarding schools designed to assimilate these children into the larger society. Similarly, reformers established constraints on the lives of the children of poor and working-class immigrants.

The Progressive Era saw the introduction of the juvenile court system, and the creation of the world's first public agency devoted to children, the Children's Bureau. At the same time, states engaged in the sterilization of "feble-minded" girls, and restricted public assistance to "worthy" mothers, usually widows. The 1930s Great Depression ushered in New Deal responses including Aid to Dependent Children, job programs responsible for new construction of schools, playgrounds, and swimming pools, and the enactment of the Fair Labor Standards Act of 1938 restricting child labor practices and creating a statutory definition of childhood up until the age of seventeen.

Outlining cases which identified newly recognized rights of children, out of wedlock children, [FN8] gender neutrality under Title IX of the Educational Amendments of 1972, [FN9] reproductive freedom rights under Title X of the Public Health Service Act of 1970 [FN10] and Medicaid (Title XIX of the Social Security Act of 1965), Mintz places the Supreme Court's decision in *Gault* in the midst of other rights-expanding decisions. However, in his conclusion, Mintz lists the advances in other nations' approaches to recognition of rights of minors which far exceed those recognized in the United States. He concludes with two thoughts: childhood was a distinctive and vulnerable stage of life distinguishing it from adulthood, and the notion that childhood must be prolonged to prepare children for adulthood. His overview places the *Gault* decision in a contextual timeline.

In her article, *Gault Turns 40: Reflections on Ambiguity*, [FN11] Irene Merker Rosenberg sees the meaning of *Gault* shifting over time and changing as the membership of the Supreme Court changed. She argues that *Gault* occurred at the height of the Warren Court's activism, but that such criminal procedure changes "were not as extreme as critics claimed," [FN12] and that she once wrote that *Gault* was far more narrower in its holding than many assumed. [FN13] By using the Constitution's Due Process Clause as the foundation for its opinion, the Court "could vary ... protection for juveniles, without doing so for adults," [FN14] as due process was used by the Court when no explicit guarantee in the Bill of Rights would otherwise prohibit state conduct. [FN15] Rosenberg argues that the malleability of due process might not necessarily increase children's constitutional rights in comparison to adult rights, rather, it might be manipulated so as to recognize fewer rights for children. [FN16]

Rosenberg suggests an expansionist reading of *Gault*, rejecting the 1971 rationale of *McKeiver v. Pennsylvania*, [FN17] which held that due process did not require a jury trial for juveniles in delinquency cases. She sees noncompliance with the original concept of separate juvenile courts allowing individualized treatment of children when jury trials under the Sixth Amendment are not considered so fundamental as to be incorporated into the Due Process Clause and made applicable to the states. [FN18] Rosenberg sees further restrictions on

children's rights in the Court's decision of *Fare v. Michael C.* [FN19] The adoption of the totality of circumstances test to determine whether there has been a waiver of rights when juveniles are subject to interrogation results in less protection for juveniles due to their age, inexperience, immaturity, and heightened suggestibility. [FN20]

In *New Jersey v. T.L.O.*, [FN21] the Supreme Court crafted a category of "special needs" applying a balancing test and eliminating the need for a warrant or probable cause when a school official searched a student's purse for evidence that she smoked on the public school premises, culminating in the finding of marijuana in the student's purse and eventually introducing that evidence in a delinquency adjudication. [FN22] The Court focused on substantive Fourth Amendment grounds and declared the school search to be reasonable. [FN23] Rosenberg then reviews school drug testing cases focusing on children's right to privacy [FN24]-or lack thereof-and emphasizing the Supreme Court's reliance on the state's police and *parens patriae* powers which diminish the rights of children when compared to the rights of adults.

