

## Criminal Law Bulletin

May-June 2008

*Gault*, 40 Years Later: Are We There Yet?

Ellen Marrus [FN1]

The year 2007 marked the fortieth anniversary of *In re Gault*, [FN1] which granted children charged with a crime the right to counsel in juvenile court. [FN2] Four years earlier, in 2003, events had been held around the country to celebrate, acknowledge, and evaluate *Gideon v. Wainwright*, [FN3] which required state courts to provide counsel for indigent defendants charged with felonies. [FN4] Since both of these decisions granted individuals the right to counsel when the defendant is facing the possibility of a loss of liberty, one might expect the same degree of recognition for *Gault* as there was for *Gideon*. Although there were some events celebrating *Gault* scattered around the country, it passed by unnoticed for most individuals, and certainly for most children, who were unaware of the significance of the Court's holding. [FN5] The lack of attention focused on *Gault* during this anniversary year is not indicative of the importance of a child's right to counsel. Children are different from adults and are even more vulnerable than adult defendants in court. Children have a difficult time understanding the legal system and their rights during the proceedings.

The anniversary of *Gault* is a time that child advocates can, and should, reflect on the meaning of *Gault*, its effect on the juvenile justice system, and how the decision can be made to be even more meaningful for children who find themselves in the juvenile justice system. The first time I read the case was as a law student taking a course in juvenile law. My classmates and I regarded the case as providing children with stronger procedural rights and protections than what were originally afforded delinquents in juvenile court. As someone who went to law school with the intention of being a child advocate, I reread this particular case many times, often looking for support in how I viewed my role as a defense attorney for children. As a law professor, one who both teaches juvenile law and writes extensively in this area, I have continued to reread this case both to support propositions in my scholarship and to expand the concepts that I teach to law students. As I read *Gault* again in preparation for this article, [FN6] I pondered whether we have actually reached the potential that *Gault* has to offer.

In the *Gault* decision, Justice Fortas crafted an opinion that was far reaching, yet narrow; simple, yet complex; and clear, yet ambiguous. *Gault* was the first case decided by the Supreme Court to discuss the rights of juveniles who were charged with a crime in juvenile court. The Court afforded some of the same rights of criminal defendants to juveniles- the right to notice of the charges being brought against them, [FN7] the right to confront [FN8] and cross-examine witnesses, [FN9] the privilege against self incrimination, [FN10] and the right to counsel. [FN11] At the same time, the opinion only discussed these rights in relation to the limited context of adjudicatory hearings. [FN12] Additionally, other than the privilege against self-incrimination, [FN13] the Court found these rights for juveniles based on the Fourteenth Amendment's Due Process Clause rather than the same rationale the Court used when applying the rights to adult criminal defendants. [FN14] And finally, although it is clear that children are entitled to these rights, the Court did not provide guidance to the states on how to implement the procedural due process rights in juvenile court. That was left to the individual states.

Although all the rights granted in *Gault* are important to children, for the purposes of this article I focus on

the right to counsel obtained for juveniles charged with a crime. For without adequate legal counsel, children who are facing the maze of the juvenile courts would likely be unable to obtain and protect the other constitutional rights granted under **Gault** or, for that matter, any other rights granted by the Court. [FN15]

When discussing the right to counsel for juveniles it is necessary to understand the Court's analysis and to discuss other issues that were not settled by the decision, such as when the right to counsel should attach for juveniles; who is the client- parent, child, or both; the role of counsel in juvenile court; the scope of representation provided to juveniles; the right to waive counsel; indigency determinations; ethical obligations an attorney has towards a child client; how to evaluate the competence of attorneys practicing juvenile law; and the quality of representation attorneys should provide. In this article I am discussing the rationale given by the Court for granting juveniles the right to counsel, when minors should have an attorney, the right to waive counsel, and indigency determinations as these issues affect the availability of counsel for children in juvenile court. I do not purport to answer all the questions raised by **Gault**, but rather further the discussions on these issues. It is also important to recognize that, particularly in the case of children, one size may not fit all. Not only are children different than adults, but they are also different from each other. Any form of model representation must take these differences into account and the role of the lawyer should be massaged to meet the individual needs of each child. [FN16]

Historically, the right to counsel in criminal trials has always been recognized as critical to the criminal court process. [FN17] The right to counsel acts as a watchdog over defendants' rights, ensuring fundamental fairness in both pre-court and court proceedings. In 1932, the Supreme Court stated:

The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible .... Without ... [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. [FN18]

If adults, regardless of their experience and intellect, need to be represented by counsel would not a child have an even greater need? Therefore, the same analysis the Court used in identifying the need for counsel for criminal defendants could be applied to children charged with a crime, whether they are in criminal or juvenile court. [FN19] Youth do not have the life experiences of adults, and therefore, would find it even more difficult to maneuver and understand our complex legal system. Children do not have the maturity to represent themselves in delinquency proceedings. They do not have the knowledge or the understanding to respond to the changes brought against them, to call forth witnesses, to cross-examine witnesses testifying against them, or if declared a delinquent to bring forth the information that the court would need to make a placement decision. Youth, even more than adults, need the help of a lawyer who can advocate on behalf of their wants, needs, and interests.

