

## PURSUING GAULT

David S. Tanenhaus and Eric C. Nystrom\*

*I join your magnificent opinion in the above case.*

*It will be known as the Magna Carta for juveniles.*

—Chief Justice Earl Warren to Justice Abe Fortas,

March 17, 1967.<sup>1</sup>

Imagine how delighted Abe Fortas must have been to receive this congratulatory memo from the “Super Chief.”<sup>2</sup> Fortas had spent five months drafting the majority opinion for *In re Gault*.<sup>3</sup> In 1964, Judge Robert E. McGhee had committed fifteen-year-old Gerald Gault, who had been accused of making an obscene phone call, to serve up to six years at the Arizona State Reformatory for Boys.<sup>4</sup> This constituted a potential six-year sentence for allegedly uttering lewd suggestions into a telephone.<sup>5</sup> Under Arizona law, for the same offense, an adult could have been sentenced to no more than sixty days in jail and ordered to pay a \$50 fine.<sup>6</sup>

At issue in *Gault* was whether the Fourteenth Amendment’s due process clause guaranteed constitutional rights to children in juvenile court proceedings.<sup>7</sup> Although every justice, except for Potter Stewart, agreed that children in juvenile court should have the right to timely notice of the charges and assis-

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<sup>1</sup> Letter from Chief Justice Earl Warren to Justice Abe Fortas (Mar. 17, 1967) (on file as part of the Abe Fortas Papers (MS 858), Manuscripts and Archives, Yale University Archives, Box 124).

<sup>2</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 24 (1983).

<sup>3</sup> *Gault*, 387 U.S. 1 (1967); DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN* 82 (2011).

<sup>4</sup> *Id.* at 6–8.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN* 33 (2011).

<sup>7</sup> *Id.* at xvii.

tance of counsel, Fortas wanted Gault to do much more.<sup>8</sup> This included his adamant belief that *Gault* should extend the Fifth Amendment's privilege against self-incrimination to children in juvenile court.<sup>9</sup> Warren's memo confirmed that Fortas had now secured enough votes to do so.<sup>10</sup> As it turned out, Fortas was completing the Warren Court's final great due process decision, which both jurists and academic lawyers have gone on to cite frequently.<sup>11</sup>

Fortas's role during this revolutionary era for American constitutional law is remarkable.<sup>12</sup> Only five years earlier, in 1962, the Supreme Court had asked Fortas, who was a prominent Washington lawyer, to represent Clarence Gideon in *Gideon v. Wainwright* (1963).<sup>13</sup> His victory in *Gideon* made *Gault* not only possible but seemingly inevitable.<sup>14</sup> The fact that Fortas successfully litigated *Gideon* in 1963, joined the high court two years later, and then wrote *Gault* in 1967, demonstrates that the basic assumptions about fundamental fairness had changed.<sup>15</sup> Within four years, the Supreme Court had accepted that it would be unfair to try a person without the right of assistance of counsel in a case that could lead to punitive incarceration. Fortas successfully litigated this proposition in *Gideon*,<sup>16</sup> and then promulgated it as a justice in *Gault*.<sup>17</sup>

The *Gault* revolution, as law professor Martin Guggenheim explained, "created the need for thousands of lawyers to work in a previously nonexistent field."<sup>18</sup> This symposium commemorates the careers of two such outstanding lawyers: Barry C. Feld and Mary Berkheiser. Their scholarship and advocacy

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<sup>8</sup> *Id.* at 85.

<sup>9</sup> *Id.* at 82.

<sup>10</sup> Warren, *supra* note 1.

<sup>11</sup> FRED P. GRAHAM, THE SELF-INFLICTED WOUND 9 (1970); *Most-Cited U.S. Supreme Court Cases in HeinOnline – Part II*, HEINONLINE BLOG, <http://heinonline.blogspot.com/2009/01/most-cited-us-supreme-court-cases-in.html> [https://perma.cc/Y2BB-3SKE] (last visited Jan. 26, 2017).

<sup>12</sup> See e.g., LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 254–59 (1990).

<sup>13</sup> 372 U.S. 335 (1963). The *Gideon* decision, even though it applied only to the criminal justice system, turned out to be transformative for American juvenile justice. *Gideon* affirmed that the state had to supply counsel to defendants who were charged with a felony and could not afford legal representation. The Supreme Court had to determine that this constitutional protection existed in state criminal courts before a litigant could successfully raise this issue regarding a client in juvenile court. Otherwise, a litigant would have been asking the Supreme Court to interpret the U.S. Constitution to include a procedural due process right in the juvenile court that was not constitutionally mandated for defendants in criminal court. Only after the *Gideon* decision in 1963 did it make sense to raise the constitutional question of whether juvenile courts also had to supply assistance of counsel to those who could not afford an attorney. The classic account of this case is ANTHONY LEWIS, GIDEON'S TRUMPET 48 (1964). For an empirical evaluation of *Gideon*'s significance see Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 15 (2016).