By identifying the Court's bifurcated approach to juvenile rights-one group of cases expanding such rights while another group of cases restricting such rights-Rosenberg then turns her attention to the Court's death penalty decision in *Roper v. Simmons*. [FN25] By rejecting the application of the death penalty to juveniles, the Court may have reinforced what Rosenberg calls the "important differences between children and adults regarding the extent of 'moral blameworthiness' for committing a heinous crime." [FN26] Rosenberg concludes on an optimistic note suggesting that *Gault* remains intact insofar as recognizing that "the status of being a child does not permit a denial of basic constitutional rights." [FN27]

Michael Lindsey's article, *The Impact of Gault on the Representation of Minority Youth*, [FN28] quickly identifies the overwhelming disparity and overrepresentation of minority youth in delinquency proceedings. He argues that "where there is an opportunity for the professional decision-maker to exercise discretion, ethnic minority youth get neither the benefit of doubt that a least restrictive option should be considered, nor a comprehensive support plan that realistically provides them with services that address the delinquent behavior" [FN29] Lindsey proposes elimination of specific agency services towards an electronic-community model which shares basic non-confidential information about children and families. He suggests that lawyers think carefully about ways to assist minority youth in trouble. [FN30]

Lindsey argues that many lawyers appear disconnected from "meeting the needs" of their juvenile clients, especially if they define their role in a more traditional manner and seek only to prevail in the client's litigation. [FN31] Lindsey identifies several issues remaining to be addressed in a post-*Gault* juvenile justice system including: lack of resources for many juvenile counsel; inconsistent juvenile defense systems at the state level relying on county or local funding; and the harmful impact of poorly qualified counsel representing juveniles. [FN32] Lindsey encourages recognition of juvenile defense work as a specialization in the legal field requiring adoption of best practices standards, adequate training and technical support, and elimination of waivers of counsel.

Relying on OJJDP statistics, Lindsey highlights the massive increase in delinquency adjudications over the past forty years, and the major increase in disproportionate representation of minority youth [FN33] in delinquency systems. [FN34] He further asserts that eighty-to-ninety percent of juveniles waive their right to counsel, but those counsel actually representing youth who have not waived counsel have caseloads of up to 1,400 annually, or seven times the recommended maximum caseload according to the National Advisory Commission on Criminal Justice Standards and Goals. [FN35] Lindsey suggests that attorneys should seek to establish what he

terms mutuality of purpose with the client, and he argues that cultural differences between minority youth and their counsel may present special challenges which must be addressed. [FN36] He suggests that lawyers identify actual needs of young clients and focus on addressing some of those developmental needs, rather than simply seeking to prevail in the client's litigation. [FN37] He proposes the creation of juvenile forensic attorneys as specialists representing the needs of minority youth in delinquency systems. Actually, Lindsey's proposal sounds more like combining the delinquency and dependency models to appropriately assess and deliver much needed social services to children. [FN38]

In his article, *In re Gault at 40: The Right to Counsel in Juvenile Court-A Promise Unfulfilled*, [FN39] Wallace Mlyniec indicates that “few states permitted lawyers to represent juveniles in delinquency cases at the time Gault was decided.” [FN40] He traces the adoption of state juvenile codes and legal standards such as the twenty-two volume Institute for Judicial Administration and the American Bar Association's Standards for the Administration of Juvenile Justice as responses to the Gault decision. [FN41] Mlyniec also identifies Gault as the genesis for a “Children's Rights Movement,” which spawned several national organizations focusing on improving the representation of children and litigating substantive and procedural rights of children. [FN42]

Competence in legal representation requires knowledge, resources, keeping clients informed of rights, investigating the case pending against the client, counseling the client on strategies and legal options, interviewing witnesses, involvement in pre- and non-judicial stages of the case, pursuing pre-adjudication release, presenting witnesses and cross-examining adverse witnesses, participating in dispositional services and appeals, among other things. [FN43] Identifying duties of representation is one thing, but implementing and complying with those duties is something else. Mlyniec argues that national studies conducted between 1993 and 1995 assessing the effectiveness of lawyers representing juveniles in delinquency cases produced disappointing results. The national norm appeared to be underfunded juvenile defense groups, extremely high caseloads, low morale, inadequate access to witnesses, poor investigation resources and inadequate support staff resulting in most cases resolved through plea bargaining, and with unwitting waiver of the right to counsel occurring frequently throughout delinquency systems. [FN44]