In *Betts v. Brady* [FN20] the Court found that state courts had to appoint counsel only in special circumstances, i.e., where the trial transgresses fairness, taking into consideration such factors as the length of the sentence, the complexity of the charges and the defendant's ability to represent himself. Although the *Betts* decision expanded the right to counsel in state criminal cases in only "special circumstances," the rationale the Court used would apply in all juvenile delinquency cases. When youth are in court facing delinquency charges, they

usually face the strong possibility of confinement, whether the charge is a misdemeanor or a felony. Although the purpose of the juvenile system was originally designed to keep a “wayward” child on the right path, and the focus was on rehabilitation rather than punishment, children were still confined in institutions for long periods of time. In order to ensure the child successfully completed treatment he could be held until reaching the age of maturity or was rehabilitated, in other words, learning a new way to deal with his social problems. [FN21]

Furthermore, trials in juvenile court also have complex legal issues. A detention hearing is akin to a bail hearing; an adjudicatory hearing, where the guilt or innocence of the minor is determined, is similar to trials in criminal court; and dispositional hearings, where the judge decides where and for how long a child can be detained or restricted, serve the same purpose as sentencing hearings for adult criminal defendants. Adolescents would be likely to lack the ability to present his or her case to the court or to handle the intricacies of juvenile proceedings. Younger children would be even more disadvantaged. [FN22]

Four years prior to **Gault**, the Court decided *Gideon v. Wainwright*. [FN23] In ruling that defendants charged with felonies in state court were entitled to counsel, the *Gideon* Court stated that

precedents, ... reason and reflection require [the Court] to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him .... The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [FN24]

*Gideon* provided for the incorporation of the Sixth Amendment right to counsel to state criminal cases. [FN25]

The *Gideon* rationale is also applicable to juvenile court proceedings. However, the Court did not apply the Sixth Amendment or the *Gideon* decision to juvenile cases, rather the **Gault** Court used the Fourteenth Amendment Due Process Clause as the basis for providing children the right to counsel in juvenile court proceedings:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may 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 be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. [FN26]

Why the Court chose to use the Fourteenth Amendment rather than the Sixth Amendment right to counsel for juvenile proceedings is not entirely clear. There is no question that the Court recognized the need for a juvenile to be represented by counsel. [FN27] While the state of Arizona suggested that probation officers and parents could watch out for a child's interests, the Court rejected this idea by recognizing that probation officers act as “arresting officers ... initiate proceedings, ... and testify ... against the child.” [FN28] According to the Court, “nor [could] the judge represent the child.” [FN29] Counsel plays as important a role in juvenile proceedings as in criminal cases, and using the same rationale that the Court used in *Powell*, *Betts*, and *Gideon*, the Court recognized the need for counsel in juvenile court:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him. [FN30]

The easy explanation for why the Court did not apply the Sixth Amendment to juvenile proceedings is that

the Sixth Amendment and Gideon is viewed in the context of criminal law, granting criminal defendants the right to counsel. Juvenile matters, on the other hand, were deemed to be civil proceedings. The Court stated that juvenile proceedings were “‘civil’ not ‘criminal’ and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.” [FN31] Recognizing that the juvenile court was founded on the belief

that society's role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career .... The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive. [FN32]

In other words, the juvenile courts were designed to offer a helping hand to children and their families, not just to punish youth for criminal activity. [FN33] Furthermore, if juvenile courts were simply a replication of criminal courts there would be no reason to have two separate systems.

However, Justice Fortas also took the time to make note of the similarities between criminal trials and juvenile proceedings stating:

A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence-and of limited practical meaning-that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a receiving home or an industrial school for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes ‘a building with white-washed walls, regimented routines 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. [FN34]

The similarities to criminal trials support the idea that children in juvenile court have as strong of a need for representation as do adults in criminal court. In fact, just calling the proceedings civil does not make them less criminal in nature. Additionally, the lower age of the defendant does not lessen the requirement for due process protections when he or she is facing a loss of liberty. It was, in fact, the similarities to criminal court and the tender age of juvenile defendants that compelled Justice Fortas to state:

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ under our Constitution, the condition of being a boy does not justify a kangaroo court .... 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. [FN35]

The Court balanced several factors when recognizing a child's need for counsel in juvenile proceedings. First, the Court took into consideration the overarching need to ensure fundamental fairness in these hearings. [FN36] It was clear in **Gault's** case that left to his own devices a child is unable to present his own defense. Even when that child has parents who care about their child's well-being, a boy still needs an attorney who knows the rules of court to advocate on the child's behalf, protecting his interests, particularly as the end result, even in juvenile court, can end in a period of long confinement for the child. [FN37] On the other hand, the justices did not want to have the adversarial nature of the criminal court simply duplicated as the juvenile court has its own specific process and should continue to focus on treatment and rehabilitation. [FN38] By handling the cases in this manner, juvenile courts can better serve the needs of children than the punishment aspect of criminal courts. However, the unique structure of the juvenile court and the provisions that provide for the pro-

tection of children can still occur when lawyers have a role in providing defense for youth. Using the Fourteenth Amendment rather than the Sixth Amendment to find that the right to counsel is fundamental to the fairness of the proceedings in juvenile court, can allow lawyers to develop a more appropriate system of representation for youth rather than mimicking the role of counsel in criminal court.