<sup>14</sup> TANENHAUS, *supra* note 6, at 65–66.

<sup>15</sup> See *Gideon*, 372 U.S. at 335; see *In re Gault*, 387 U.S. 1, 3 (1967).

<sup>16</sup> *Gideon*, 372 U.S. at 344.

<sup>17</sup> *Gault*, 387 U.S. at 36–37.

<sup>18</sup> MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, at i (2005).

on behalf of children and their families have made a tangible difference at the local, state, and national level.<sup>19</sup> Feld literally wrote the book on the right to counsel and juvenile courts, and Berkheiser's research and advocacy remind us how this constitutional right is often more fictional than real.<sup>20</sup> These *Gault* lawyers and their dedicated students have contributed to the fifty-year campaign, now championed by the National Juvenile Defender Center, to ensure that every child has the effective assistance of counsel in America's juvenile courts.<sup>21</sup>

In this essay, we neither lament Gault's "lost promise" nor treat it as a "period piece."<sup>22</sup> Instead, we use digital tools to investigate the uses of this frequently cited case over time. We begin with Fortas himself. Part I analyzes how he used *Gault* to argue for the importance of the privilege against self-incrimination. By doing so, he drew on contemporary, social-scientific research about the administration of juvenile justice and included broad statements about the foundation of constitutional freedom and the applicability of the privilege against self-incrimination in multiple contexts. In Part II, we use digital tools and citation records to trace what happened to these memorable parts of his decision (i.e., Fortas's *Gault*) in the subsequent case law, and how these parts compare to other citations of *Gault*. In this section, we also use digital tools to search for potentially interesting patterns meriting further investigation. The conclusion notes that what remains of *Gault* is significant but largely confined to juvenile court. Yet, scholars may be able to use citations to the case to discover valuable sites for exploring the legal history of American juvenile justice from *Gault* to the present.

### I. FORTAS'S *GAULT*

Fortas's biographer Laura Kalman observes that *Gault* best illustrated Fortas's "personal approach to judging and his identification with those left out of society."<sup>23</sup> She highlighted Fortas's 1969 address to the Juvenile Court Practice

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<sup>19</sup> Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299 (2017); Mary Berkheiser, *Championing Children's Rights in Nevada, 2000–2015: The Thomas & Mack Juvenile Justice Clinic as Change Agent*, 17 NEV. L.J. 331 (2017).

<sup>20</sup> See BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND JUVENILE COURTS (1993); Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 581 (2002).

<sup>21</sup> See The National Juvenile Defender Center's Gault @ 50 Campaign, GAULT AT 50, <https://gaultat50.org> [<https://perma.cc/6M2Q-QDM8>] (last visited Jan. 26, 2017).

<sup>22</sup> For an example of the "lost promise" framing, see Katherine R. Kruse, In re *Gault and the Promise of Systematic Reform*, 75 TENN. L. REV. 385, 386 (2007). In *Courts and Social Policy*, Donald Horowitz described *Gault* as a "period piece." DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 172 (1977).

<sup>23</sup> KALMAN, *supra* note 12, at 250.

Institute, during which he spoke about juvenile offenders endogenously (i.e., as our children).<sup>24</sup>

He explained, “we’re talking about *all* children: our children: . . . White as well as Black, Middle class as well as poor—not just *theirs*.”<sup>25</sup> Fortas cared about their future because he considered the juvenile justice system “the most appalling and dangerous part of the bankrupt estate of our national services.”<sup>26</sup> Fortas, who was a legal realist, understood that due process alone could not fix systemic problems.<sup>27</sup> Yet, as Kalman explained, “Introducing due process was still the largest contribution to improving the juvenile courts Fortas believed he could make as a judge.”<sup>28</sup> Fortas had definite ideas in mind about just what the case and his opinion in it would mean. Accordingly, Fortas lobbied his fellow justices to secure as many procedural rights for children as possible—although what Fortas intended in *Gault* and how his colleagues and other interested parties read it sometimes proved wholly different.<sup>29</sup>

To explain why children needed the privilege against self-incrimination, Fortas circulated Justice William O. Douglas’s opinion in *Haley v. Ohio* (1948), which involved a fifteen-year-old African American accused of murder.<sup>30</sup> The police had arrested him at midnight and questioned him in teams until he confessed at five o’clock in the morning.<sup>31</sup> Douglas explained,

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race.<sup>32</sup>

He added,

Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. . . . No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning.<sup>33</sup>

The Court held that the questioning at issue in *Haley* had violated the boy’s due process rights, although only by a 5-4 margin.<sup>34</sup> But this case, and a later

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<sup>24</sup> *Id.* (citing Abe Fortas, “Beyond *Gault*: The Juvenile Offender” (Paper delivered to the Juvenile Court Practice Institute, Washington, D.C., Nov. 20, 1969)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 249–50.