Mlyniec discusses the follow-up process after the publication of the first national studies on effectiveness of juvenile public defenders. Because the initial publication lacked specific state-by-state data, the OJJDP along with state and private sources began in 2001 to collect information on a state-by-state basis with approximately fourteen state studies having been completed to date. The overall conclusion of such studies shows chaotic, underfunded systems which rely on individual appointments, underfunded county public defense groups, and some law school clinics and nonprofit centers. [FN45] The state-by-state studies revealed income restrictions on access to publicly funded counsel, procedural restrictions which sometimes precluded appointment of counsel, and various other state created rules or regulations which further reduced access to counsel for children charged with delinquency offenses. Gault did not address pre-adjudication or post-adjudication appointment of counsel, phases which Mlyniec called “the most critical hearings in the child's delinquency case.” [FN46]

Perhaps the most vexing practice identified by Mlyniec was the routine waiver of the right to counsel in so many jurisdictions. Such waiver frequently occurred before the child or the child's family had any contact with a lawyer. Rather, such waivers occurred at alarmingly high rates, and generally following court applied pressure. Rights of the juvenile were frequently not disclosed to the child or family members prior to the waiver of counsel. [FN47]

Mlyniec then examines the issue of lawyer competence and quality of representation. [FN48] Acknow-

ledging that courts have an easier time identifying ineffective assistance of counsel, and that they are reluctant to substitute their own judgment when it comes to tactical decisions in the representation of a client, the article identifies that court-imposed relief for inadequately represented juveniles will occur only where there was a reasonable probability that, but for counsel's ineffectiveness, the result at the adjudication hearing would have been different. [FN49] However, explains Mlyniec, lawyers are appointed at the first hearing in juvenile cases in "only a few cases," so juveniles frequently go unrepresented by counsel when major issues such as pre-adjudication incarceration are decided. [FN50] Individual state assessments further reveal the lack of fact investigation by children's lawyers, the failure to file pre-adjudication motions, the failure to prepare for adjudication hearings, and the failure to competently represent juveniles in the dispositional stage of cases, let alone to file appeals. [FN51] Much of the failing of quality representation may be in part attributable to lack of training, inadequate resources, and very heavy caseloads. [FN52] Because of budgetary shortfalls, most state programs fail to provide adequate training for attorneys representing juveniles in delinquency courts. [FN53] States and counties continue to underfund juvenile defenders salaries and fail to provide adequate support staff, investigators, access to computerized legal research, or in many communities, attorneys have no funds for such basics as case files or office supplies. [FN54] Despite provisions in the Rules of Professional Conduct to the contrary, Mlyniec states that virtually every state assessed identified its form of juvenile representation as the "best interest model" rather than the traditional lawyer-client relationship known as "expressed interest model." [FN55]

Since gathering data for the sixteen individual state assessments of the conditions in juvenile delinquency representation, Mlyniec notes that many reform efforts have resulted in the improvement of conditions previously reported. Additionally, he asserts that "[t]he decrease in juvenile crime during the last ten years has combined with incredible advances in brain science and adolescent development theory to bring some sanity back to the juvenile justice debate." [FN56] The work is far from done, and the conditions identified in the first assessed states likely continue to exist in the remaining thirty-four states. [FN57]

In her article, Gault, 40 Years Later: Are We There Yet?, [FN58] Ellen Marrus identifies the lack of attention paid to the Court's Gault decision in the case's fortieth year anniversary. She then focuses her attention on the some fundamentals involved in the right to counsel, noting that the Court's decision rested on Fourteenth Amendment due process analysis rather than a more traditional Sixth Amendment framework. [FN59] She argues that children, more so than adults, are in need of counsel when they stand charged with criminal or delinquent misconduct. [FN60] She notes that the Supreme Court failed to cite to either the Sixth Amendment or to its earlier decision in *Gideon v. Wainwright* [FN61] when deciding the right to counsel for juveniles at the adjudication stage in Gault. [FN62] Marrus postulates that the reason for the Court's failure to cite to the Sixth Amendment was the Court's view that juvenile proceedings were civil in nature rather than criminal. [FN63] She then discusses the Gault decision in detail. [FN64] Marrus laments that following the decision, "most courts and child advocates took the path of least resistance and either imitated the relationship between lawyer and client in criminal court or sought to be a 'child saver.'" [FN65] She suggests that turning juvenile courts into mini criminal courts or defining counsel's role in a paternalistic fashion fails to live up to the potential Gault offered while recognizing juvenile rights. [FN66]