Although the **Gault** right to counsel is not equivalent to the adult criminal defendant's Sixth Amendment right to counsel, [FN39] it does not have to mean that children necessarily have to receive less adequate protections in juvenile court. In fact, there is a strong argument that the opposite should be true. The differences between adults and juveniles, and criminal and juvenile court may be just the reason that children deserve more protection than adults. The lack of maturity that a child displays, the fewer life experiences of youth, and the conflicting need that adolescents have to be independent and yet please those individuals in positions of authority place children in a particularly vulnerable position if they do not have counsel available to zealously advocate on their behalf. Providing counsel to juveniles can lead to a better system in juvenile court, one that meets the needs of children, provides the rights and protections necessary to safeguard youth in the system, and better protects the community.

While some commentators voiced concern that having attorneys present for children during delinquency proceedings could change the process and take away the advantages of having a juvenile court, the justices believed the opposite. [FN40] Counsel would help youth understand the process and help the judge individualize treatment. Without counsel, they would not know how to maneuver the process, how to bring forth information that could help their situations or how to help the judge determine the best disposition for them. Juveniles need advocates that can speak to the court for them, help their voices be heard, and assist them in achieving their goals. Although the juvenile court was looked at as a kinder and gentler court, it did not mean that a child should be railroaded through the system or that the child's due process rights are ignored. It is up to child advocates to define the role of attorneys in juvenile court and to help legislators, judges, and other court officers perceive the best role for attorneys representing children charged with a crime.

The **Gault** Court's holding of a right to counsel is only the first step in the process of providing a fair and just juvenile court system. The Court did not provide all the answers for the states, and did not provide guidelines for how the right to counsel should be implemented. Instead, the Court left the door open for a system where youth can have a stronger and more active voice in the proceedings, making the process more meaningful for children, incorporating the original ideals of the juvenile court, and allowing for flexibility in order that jurisdictions meet the objectives of their community. Instead of meeting this challenge and redefining the system so that it truly takes into consideration a child's stages of development and the youth's unique characteristics, most courts and child advocates took the path of least resistance. Many lawyers imitated the relationship between lawyer and client in criminal court. Others sought to be a "child saver" and act in what they believed was in the child's best interests. In the first role the court room became an adversarial process, emphasizing punishment, failing to pay attention to the individualized needs of children, and not delineating the differences between children and adults. The juvenile courts became mini-criminal courts with harsh sentences and little attention being paid to rehabilitation. The criminal justice system is not an ideal one to follow. It does not serve adult defendants well, and there is no reason to believe youth can fare any better. The "child savers" believed they were protecting children from their own mistakes and using punishment as a way to show the youth the wrongfulness of their ways. In this process the rights of children and the fairness of the proceedings were not a focal point, rather the attorneys acted in what they perceived to be in the best interests of the children rather than advocating what their clients wanted. It does make sense, however, at this anniversary celebration to take the opportunity to re-evaluate the **Gault** decision, the juvenile court process, and to take the opportunity to explore other models that

would be beneficial to children who face delinquency charges.

It is also important to consider when the right to counsel might attach. In **Gault**, the Court only discussed the rights afforded to juveniles during the adjudicatory hearing. [FN41] That does not mean, however, that the Court did not recognize the need for counsel at other stages or that children do not require counsel at other points in the proceedings to assure fair and just treatment. Indeed, the Court specifically spoke to the dispositional phase and made note that an attorney “can play an important role in the process of rehabilitation.” [FN42] An attorney knows, or should know, the programs that may be available to provide treatment and guidance for the child. It is important for the judge to be given information about what may be available, but also background information about the child, his family, and any other support networks the child may have. The attorney can draw the lines connecting the dots between a quality treatment program and the individualized needs of the child. Although probation officers may also fill this role, they are often overworked and not used to thinking outside the box. They may also see so many children that they start to view them as all the same and forget to look at the individual characteristics of the particular child in question. A lawyer can remind them of the child's needs. Furthermore, the probation officer is viewed by the child as part of the system and may not be trusted by the child or his family. The probation officer may also be equally concerned with community safety while the lawyer, on the other hand, places the child first and concentrates on the best outcome for the minor. The youth knows that at least one adult that is involved in the matter is there for his needs and wants.

The Court also noted that the President's Crime Commission recommended that counsel be appointed “wherever coercive action is a possibility.” [FN43] This supports the position that children need counsel at every stage in the proceedings, beginning at the earliest possible point, including the initial point of interaction between the child and the system. Children are in a uniquely vulnerable position in relation to the legal proceedings. They are more likely to be traumatized by the events, not fully understand what is going on, feel isolated upon removal from families and friends, and need someone they can trust to help guide them through the legal maze. An attorney is needed to protect the child's rights when questioned by the police, when going through the intake process, for adjudicatory and dispositional hearings, appeals, and post-dispositional proceedings.

The importance of counsel for children at all stages is well illustrated by Gerald **Gault's** specific facts and case. If Gerald had an attorney when he was first questioned by the police officer and taken into custody he might not have been detained at all. When the police initially came to the **Gault** home, they were looking for Gerald's brother, as the phone, from which the call was made, was in the brother's name. Gerald was not asked about the phone call itself nor if anyone else had been in the house at the time the call was made. Gerald was taken into custody partially because he was the only one home at that time. [FN44]

One would hope that if Gerald had an attorney at the time he was taken into custody the lawyer would have talked to Gerald, would have known how to build a connection with him and opened up lines of communication. The attorney would have gathered information that might have lead to no charges being filed, the charges being dismissed, or at least, Gerald's immediate release. Gerald's only mistake was having dialed the number for his friend. He was concerned that his friend, Ronald, would attempt to make a long distance phone call. The phone was new, his brother's job that enabled the family to have the phone was also new, and Gerald did not want additional costs added to the phone bill. [FN45] If this information was known by the probation officer and the police at the time the investigation started it may have resulted in probation taking no formal delinquency action against Gerald **Gault**.