<sup>28</sup> *Id.* at 250.

<sup>29</sup> See TANENHAUS, *supra* note 6, at 82–85, 97–121.

<sup>30</sup> 332 U.S. 596, 597 (1948).

<sup>31</sup> *Id.* at 598.

<sup>32</sup> *Id.* at 599.

<sup>33</sup> *Id.* at 599–600.

<sup>34</sup> *Id.* at 596–97, 601.

one (*Gallegos v. Colorado*),<sup>35</sup> did not involve juvenile court proceedings. Both cases were criminal prosecutions of adolescents.<sup>36</sup> Still, Fortas was able to secure the votes he needed in *Gault* to extend the privilege against self-incrimination into juvenile court.<sup>37</sup>

In his majority opinion in *Gault*, Fortas first explained the significance of due process for protecting the individual in modern society.<sup>38</sup> This included Fortas's declaration, "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."<sup>39</sup> LexisNexis made this statement in Headnote 4 of its presentation of *Gault*.<sup>40</sup> The breadth of Fortas's statement about due process as a foundational constitutional principle suggests why jurists would be tempted to apply it broadly.

Yet the most striking feature of this broad statement about the importance of due process is its legal realist grounding in social science, as evinced by the "big note"<sup>41</sup> that supports it.<sup>42</sup> As Fortas explained, "The impact of denying fundamental procedural due process to juveniles involved in 'delinquency' charges is dramatized by the following considerations. . . ."<sup>43</sup> These considerations included: (1) the number of arrests of persons under the age of 18 for serious crime; (2) evidence for the benefit of providing assistance of counsel in New York, which had recently adopted this practice; (3) evidence that juveniles found "delinquent" were incarcerated in adult prisons in many states; (4) the danger of double jeopardy (i.e., a juvenile being prosecuted in juvenile and adult court for the same offense); and (5) evidence of juveniles being transferred from juvenile to adult court.<sup>44</sup> Fortas cited the most current research on the operations of American juvenile justice to support each conclusion.<sup>45</sup> Thus, Fortas's broadest statement about due process as a foundational, constitutional principle drew heavily upon social scientific findings about the administration of juvenile justice in the 1960s.<sup>46</sup>

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<sup>35</sup> *Gallegos v. Colorado*, 370 U.S. 49, 50 (1962).

<sup>36</sup> *Id.*; *Haley*, 332 U.S. at 597.

<sup>37</sup> *In re Gault*, 387 U.S. 1, 19 (1967).

<sup>38</sup> *Id.* at 19–20.

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *In re Gault*, 387 U.S. 1 (1967), LEXISNEXIS, <http://www.advance.lexis.com> [<https://perma.cc/3D9G-A8HT>] (search in search bar for "387 U.S. 1") (last visited Jan. 27, 2017).

<sup>41</sup> *Gault*, 387 U.S. at 20 n.26; David Tanenhaus (@david\_tanenhaus), TWITTER (Sept. 16, 2016, 1:04 PM), [https://twitter.com/david\\_tanenhaus/status/776874340050612224](https://twitter.com/david_tanenhaus/status/776874340050612224) [<https://perma.cc/FWS7-TWK6>].

<sup>42</sup> *Gault*, 387 U.S. at 20 n.26.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Fortas also included a wide-ranging discussion of the significance of the privilege against self-incrimination, whose roots date back to at least the sixteenth century.<sup>47</sup> As he explained,

The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.<sup>48</sup>

He added, “It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.”<sup>49</sup> This argument about the need to transplant a procedural safeguard from criminal justice into juvenile justice complemented his earlier declaration about due process as a foundational principle.<sup>50</sup> It also helped him to make the related argument that children and adolescents actually required this privilege to protect them because they were more vulnerable than adults.<sup>51</sup> This sentiment was echoed later in the twenty-first century, when the Supreme Court constitutionalized the idea that children are developmentally different from adults, and that distinction matters, at least for sentencing purposes.<sup>52</sup>

Significantly, Fortas used his discussion of the privilege against self-incrimination to move from the realm of juvenile justice into other settings. He proclaimed, “The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive.”<sup>53</sup> He noted,

As Mr. Justice White, concurring, stated in *Murphy v. Waterfront Commission*, . . . “The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclo-*

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<sup>47</sup> He traced this history in an earlier article, which he cited in *Gault*. Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 91, 96–104 (1954).

<sup>48</sup> *Gault*, 387 U.S. at 47 (footnote omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *Id.* at 48.

<sup>52</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012); Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013).

<sup>53</sup> *Gault*, 387 U.S. at 47.