Marrus discusses issues not included in the Gault decision, but disclosures made to her by Gerald Gault himself in two separate interviews. [FN67] She relates that Gault's co-defendant was the person who actually made the lewd phone call, but that the co-defendant was allowed to leave the state to reside with a parent in California while Gault was arrested and detained immediately. [FN68] Marrus then turns her attention to the troubling issue of juvenile waiver of the right to counsel. [FN69] She concludes that "[c]hildren do not have the foundation on which to balance the advantages and disadvantages to having counsel." [FN70] Eight jurisdictions prohibit

the waiver of the right to counsel by juveniles in delinquency cases. [FN71]

Finally, Marrus considers the issue of determination of the child's indigency. She cautions that "the child is placed in an awkward position and may be pressured into waiving counsel as the parents either cannot afford the cost of an attorney or do not want to assist with payment of attorney fees." [FN72] She finds that team representation makes greater sense than having a lone attorney working for the child. This team representation approach would bring other disciplines to the table to help fashion services and counseling for the juvenile. [FN73]

This collection of articles helps provide a context for understanding the significance of the Gault decision. They provide an historical perspective that allows us to see the progression of recognizing children's rights, but then they also identify the limitations of what the Supreme Court determined when issuing the Gault decision. They suggest that disparate minority treatment in juvenile justice systems continues to present serious challenges and that underfunding and waiver of counsel contribute to undermining the effectiveness of Gault's impact. While Gault continues to be recognized as a landmark decision that theoretically altered forever juvenile justice in this country, these symposium articles illuminate the many issues still demanding attention despite the passage of forty years since the Supreme Court's ruling.

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[FN1]. See generally Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *Stan. L. Rev.* 1187 (1970).

[FN2]. See *Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN3]. See generally Donald T. Kramer, *Legal Rights of Children* § 1:3 (rev. 2d ed. 2005):

At the time Gerald was picked up, his mother and father were both at work. No notice that Gerald had been picked up was left at his home. No other steps were taken to advise the parents that their son had, in effect, been arrested. When the parents arrived home, not finding Gerald there, they sent Gerald's older brother to look for him. At the Lewis family's trailer home, he learned that Gerald and Ronald had been apprehended and were in custody. The brother and his mother went to the county juvenile detention home and were told that a hearing would be held the following day in juvenile court. The arresting officer then filed a petition with the court the next day, explaining the circumstances of the arrest. The petition was not served on the Gaults; and, in any event, the petition was largely devoid of any facts and only alleged that the minor was a delinquent and was "in need of the protection of this Honorable Court."

At the first of two hearings, which was held in the judge's chambers, Gerald's father was not present, nor was the complainant, Mrs. Cook. No one was sworn at the hearing, no transcript of the proceedings was made, and no memorandum of what occurred at the hearing was made. Following this hearing, Gerald was returned to the detention home, and was not released there from until two or three days later. A second hearing was held six days after Gerald's apprehension. At that hearing, Gerald and his mother and father, the two arresting police officers, Ronald Lewis and his father, and the judge were present. The testimony offered at the hearing was contradictory and confusing, and the complainant, Mrs. Cook, again was not present. At the conclusion of the hearing, the judge ordered Gerald to be committed as a juvenile delinquent for the period of his minority, unless "sooner discharged by due process of law." No appeal of the judge's decision was permitted under Arizona law.

Id. at 11.

[FN4]. [Gault, 387 U.S at 18.](#)

[FN5]. Steven Mintz, [Placing Children's Rights in Historical Perspective](#), 44 Crim. L. Bull. 313, 315 (2008).

[FN6]. See [Juvenile Delinquency, Prevention, Assessment, and Intervention 37](#) (Kirk Heilbrun et al., eds., 2005) (“Those who favor the retribution role of juvenile justice assert that juveniles should be held accountable for their actions, punished accordingly, and segregated from society. Any treatment that they receive must therefore be provided in an institutional setting (e.g., juvenile detention center, wilderness program.”). By contrast, those who favor rehabilitation assert that providing community-based treatment may be a more effective way to rehabilitate these youth. The results of at least one meta-analysis suggested that violent youth may benefit the most from shorter stays in institutional settings and increased involvement with community services.

[FN7]. Mintz, *supra* note 5.