If an attorney was available for Gerald after he was detained and for the detention hearing, the attorney

should have been able to establish a more positive picture of Gerald and his family for the judge. Gerald had a close knit family. In addition to Gerald the household consisted of two working parents and an older brother who was employed. There was little risk of the family leaving the jurisdiction of the court, and they could make sure that Gerald returned to court for any future hearings. The family was concerned about Gerald's well-being and would have made sure adequate supervision was provided if Gerald remained at home. The offense that Gerald was charged with was a minor one and did not involve any physical harm to a person. There was no reason for Gerald to be detained for any period of time prior to adjudication. [FN46]

At the adjudicatory hearing an attorney would have protected Gerald's rights, insured him a hearing that met the standards of fundamental fairness, had the complainant come forward to testify, and prevented the judge from questioning Gerald directly. Gerald did not have someone to advocate for him at the hearing and to make sure he was able to present his story. Although his parents believed in him, they did not know the system any better than he did. They did not know what information to bring to the judge's attention and how Gerald's friend and co-defendant fit into the picture. In fact, the co-defendant, Ronald, and Gerald were treated very differently. The charges were never brought against Ronald, although he was the one to talk to Mrs. Green and made the lewd and obscene statements. [FN47] Instead, Ronald was allowed to leave the state with his father and move to California where his mother resided. [FN48] Ronald's father worked part-time for the sheriff's department. [FN49] A lawyer could have brought these facts to the court's attention. Having an attorney to present this information and advocate on the youth's behalf would allow a child to have more faith in the system and not believe that justice is only served based on who you know.

At the dispositional hearing an attorney would have been able to provide the judge with another view of Gerald and his family than the one probation provided. Hopefully, with more information, even if Gerald had been adjudicated a delinquent, he would not have been sent to the industrial school until the age of majority.

It would have been surprising if Gerald had been adjudicated a delinquent and sent to the state industrial school if he had been represented by an attorney who was advocating on his behalf. However, if this did happen while Gerald was represented by counsel, he would be more likely to believe that he had, at least, been treated fairly as someone would have been in his corner, explaining the process as it went along. [FN50] Furthermore, counsel could have explained the appellate process to Gerald. Instead, this fell to Gerald's parents. They had to seek out an attorney to appeal the case because they believed Gerald was being treated unjustly. [FN51] What if Gerald's parents either did not care, did not believe Gerald's version of the incident or his innocence, or did not understand the legal system and what needed to be done next? Left to his own devices, Gerald would not have appealed the case. Like many adolescents, Gerald believed that he must have done something wrong, since the judge said so, even though he was not sure what it was, and therefore, would have to just "face the music" and go to the placement. [FN52] It was not until Mr. **Gault** informed Gerald that the judge said negative things about his mother-that she was a bad mother because she let Gerald get into trouble-that Gerald was outraged. [FN53] It was not the constitutional issues that made Gerald want to appeal. At that time he was not aware of nor did he understand those issues. It was a matter of family pride and love for his mother that made him tell his father to do whatever they had to do to set the record straight. [FN54] The comments about Gerald's mother, however, was not a basis for an appeal. The **Gault** family needed the help of an attorney to take advantage of the appellate process.

In a criminal case the appointment of counsel occurs at a "critical stage" of the proceedings. In juvenile matters there is a strong argument that every stage is critical for the child-from the first contact that a child may have with the juvenile justice system when questioned by police or a probation officer, to the last appeal or post

dispositional hearing-and that it is imperative that an attorney be involved immediately in order to safeguard the child's rights. One might take the appointment of counsel a step further and argue that attorneys for children have an ethical obligation to be involved with the child even earlier, taking a preventive role with the youth and helping keep the child out of the system entirely. In an attempt to reduce the number of children caught in the web of delinquency court, lawyers can interact with children through programs at schools, religious organizations and community groups. Attorneys can provide leadership, mentoring, and information to children before they get into trouble. In this way youth may be better able to understand the system, their rights, and their responsibilities and take a more active and productive role in society. [FN55]

Since having counsel is a critical component of juveniles having a fair and just trial, should children, like adults, have the right to waive counsel in addition to having the right to have an attorney appointed to represent them? The answer is not as simple as it may appear. Criminal defendants have a Sixth Amendment right to counsel, and also have a constitutional right to waive counsel. [FN56] Criminal defendants may choose to represent themselves in the proceedings. [FN57] However, as previously discussed, a child's right to counsel is not derived from the Sixth Amendment, rather it is a Fourteenth Amendment due process right. If one takes the position that the right to have an attorney is equivalent in juvenile and criminal court, it would follow that the right to waive counsel should also be the same. But, is this possible? Before a defendant in criminal court can waive counsel, the judge asks a series of questions that shows that the defendant is giving a voluntary, knowingly and intelligent waiver of counsel. [FN58] In some jurisdictions a child will also be given a colloquy and based on the child's responses and the totality of the circumstances, the judge determines if the child is making a voluntary and intelligent waiver of the right to counsel. [FN59] This analysis makes sense if one believes that children's rights are equivalent to those of adults and that it does not matter if the right to counsel is based on the Sixth or the Fourteenth Amendments. However, since the right to waive counsel is rooted in the Sixth Amendment and the right to counsel for juveniles is based on the Fourteenth Amendment, it would seem the waiver of counsel would not apply the same to children as to adults. Since the right to counsel is different for juveniles so should the waiver of this right. A juvenile's waiver that is similar to one for adults does not take into account the developmental differences between children and adults [FN60] or the juvenile and criminal systems. [FN61] Youth are less likely than adults to understand the long term consequences of waiving counsel and proceeding with the delinquency hearing on their own. [FN62]