*sure*s which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*<sup>54</sup>

Fortas, therefore, had pieced together precedents to make his bold statement about the applicability of the privilege against self-incrimination in multiple contexts.<sup>55</sup>

In Part II below, we examine whether jurists used the condensed version of this statement (i.e., LexisNexis Headnote 11) in later cases.<sup>56</sup> The bare text did not include the citation to Justice White's concurring opinion.<sup>57</sup> Instead, it simply stated:

The privilege against self-incrimination can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. It protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.<sup>58</sup>

Fortas's majority opinion in *Gault* brought the due process revolution into juvenile court.<sup>59</sup> Fortas was exceedingly proud of his *Gault* decision, and even mailed autographed copies to many of those involved in litigating the case and fighting for due process rights for children in juvenile court.<sup>60</sup> But what we are calling Fortas's *Gault* sought to do much more. It included both a broad statement about due process as the basis of constitutional freedom (Headnote 4),<sup>61</sup> and a declaration that the privilege against self-incrimination should attach to any proceeding that could potentially lead to evidence that could be used against the individual in a criminal prosecution (Headnote 11).<sup>62</sup> Neither of these statements were confined to juveniles alone. In Part II, we use digital tools to examine how jurists have cited *Gault* for nearly half a century, and whether Fortas's *Gault* mattered in the long run.

## II. CHASING GAULT

Tracing the route Fortas and the Warren Court took to the decision in *Gault* proved far more straightforward than understanding how jurists have applied *Gault* since 1967. More than 4,000 cases, at all levels of the American court

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<sup>54</sup> *Id.* at 47–48 (citation omitted).

<sup>55</sup> *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *McCarthy v. Arndstein*, 266 U.S. 34, 40–42 (1924).

<sup>56</sup> *In re Gault*, 387 U.S. 1 (1967), LEXISNEXIS, <http://www.advance.lexis.com> [<https://perma.cc/3D9G-A8HT>] (search in search bar for “387 U.S. 1”) (last visited Jan. 27, 2017).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Gault*, 387 U.S. at 50.

<sup>60</sup> TANENHAUS, *supra* note 6, at 91–92.

<sup>61</sup> *See infra* Table 2.

<sup>62</sup> *See infra* Table 2.

system, have cited *Gault*<sup>63</sup> far too many to read one by one in a short span of time. Accordingly, we decided to use digital tools to aid our analysis of what the scholars Kellen Funk and Lincoln A. Mullen have classified a “medium data” scope.<sup>64</sup> We leveraged two longstanding legal research tools to search for trace patterns in the usage of *Gault* over time. The first is *Shepard’s Citations*, a venerable legal research product that traces the citation of cases and whether those later citations uphold or call into question the earlier precedent.<sup>65</sup> The second is LexisNexis’s “headnote” annotations, which summarize and categorize the essential legal principles at the heart of each case.<sup>66</sup> Both of these tools began, and largely remain, products of highly trained human judgment.<sup>67</sup> Once LexisNexis finished integrating headnotes with Shepard’s data in 2005, it began to selectively provide information in a “Shepardized” report that indicated the cited case’s headnotes whose issues likewise were at stake in the citing case.<sup>68</sup> Careful use of the Shepard’s data about citation, coupled with the LexisNexis headnotes (available for about 85 percent of citing cases), provided the opportunity to see broad trends in the usage of *Gault* from 1967 to mid-2016.<sup>69</sup>

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<sup>63</sup> As of September 16, 2016, Shepherd’s lists 4,226 cases that cited *Gault*, though a careful examination shows that a small number appear to be duplicate entries, and it is possible some cases have been missed in smaller jurisdictions. Unfortunately, LexisNexis does not seem to permit linking directly to an individual Shepard’s report. Our revised and corrected data is available in tabular form at [ericnystrom.org/data/pursuing-gault](https://perma.cc/FJ9N-AWED) [https://perma.cc/FJ9N-AWED] (last visited Jan. 27, 2017).

<sup>64</sup> Kellen Funk & Lincoln A. Mullen, *A Servile Copy: Text Reuse and Medium Data in American Civil Procedure*, 24 RECHTSGESCHICHTE LEGAL HIST. 341, 342–43 (2016); Eric C. Nystrom & David S. Tanenhaus, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 AM. J. LEGAL HIST. 150, 154 (2016).

<sup>65</sup> Patti Ogden, “*Mastering the Lawless Science of Our Law*”: A Story of Legal Citation Indexes, 85 LAW LIBR. J. 1, 33–36 (1993).