[FN8]. See [Levy v. Louisiana, 393 U.S. 898, 89 S. Ct. 65, 21 L. Ed. 2d 185 \(1968\).](#)

[FN9]. See [Clinton v. Nagy, 411 F. Supp. 1396 \(N.D. Ohio 1974\).](#)

[FN10]. See [Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675, 2 Media L. Rep. \(BNA\) 1935 \(1977\).](#)

[FN11]. Irene Merker Rosenberg, [Gault Turns 40: Reflections on Ambiguity](#), 44 Crim. L. Bull. 330 (2008).

[FN12]. Rosenberg, *supra* note 11, at 332.

[FN13]. Rosenberg, *supra* note 11, at 332.

[FN14]. Rosenberg, *supra* note 11, at 338.

[FN15]. It is interesting to note that much earlier decisions had used due process as the basis for recognizing juvenile rights. The 1870 Illinois Supreme Court decision, [People v. Turner, 55 Illinois 280 \(1870\)](#), released fourteen-year-old Daniel O'Connell from incarceration in the Chicago Reform School while striking down key provisions of the state reform school laws citing to the state's newly enacted constitution's Due Process Clause. See David S. Tanenhaus, [Juvenile Justice in the Making](#) xiii, 86 (2004).

[FN16]. Rosenberg, *supra* note 11, at 340.

[FN17]. [McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 \(1971\)](#). See also Rosenberg, *supra* note 11, at 15-16.

[FN18]. Rosenberg, *supra* note 11, at 341.

[FN19]. [Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 \(1979\)](#) (holding that a sixteen-year-old juvenile responding to custodial interrogation had waived his Fifth Amendment privilege even though he requested to speak with his probation officer; the Court declared that this was not a per se invocation of the juvenile's right to counsel, nor was it a request to remain silent).

[FN20]. Rosenberg, *supra* note 11, at 344.

[FN21]. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985).

[FN22]. Rosenberg, *supra* note 11, at 347.

[FN23]. *T.L.O.*, 469 U.S. at 333-37.

[FN24]. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564, 101 Ed. Law Rep. 37 (1995); *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735, 166 Ed. Law Rep. 79 (2002).

[FN25]. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[FN26]. Rosenberg, *supra* note 11, at 353.

[FN27]. Rosenberg, *supra* note 11, at 354.

[FN28]. Michael L. Lindsey, *The Impact of Gault on the Representation of Minority Youth*, 44 Crim. L. Bull. 355 (2008).

[FN29]. Lindsey, *supra* note 28, at 356.

[FN30]. Lindsey, *supra* note 28, at 358.

[FN31]. Lindsey, *supra* note 28, at 358.

[FN32]. Lindsey, *supra* note 28, at 358-359.

[FN33]. This disproportionality of minority youth involvement in delinquency systems is not new. In 1989, Ira Schwartz wrote:

Since 1977, there has been a substantial increase in the number and proportion of minority youth confined in detention centers and training schools all around the country. In fact, minority youth now comprise approximately 50 percent of all juveniles confined in publicly operated juvenile detention and correctional facilities in the United States. Black males are overrepresented by almost 180 percent in comparison to their numbers in the general population, and Hispanic males are overrepresented by 86 percent.”

Ira M. Schwartz, (in) *Justice for Juveniles, Rethinking the Best Interests of the Child* 47 (1989).

[FN34]. Lindsey stated:

The person offense case rate for black juveniles (28.2 per 1,000) was nearly 3 times the rate for white juveniles (9.5), the public order case rate for black juveniles (23.4) was more than 2 times the rate for [white] juveniles (11.4), and the property case rate for black juveniles (34.2) was nearly 2 times the rate for white juveniles (17.5). White youth accounted for the largest number of delinquency cases involving detention, although they were least likely to be detained.

Lindsey, *supra* note 28, at 360.

Zimring argues that the forty percent of incarcerated juveniles who are African American are grossly out of proportion to the African American percentage of the youth population (about fifteen percent), but that in the adult criminal system, African American incarceration overrepresentation is actually greater, with close to half

the jail and prison populations so classified. Interestingly, however, Zimring has written that policy analysts must be alerted that “the pattern [of juvenile minority overrepresentation] extends beyond juvenile justice and is therefore less likely to have been generated by the peculiar rules and procedures that the juvenile system uses.” Franklin E. Zimring, *American Juvenile Justice* 162 (2005).