In some jurisdictions a child may waive counsel only after consulting with an adult. This may be the child's parent, guardian, probation officer, court officer, lawyer, judge, or any other adult who may have an interest in the child's well-being. In other states, the child can only waive after consulting with a parent or guardian. Under both of these methods problems can arise. A child is more susceptible to pressure by the adults involved in the process. [FN63] The judge may encourage the child to waive counsel to encourage efficiency in the courtroom, to save the jurisdiction money, because he or she believes there is no need for counsel in juvenile court as the proceedings are not meant to be adversarial, or to maintain law and order in the community. [FN64] The probation officer may suggest that the child waive counsel either because she believes that the system works and if the child did not commit the act, he will not face any major consequences or that it is irrelevant whether the child committed the offense or not. The child needs help and that is what the system is there to provide. Juvenile court personnel often contend that the presence of an attorney will just interfere with a process that is designed to help the child. The minor will be better off if he waives his right to an attorney. Parents may encourage their son or daughter to waive counsel because they do not understand the consequences the child may be facing. Parents want their child to tell the truth and take responsibility for his or her actions. Or they may simply be frustrated or embarrassed and not know how to handle the situation, wanting it to end as quickly as possible. Parents may



also not want the involvement of a lawyer because of the costs involved in hiring an attorney and may encourage the child to waive counsel for that reason.

The other alternative that the juvenile court uses when allowing waiver is to insist on the child consulting with an attorney prior to waiving representation by counsel. This method also has flaws. For example, counsel may be pressured by the court to encourage the child to waive. Or the attorney may lack sufficient time to evaluate the case, thus not providing the youth with sound advice about the risks of waiver. The lawyer does not have a relationship with the child if they are only consulting on waiver, which would also make it difficult to discuss this issue with the juvenile. In fact, an attorney may have a stronger relationship with the judge than his client, and because he seeks approval and future appointments from the judge, he may pressure the child to waive counsel. [FN65] However, if the lawyer is a child advocate and believes that representation is important to protect the minor's rights in the proceedings, how can she, in good faith, convince the child to waive counsel?

Finally, it is rare that a juvenile judge has all the information necessary to make a sound determination that the waiver was voluntary and intelligent. The judge is not equipped to decide if the child is developmentally mature enough to make this determination. Even if the judge is knowledgeable about children's emotional and mental development, it is unlikely that the particular child's abilities have been tested and the information provided to the judge.

At a recent conference for juvenile defenders there was a panel discussion about the constitutional rights of children in juvenile court. An appellate attorney was discussing a waiver case that had been "won" in her state. The appellate court had found that children have the right to waive counsel, just as they have the right to appointed counsel. The court did find, however, that the juvenile judge's inquiry into the child's waiver was insufficient to determine if it was made knowingly and intelligently. The presenter believed this decision helped protect the constitutional rights of children and supported the right to counsel guaranteed by **Gault**. She stated that since a child has the constitutional right to counsel, there ought to be a similar constitutional right to waive counsel. Gerald **Gault** did not see it the same way. During her talk, he was shaking his head no, and he later told me that children should never be able to waive their right to counsel. [FN66] From his own experiences, he concluded that children lack the legal knowledge and experience to make this a meaningful decision. Children do not have the foundation on which to balance the advantages and disadvantages to having counsel.

If one takes the position that the right to counsel for juveniles provides more protection than a criminal defendant's right to counsel, then waiver should not be an option. Some jurisdictions agree with this and do not allow children to waive counsel under any circumstances. In this way, the courts can be sure that a child's rights are being protected. [FN67]

Finally, there is the issue of indigency. As with adults, counsel is only appointed for minors if there is a finding of indigency. [FN68] With adult defendants this can be considered a fairly straight forward process. In the beginning of the proceedings, either a probation or court officer or the judge determines the income of the defendant and if it falls within the established guidelines of indigency an attorney is appointed. If not, the defendant must hire his own attorney. [FN69] The way it is handled for children is not as clear. With children, states consider the parents' resources rather than the child client's. Courts take one of several approaches. Some make a determination of indigent status at the beginning of the proceedings so as to ensure the earliest appointment of counsel for qualified youth. In other instances an attorney is appointed at the onset of the proceedings, with indigent status being decided only at the conclusion of the matter. If the parents prove their inability to pay, the state picks up the cost of representation. If the court determines the parents can afford to pay for the child's counsel,

they are assessed attorney's fees. With either approach the child is placed in an awkward position and may be pressured into waiving counsel as the parents either cannot afford an attorney or do not want to assist with payment of attorney fees. By forcing the parent to pay for the attorney, the court is creating additional tension to an already stressful family situation.

The only approach that protects the child's right to counsel is to determine indigency based on the child's accessible income. In this way if the child has income it can be considered as a source for payment of the attorney's fees. However, if the child's income is in a trust fund to which the child has limited or no access, the child would still be considered indigent and entitled to a court-appointed attorney. This would relieve any pressure the child might have to waive counsel or to plead to the charges rather than requesting a trial.