<sup>66</sup> We have to date used only the Lexis/Shepard’s combination because of the significant effort needed to custom-build a program to parse this output reliably; however, it is reasonable to presume that competing tools, such as West’s KeyCite, could be employed in much the same fashion. For LexisNexis, see <http://lexisnexis.com/hottopics/lnacademic/Default.asp> [https://perma.cc/2EBZ-LBTX] (last visited Jan. 27, 2017). See also William L. Taylor, *Comparing KeyCite and Shepard’s for Completeness, Currency, and Accuracy*, 92 LAW LIBR. J. 127, 128 (2000); Jane W. Morris, *A Response to Taylor’s Comparison of Shepard’s and KeyCite*, 92 LAW LIBR. J. 143, 143 (2000); Dan Dabney, *Another Response to Taylor’s Comparison to KeyCite and Shepard’s*, 92 LAW LIBR. J. 381, 381–85 (2000).

<sup>67</sup> Susan Nevelow Mart, *The Relevance of Results Generated by Human Indexing and Computer Algorithms: A Study of West’s Headnotes and Key Numbers and LexisNexis’s Headnotes and Topics*, 102 LAW LIBR. J. 221, 221 (2010); Shawn Nevers, *LexisNexis Headnotes*, HUNTER’S QUERY (Sept. 18, 2009), [http://huntersquery.byu.edu/wordpress/index.php/2009/09/lexisnexis\\_headnotes](http://huntersquery.byu.edu/wordpress/index.php/2009/09/lexisnexis_headnotes) [https://perma.cc/HD5K-7LM3].

<sup>68</sup> Laura C. Dabney, *Citators: Past, Present, and Future*, 27 LEGAL REFERENCE SERVS. Q. 165, 179 (2008).

<sup>69</sup> See James F. Spriggs II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard’s Citations*, 53 POL. RES. Q. 327, 328 (2000). A key step was transforming this information into a format useful for verification and further analysis. We developed scripts to transform a downloaded Shepard’s report into tabular form, which served as a foundation for all further correction and analysis. Our scripts are available at



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TABLE 1: CASES CITING *GAULT* (DATA COMPILED FROM SHEPARD'S, SEPTEMBER 16, 2016, WITH CORRECTIONS BY AUTHORS)

Citing cases with one or more headnotes	3575
Citing cases, no headnotes given	611
Total cases citing <i>Gault</i>	4186

Fortas expected his *Gault* opinion to cover a lot of legal ground.<sup>70</sup> Indeed, LexisNexis identified thirteen separate legal issues as “headnotes” in Lexis’s classifying system,<sup>71</sup> incorporating an excerpt of the opinion’s text, and classifying each in a hierarchy of legal topics (Table 2). Eight of the headnotes refer specifically to juvenile justice, laying out important principles that, Fortas argued, ought to apply to adjudicatory hearings (i.e., the trial stage in juvenile court).<sup>72</sup> Several of these principles, such as the one found in Headnote 10, explicitly compared juvenile and criminal court proceedings in order to highlight the procedural safeguards that were absent in juvenile court. Five other Headnotes (2, 4, 7, 11, 12), however, were not juvenile-specific, either because they restated general principles applicable to all individuals (such as Headnotes 4 and 11), or because they mentioned juveniles and adults as equivalent classes with equivalent rights (such as Headnotes 2 and 12).

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<https://github.com/ericnystrom/sheptools> [<https://perma.cc/SFF6-V5W5>] (last visited Jan. 29, 2017).

<sup>70</sup> TANENHAUS, *supra* note 6, at 84.

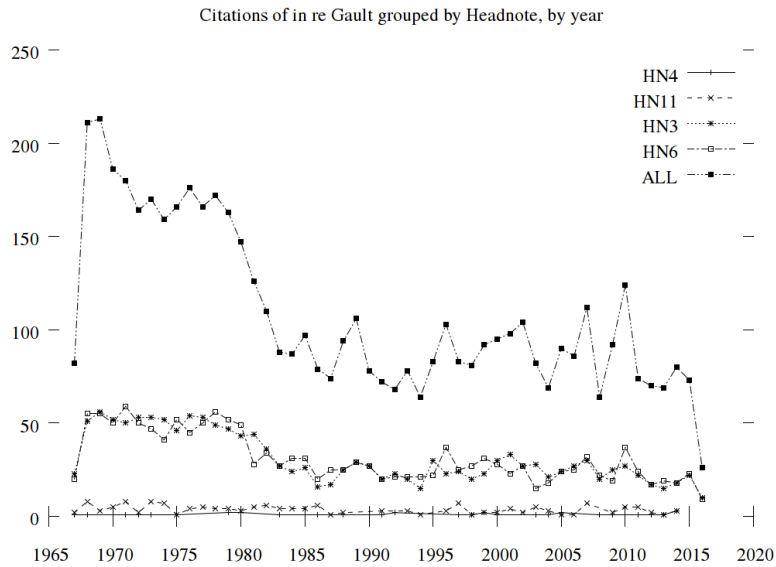
<sup>71</sup> See *infra* Table 2.