[FN35]. Lindsey, *supra* note 28, at 363.

[FN36]. Lindsey, *supra* note 28, at 364.

[FN37]. Lindsey, *supra* note 28, at 369.

[FN38]. For an historic perspective on identifying public policy that would benefit the largely black inner city underclass, see William Julius Wilson, *The Truly Disadvantaged, The Inner City, the Underclass, and Public Policy* (1987). For a more updated collection of research and policy papers on minority overrepresentation in juvenile justice, see *Minorities in Juvenile Justice* (Carl E. Pope & William H. Feyerherm eds., 1995).

[FN39]. Wallace J. Mlyniec, *In re Gault* at 40, *The Right to Counsel in Juvenile Court-A Promise Unfulfilled*, 44 *Crim. L. Bull.* 371 (2008).

[FN40]. Mlyniec, *supra* note 39, at 373.

[FN41]. Mlyniec, *supra* note 39, at 374. Mlyniec explains that the IJA-ABA Standards gave juveniles—rather than lawyers or other adults—the responsibility for determining the juvenile's interests and goals. *Id.*

[FN42]. Organizations included the Children's defense Fund in Washington, the Juvenile Law Center in Philadelphia, the Youth Law Center in California, the ABA's Juvenile Justice Committee, the National Association of Counsel for Children, and the National Juvenile Defender Center. Mlyniec, *supra* note 39, at 374.

[FN43]. Mlyniec outlines the responsibilities of a juvenile's attorney in large measure by following the duties enumerated in the IJA-ABA Standards, rather than simply following the provisions of the ABA Model Rules of Professional Conduct.

[FN44]. Mlyniec, *supra* note 39, at 377; see also Patricia Puritz et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995).

[FN45]. Mlyniec, *supra* note 39, at 381.

[FN46]. Mlyniec, *supra* note 39, at 383.

[FN47]. Mlyniec, *supra* note 39, at 384-387.

[FN48]. Mlyniec, *supra* note 39, at 388-390.

[FN49]. Mlyniec, *supra* note 39, at 390 (citing [Strickland v. Washington](#), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[FN50]. Mlyniec, *supra* note 39, at 392.

[FN51]. Mlyniec, *supra* note 39, at 392-399.

[FN52]. Mlyniec, *supra* note 39, at 400.

[FN53]. Mlyniec, *supra* note 39, at 402-404.

[FN54]. Mlyniec, *supra* note 39, at 404-407.

[FN55]. Mlyniec, *supra* note 39, at 409.

[FN56]. Mlyniec, *supra* note 39, at 411.

[FN57]. Mlyniec, *supra* note 39, at 412.

[FN58]. Ellen Marrus, Gault, 40 Years Later: Are We There Yet?, 44 Crim. L. Bull. 413 (2008).

[FN59]. Marrus, *supra* note 58, at 414.

[FN60]. Marrus, *supra* note 58, at 416.

[FN61]. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963) (identifying as a fundamental right the obligation of states to appoint counsel for adults charged with criminal conduct and unable to afford to pay for representation).

[FN62]. Marrus, *supra* note 58, at 418.

[FN63]. Marrus, *supra* note 58, at 419.

[FN64]. Marrus, *supra* note 58, at 420-421.

[FN65]. Marrus, *supra* note 58, at 422.

[FN66]. Marrus, *supra* note 58, at 422.

[FN67]. Marrus, *supra* note 58, at 424-426.

[FN68]. Marrus, *supra* note 58, at 426.

[FN69]. Marrus, *supra* note 58, at 426-429. For a current discussion of the myriad issues complicating the issue of juvenile waiver of rights, see Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, in *Youth on Trial, A Developmental Perspective on Juvenile Justice* 105 (Thomas Grisso & Robert G. Schwartz eds., 2003).

[FN70]. Marrus, *supra* note 58, at 429.

[FN71]. Marrus, *supra* note 58, at 429 n.67.

[FN72]. Marrus, *supra* note 58, at 430.

[FN73]. Marrus, *supra* note 58, at 431.

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