There are many other factors to consider when determining the benefits of counsel for children in juvenile court. As I previously mentioned, they should be examined as the beginning of a discussion on ways to seize the opportunity **Gault** presented and develop a meaningful role for attorneys in juvenile court. A lawyer must be able to advocate for what the child wants, and at the same time, must often advise the child of the options and their consequences. Without both aspects the child will be unable to make informed decisions, and is unlikely to believe that he or she is being treated fairly and justly.

Attorneys cannot usually do this job alone. We are not social workers, child counselors, or educators. Thus, the traditional models of attorney client relationships may not work as well in juvenile court. We should be looking outside the customary role lawyers take in criminal court and allow for attorneys to form a relationship with the child client that will both meet the needs of the child and the attorneys' ethical responsibilities of representation. I am hopeful that when we celebrate the fiftieth anniversary of **Gault** the reality of the juvenile court process will meet the dream of what the right to counsel can mean for children and what I believe was intended by the Court in the **Gault** decision.

[FN1]. George Butler Research Professor of Law and co-director of the Center for Children, Law & Policy (CCLP) at the University of Houston Law Center. B.A. Kean College, 1973; J.D. University of San Francisco, 1990; LL.M. Georgetown University Law Center, 1992. I would like to thank my Dean, Raymond Nimmer, for his support, not only of my work on this article, but also of the Center for Children, Law & Policy and helping us celebrate **Gault** appropriately. I would also like to thank my research assistants, Jeanice Dawes and Andrew Meissen, University of Houston Law Center, Class of 2008 and the University of Houston Law Foundation.

[FN1]. Application of **Gault**, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN2]. **Gault**, 387 U.S. at 41.

[FN3]. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

[FN4]. *Gideon*, 372 U.S. at 344. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*

[FN5]. Through the assistance of a grant from Humanities Texas the Center for Children, Law & Policy (CCLP) at the University of Houston Law Center was able to develop a curriculum for upper elementary, middle and high school students that focused on the right to counsel given by the Court in **Gault**. CCLP staff, interns, and University of Houston Law Center students presented the curriculum to hundreds of children in public and

private schools in Harris County, Texas. It helped children understand the need for counsel and particularly for attorneys that understood the juvenile court process. The classes have been so successful that we continue to receive requests from schools to continue the presentations. The book, *Why A Lawyer*, which was distributed to school children through this project can be downloaded at the Center's website, <http://www.law.uh.edu/center4clp/events/gault> at 40/.

[FN6]. This article was first presented at a symposium, *In re Gault : A 40 Year Retrospective on Children's Rights*, sponsored by CCLP at the University of Houston Law Center on November 2, 2007. The symposium was a culmination of events sponsored by CCLP to celebrate the fortieth anniversary of **Gault**.

[FN7]. **Gault**, 387 U.S. at 33-34.

[FN8]. **Gault**, 387 U.S. at 56.

[FN9]. **Gault**, 387 U.S. at 57.

[FN10]. **Gault**, 387 U.S. at 55.

[FN11]. **Gault**, 387 U.S. at 41.

[FN12]. **Gault**, 387 U.S. at 31 n.48.

[FN13]. **Gault**, 387 U.S. at 55. The privilege against self-incrimination was the only right applied to delinquency proceedings under the Bill of Rights.

[FN14]. See Barry C. Feld, *Criminalizing Juvenile Justice Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141, 151-64 (1984); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 U.C.L.A. L. Rev. 656, 665-73 (1980) (discussing the constitutional bases for the **Gault** holding).

[FN15]. Citing to the National Crime Commission Report, the Court stated:

The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.

**Gault**, 387 U.S. at 39.

[FN16]. For an example of a model of representation that can work for children, see Ellen **Marrus**, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 Md. L. Rev. 288 (2003) (discussing holistic representation for children and how a team approach meets the individualized needs of the child-client).

[FN17]. *Powell v. State of Ala.*, 287 U.S. 45, 50, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932) (holding lack of meaningful counsel in a capital case constituted a due process violation); *Johnson v. Zerbst*, 304 U.S. 458, 457-68, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938) (holding the Sixth Amendment mandates assistance of counsel, absent a proper waiver by the defendant, for capital and non-capital federal criminal

cases).

[FN18]. [Powell](#), 287 U.S. at 68-69.

[FN19]. [Powell](#) and [Johnson](#) would apply to defendants in criminal court of any age. However, the first juvenile court was established as early as 1899, and by the late 1920s juvenile courts could be found in every state. Yet, the right to counsel was not part of the process:

There was almost a change in mores when the juvenile court was established. The child was brought before the judge with no one to prosecute him and none to defend him-the judge and all concerned were merely trying to find out what could be done on his behalf. The element of conflict was absolutely eliminated ....

[Justice for the Child](#) 14 (Margaret K. Rosenheim ed., 1962) (quoting Jane Addams). See also [Barry C. Feld](#), [The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make](#), 79 *J. Crim. L. & Criminology* 1185, 1192 (1989) (noting that juvenile court judges did not welcome lawyers in the courtroom because they “regarded lawyers as both irrelevant and an impediment to their child-saving mission”).

[FN20]. [Betts v. Brady](#), 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) . [Gideon v. Wainwright](#), 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963), overruled [Betts](#) by disallowing states the right to selectively appoint counsel according to “special circumstances” and determining that appointment of counsel is a fundamental right.