<sup>72</sup> *In re Gault*, 387 U.S. 1, 13 (1967).

TABLE 2: HEADNOTE-TOPICS REFERENCED BY *GAULT* CITERS; EACH CITING CASE MAY REFER TO MORE THAN ONE HEADNOTE, AND CITING CASES WITHOUT HEADNOTE DATA ARE NOT INCLUDED HERE (DATA COMPILED FROM SHEPARD'S, SEPTEMBER 16, 2016, WITH CORRECTIONS BY AUTHORS; SUMMARIES BY AUTHORS)

Headnote	Cites	Percent of Total	Summary
HN1	4	0.07	Specific reference to Arizona Rev. Stats on juveniles
HN2	55	1.01	"Neither man nor child" can face trials without due process
HN3	1547	28.51	Juveniles have long been treated differently from adults under the law
HN4	34	0.63	Due process is "primary and indispensable foundation of individual freedom," an essential part of the social compact
HN5	438	8.07	Juvenile judges cannot exercise unlimited or arbitrary power
HN6	1563	28.81	Juvenile delinquency hearings must have due process and fair treatment, due to requirements of 14 <sup>th</sup> Amendment
HN7	263	4.85	Specific and timely notice of charges must be provided
HN8	324	5.97	Juvenile hearings require notice sufficient for an adult trial
HN9	139	2.56	Parents of a juvenile cannot be denied choice of counsel
HN10	313	5.77	Assistance of counsel "equally essential" for juveniles
HN11	159	2.93	Privilege against self-incrimination applies in any proceeding, to protect any disclosure that might lead to criminal charges
HN12	520	9.58	The constitutional privilege against self-incrimination applies to both juveniles and adults
HN13	67	1.23	Testimony in delinquency hearings subject to cross-examination

FIGURE 1



An examination of the trends in headnote usage over time suggests some interesting patterns. It would be expected that the citation of *Gault*, like any other case, would begin strong, then decrease over time.<sup>73</sup> Such a pattern would particularly make sense for *Gault* in light of its revolutionary potential to transform the administration of juvenile justice from a non-adversary to adversary system.<sup>74</sup> What is curious, however, is the remarkable persistence of the relevance of *Gault* after the initial period, including some peaks of renewed activity, such as during 2010.<sup>75</sup> The two headnotes most commonly invoked in cases that cited *Gault* suggest the landmark case's clearest legacy and hint at a longstanding complication. The language of Headnote 6 built on language from the court's earlier decision in *Kent v. United States*, which had been decided only on statutory grounds, makes it clear that juvenile delinquency adjudications must include baseline Fourteenth Amendment standards for due process and fair treatment.<sup>76</sup> In Fortas's memorable words, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."<sup>77</sup> *Gault* is best remembered for constitutionalizing this point, and this issue brought juvenile jus-

<sup>73</sup> Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 342 (2013).

<sup>74</sup> B. JAMES GEORGE, *GAULT AND THE JUVENILE COURT REVOLUTION* (1968).

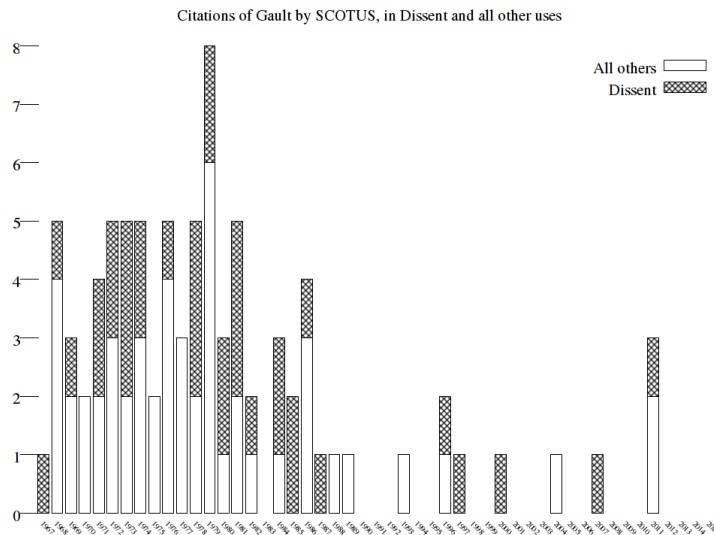
<sup>75</sup> See *supra* Figure 1; see also our compiled and corrected Shepard's citation data for *Gault*, *supra* note 63.

<sup>76</sup> *Kent v. United States*, 383 U.S. 541, 562 (1966).