[FN21]. Today children can also receive long sentences, even in juvenile court. For example, the state of Texas allows determinate sentencing for children accused of certain crimes. Although the district attorney must get an indictment from a grand jury, the child will be prosecuted in juvenile court and can be sentenced to a term as long as forty years. See [Tex. Fam. Code Ann. § 53.045](#) (2006). Upon the youth reaching the age of sixteen the minor may be transferred from the Texas Youth Commission to the Texas Department of Criminal Justice if “(1) the child has not completed the sentence; and (2) the child's conduct ... indicates that the welfare of the community requires the transfer.” [Tex. Hum. Res. Code Ann § 61.079](#) (2006).

[FN22]. There are several studies indicating that most children as young as thirteen have a definitional understanding of trial procedures, i.e. they can identify the roles of trial participants and the purpose of trials. See e.g., [Gary B. Melton](#), [Children's Concepts of Their Rights](#), 9 *J. of Clinical Psychol.* 186 (1980). However, the fact that children understand the roles and definitions of the proceedings and can reiterate this information, does not mean that they understand the concepts behind the proceedings. In a study where adolescents were asked to give responses to open-ended questions about the legal system they performed poorly, particularly when compared to adults. Older adolescents did better than younger children, indicative of the fact that children would have a difficult time assisting counsel, but would find it impossible to represent themselves. See [Michele Peterson-Badalin et al.](#), [Young Children's Legal Knowledge and Reasoning Ability](#), 39 *Canadian J. Criminology* 145 (1997).

[FN23]. [Gideon v. Wainwright](#), 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

[FN24]. [Gideon](#), 372 U.S. at 344.

[FN25]. [Gideon](#), 372 U.S. at 342.

[FN26]. [In re Gault](#), 387 U.S. at 41 (1967).

[FN27]. [Gault](#), 387 U.S. at 36.

[FN28]. [Gault](#), 387 U.S. at 36. “There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this court.” *Id.* The Court did not specifically discuss a parent's ability to act in the child's best interests during the delinquency proceedings. However, parents may often be in conflict with their children during delinquency proceedings. The parent may be the complainant, i.e., the child strikes the parent and is facing assault charges. Or the parent may be abusive or neglectful and does not want that information to be presented to the court. For example, in the previous assault case mentioned, the child may have been acting in self defense as the parent was beating the child with a belt or stick. Sometimes the parent encourages the child to participate in criminal activity. I frequently saw this when children were charged with dealing drugs. Parents would use their minor child to help sell drugs and justified their behavior on the belief that the youth would only receive probation or a minor disposition because of the age of the child.

[FN29]. [Gault](#), 387 U.S. at 36.

[FN30]. [Gault](#), 387 U.S. at 36 (quoting [Powell v. State of Ala.](#), 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932)).

[FN31]. [Gault](#), 387 U.S. at 18. Juvenile court proceedings were viewed as quasi-criminal and quasi-civil in nature. This makes the attorney's job more difficult as he needs to know the rules of civil and criminal procedure. It may also not always be clear when which rules apply, particularly in cases of first impression.

[FN32]. [Gault](#), 387 U.S. at 15-16.

[FN33]. It was believed that the juvenile courts would follow the *parens patriae* philosophy of offering a helping hand to children whose families could not care for them properly, and that the judge in the juvenile court would be sympathetic and understanding to the youth:

The child ... should ... be made to feel that he is the object of [the juvenile court's] care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 120 (1909).

[FN34]. Application of [Gault](#), 387 U.S. 1, 27, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (footnotes omitted).

[FN35]. [Gault](#), 387 U.S. at 27-28.

[FN36]. [Gault](#), 387 U.S. at 20-21. Justice Fortas states that “Due Process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” *Id.* at 20.

[FN37]. One of the concerns the Court had when considering Gerald [Gault's](#) case was that as a child he received fewer protections during the hearing than an adult would in criminal court and yet, Gerald was facing a maximum of six years confinement in an institution. If Gerald had been prosecuted for the same charges as an adult the maximum sentence he would have faced would be a fine between five and fifty dollars or no more than two

months in jail. [Gault](#), 387 U.S. at 29.

[FN38]. [Gault](#), 387 U.S. at 22. “We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication.” *Id.* Yet, many commentators believe that the juvenile court does not actually protect children at all and that minors might be served better in criminal court. See Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Rights*, 16 *J. Contemp. L.* 23, 49-50 (1990) (children could receive more rights and protections in criminal court and still be eligible for treatment and rehabilitation rather than punishment); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 *N.C.L. Rev.* 1083 (1991) (stating that the juvenile courts should be abolished as the costs associated with the “procedural informality” of juvenile court may be more harmful to children than if they face the charges in criminal court); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 *Minn. L. Rev.* 691 (1991) (arguing that the abolishment of the juvenile court would allow for criminal court proceedings to provide minor defendants with the same protections as adult defendants).

[FN39]. [Gault](#), 387 U.S. at 41. The Court found a child's right to counsel based on the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment right to counsel. *Id.*

[FN40]. [Gault](#), 387 U.S. at 39 (stating “[r]ecognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed it seems that counsel can play an important role in the process of rehabilitation”).

[FN41]. [Gault](#), 387 U.S. at 13. “We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a delinquent as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.” *Id.*

[FN42]. [Gault](#), 387 U.S. at 38.

[J]uveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances.

*Id.* at 39.

[FN43]. [Gault](#), 387 U.S. at 38.

[FN44]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007). I have been fortunate to meet Gerald **Gault** on two different occasions, at the National Juvenile Defender Center (NJDC) Juvenile Defender Summit held in Phoenix, Arizona in October 2002 and again at the Summit held in Portland, Oregon in 2007. Both times I was impressed by Mr. **Gault's** concern for children and his desire to make sure people do not forget the need children have for protections in juvenile court. I also learned many facts about the incident and Gerald **Gault's** life that were not included in the Court's description of the facts.

[FN45]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN46]. Interview with Gerald **Gault** in Phoenix, Arizona (Oct. 2002) and Portland, Oregon (Oct. 20, 2007).

[FN47]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN48]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN49]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN50]. Children need to know that they have someone in their corner, advocating on their behalf, who understands the system and can ensure their rights are protected. When we taught the classes about *In re Gault* to school children, one child, whose father is a lawyer and has a successful personal injury practice, said that if she got into trouble she would not have her father represent her. Rather she would want an attorney who knew juvenile law and practiced in that area. In that way she could be sure she would be well represented.

[FN51]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN52]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN53]. Interview with Gerald **Gault** in Phoenix, Arizona (Oct. 2002) and Portland, Oregon (Oct. 20, 2007).

[FN54]. Interview with Gerald **Gault** in Phoenix, Arizona (Oct. 2002) and Portland, Oregon (Oct. 20, 2007).

[FN55]. By teaching students about the law they begin to understand their rights, but also their responsibilities. See Kathleen Sylvester, *Attorneys Who Teach Street Law*, Nat'l L.J., June 20, 1983, at 1. Although the **Gault** classes only focused on why children need a lawyer, the students and parents made interesting observations. Many parents listened to Gerald's story in disbelief and could not phantom that a child could get into so much trouble for such a minor prank. On the other hand children took Gerald's story very seriously and realized how easy it is to get into trouble, even when they may not have realized they were doing something wrong. They took away a valuable lesson and stated that they planned on being careful about what they did in the future to make sure they did not get into trouble.

[FN56]. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Justice Stewart, writing for the majority, held that the >" State may [not] constitutionally hale a person into its criminal courts and there force a lawyer upon him." Id.

[FN57]. In *Faretta*, the Court further held that individual defendants possess a right to defend themselves. *Faretta*, 422 U.S. at 834.

[FN58]. *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938) (holding that a defendant must competently waive counsel for a conviction to be constitutionally upheld under the Sixth Amendment).

[FN59]. See F.S.A.R. Juv. P. Rule 8.165 stating that the court must inform the juvenile of his rights and the benefits and disadvantages in representing himself. The judge must then make a determination that the waiver is given voluntarily and intelligently and that there are no unusual circumstances that prevent the minor from self-representation.

[FN60]. In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court discussed many of the developmental differences between children and adults in deciding why juveniles should not be put to death. Although I recognize that death penalty cases are viewed as different than other cases, the developmental

differences between children and adults may also apply to other matters such as the transfer of children to criminal court, a child's competency to stand trial, and the role of lawyers in juvenile court. See Ellen **Marrus** & Irene Merker Rosenberg, After *Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 *San Diego L. Rev.* 1151, 1161-69 (2005) (discussing the application of adolescent development discussed in *Roper* to the transfer of children to criminal court); **Marrus**, supra note 16, at 288 passim (discussing how the developmental differences between children and adults encourage a different model of representation for children).

[FN61]. See supra notes 31-37 and accompanying text.

[FN62]. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 69 *Cal. L. Rev.* 1134, 1137, 1140-43 (1980) (arguing that a per se rule that children have the advice of an adult when waiving Miranda rights is necessary as children will not understand the rights they are waiving). Although Grisso is discussing the waiver of the right of counsel under Miranda, this could also apply to the waiver of counsel for all proceedings.

[FN63]. In a study conducted by Dr. Grisso, he found that parents typically actively encouraged their children to talk to the police, probation officer, or judge or did so by not saying anything at all. See Thomas Grisso, *Juveniles' Waiver of Rights: Legal & Psychological Competence* 166-68 (1981). Additionally, parents' nervousness may make their children feel even more coerced. *Id.* at 167.

[FN64]. See Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 *Crime & Delinq.* 393, 395 (1988) (providing reasons why, even post **Gault**, children are not always appointed counsel at adjudicatory hearings).

[FN65]. See Feld, supra note 64, at 419 (listing reasons that attorneys may not be effective in juvenile court).

[FN66]. Interview with Gerald **Gault** in Portland, Oregon (Oct. 20, 2007).

[FN67]. See Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 *Am. J. Crim. L.* 611, 622-23 (1996) (listing eight states providing counsel to children with no right to waive representation).

[FN68]. In *Gideon*, when finding the right to counsel for adults the Court stated:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth ....The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our ... laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

In **Gault**, the Court applied the right to counsel to juveniles and found:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to proceedings to determine delinquency ... the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent



the child.

**Gault**, 387 U.S. at 41.

[FN69]. Jurisdictions will make the determinations of indigency based on different factors, but it is usually based on the defendant's income and must be somewhere around 125% to 150% of the poverty level. For more information about indigency and the appointment of counsel, see Sundeep Kothari, And [Justice For All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents With Meaningful Access to the Courts](#), 72 Tul. L. Rev. 2159 (1998).

44 No. 3 Crim. Law Bulletin 6

END OF DOCUMENT