<sup>77</sup> *Gault*, 387 U.S. at 28.

tice under the umbrella of the Warren Court's "due process revolution."<sup>78</sup> Headnote 3, by contrast, acknowledges there are fundamental differences between juvenile and criminal courts, which explains partly why states created dual systems to try the cases of adolescents accused of committing crimes.<sup>79</sup> The Burger Court later emphasized these differences in *McKeiver v. Pennsylvania* (1971), a 5-4 decision holding that the Constitution does not require jury trials in juvenile court.<sup>80</sup> Other headnotes, which we described in Part I as Fortas's *Gault*, suggested a wider potential application of *Gault* outside the realm of juvenile justice.<sup>81</sup> Headnotes 4 and 11, which are concerned with due process and self-incrimination, respectively, embody principles that need not be tied directly to the adjudication of children. These two headnotes, however, represent only a fraction of the overall cites (0.63 percent and 2.93 percent, respectively). Thus, Fortas's *Gault* largely faded away.

FIGURE 2



It is also significant to emphasize that the primary usage of *Gault* takes place in courts below the level of the U.S. Supreme Court. Of the nearly 4,200

<sup>78</sup> TANENHAUS, *supra* note 6, at xv.

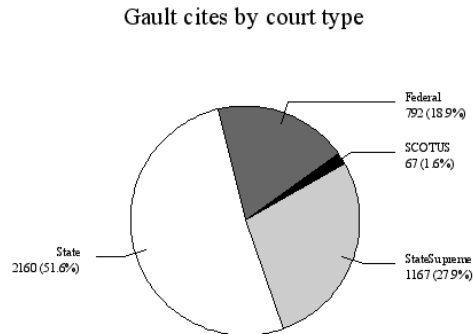
<sup>79</sup> The creation of the juvenile court at the turn of the twentieth century produced a dual system for handling the cases of minors in the United States. This meant that children could have their cases tried in either juvenile or criminal court. In his background paper for the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders published in *Confronting Youth Crime*, Franklin E. Zimring included a chapter titled "Our Dual System of Justice for Young Offenders" to describe this structural arrangement. FRANKLIN E. ZIMRING, *CONFRONTING YOUTH CRIME* 45-64 (1978).

<sup>80</sup> 403 U.S. 528, 545 (1971). In his contribution to this Symposium, Feld calls for the Supreme Court to revisit *McKeiver*; see Feld, *supra* note 19, at 324.

<sup>81</sup> See *supra* Part I.

cases that have cited *Gault*, fewer than seventy have been in the U.S. Supreme Court.<sup>82</sup> Those Supreme Court cases also include many justices citing *Gault* in dissent, such as Justice William O. Douglas in *McKeiver v. Pennsylvania*,<sup>83</sup> and Justice Thurgood Marshall in *Schall v. Martin*.<sup>84</sup> These citations suggest that different justices read and used *Gault* for competing purposes, especially between 1968 and 1986 (Figure 2). Moreover, since 1987 *Gault* has been cited infrequently at best by the U.S. Supreme Court (Figure 3).

FIGURE 3



Our analysis shows that state courts are overwhelmingly the arena in which *Gault* is deployed—more than three-quarters of the cases citing *Gault* were heard at the state level, if state supreme and lower courts are taken together.<sup>85</sup>

While *Gault* has enjoyed national notoriety since the decision was announced, Figure 3 suggests that the primary battle to realize the mandates and potential of *Gault* has taken place in venues that often escape the notice of academic lawyers and legal historians searching for national stories. One example is the state of Arkansas, where the environment of due process for juveniles created by *Gault* eventually led to the Arkansas Supreme Court invalidating the state's antiquated pre-*Gault* juvenile justice system.<sup>86</sup> With this decision, the Arkansas Supreme Court forced the state's legislature to create a modern juvenile justice system, yet none of this activity took place in the federal court system.<sup>87</sup> The example of Arkansas suggests why it is necessary to examine national-scale stories at sub-national levels, such as the state courts. Digital tools and source analysis can point legal historians to these promising sub-national sites for further investigation with more traditional methods, and assist legal

<sup>82</sup> See *infra* Figure 3; data also available in tabular form, *supra* note 63.

<sup>83</sup> *McKeiver*, 403 U.S. at 557–59.

<sup>84</sup> *Schall v. Martin*, 467 U.S. 253, 288 (1984).

<sup>85</sup> See *supra* Figure 3. For specifics, see our revised and corrected data (based on Shepard's initially), available in tabular form, *supra* note 63.

<sup>86</sup> *Walker v. Ark. Dep't of Human Servs.*, 722 S.W.2d 558, 562 (Ark. 1987).

<sup>87</sup> David S. Tanenhaus & Eric C. Nystrom, "Let's Change the Law": Arkansas and the Puzzle of Juvenile Justice Reform in the 1990s, 34 LAW & HIST. REV. 957, 959 (2016).

historians by helping arrange and manipulate data to permit analysis at scales impractical otherwise.

FIGURE 4

Cites of Gault invoking Headnote 3

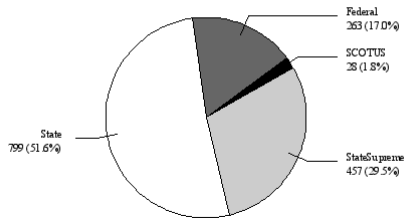
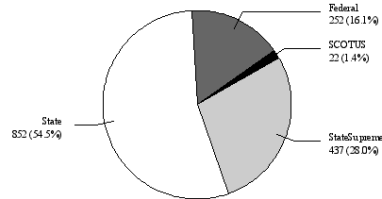


FIGURE 5

Cites of Gault invoking Headnote 6



When considering an opinion as expansive as *Gault*, it might be reasonable to think that different components of the opinion were used differently depending on the venue. While finer divisions might yield significant distinctions, the consideration of only those cases citing *Gault* that used one of the two most commonly cited headnotes (Headnote 3 states that juveniles had long been treated differently in courts; Headnote 6 declares that juveniles are entitled to due process protections) is revealing. It shows patterns of citation across jurisdiction groupings that seem remarkably similar to those for all citing cases, regardless of headnote, as demonstrated in Figures 4 and 5.

FIGURE 6

Cites of Gault invoking Headnote 11

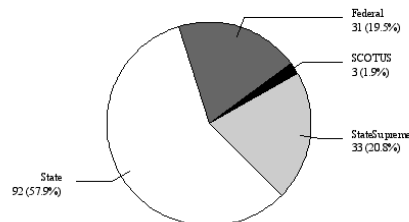
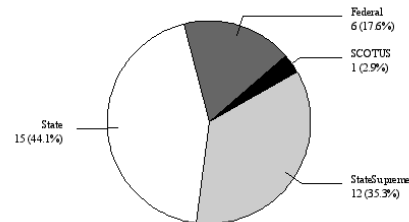


FIGURE 7

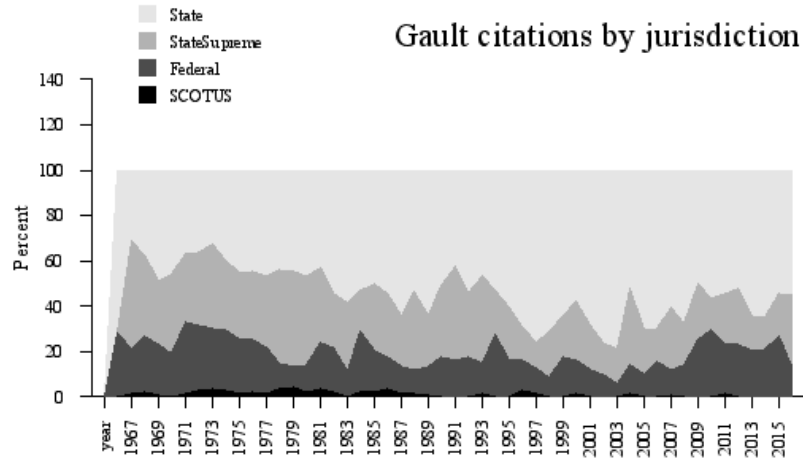
Cites of Gault invoking Headnote 4



A similar examination of Headnotes 4 and 11, two of the widest-ranging headnotes that do not specifically mention juveniles, and invoke broad protections for due process and against self-incrimination in any proceeding, suggests, by contrast, that differences in usage depending on jurisdiction might be detectable. (Figures 6 and 7.) While the total numbers of citations are much

smaller, and substantial caution must be used in interpreting any results, it is interesting that Headnote 4 seemed to have a slightly higher usage in state supreme courts when compared with overall averages, and Headnote 11 seems to have been particularly useful to state courts.<sup>88</sup>

FIGURE 8



A look at the citations of *Gault* by jurisdiction graphed over time suggests some other possible sites for future investigation. Adjusting the data to show the proportion of citations in each jurisdiction per year, as seen in Figure 8, corrects for declining citations as the *Gault* decision aged (as can be seen in Figure 1), and puts in yearly perspective the summary embodied in the pie chart in Figure 3. This chart seems to show a pattern of “implementation” in the decade or two after *Gault* was decided. In such a period, the role played by the state supreme courts (the band of medium gray in the graph) was a larger proportion of the uses of *Gault*; in later years, lower state courts absorbed a greater proportion of *Gault* use, perhaps as implementation gave way to enforcement.

Such an “implementation” explanation then becomes complicated. The graph shows a surge of federal courts using *Gault*, beginning from a low point around 2003 and continuing each year until the end of the dataset. But the U.S. Supreme Court does not seem to have mirrored this uptick. Investigating this surge might be a promising direction for future research. The graph similarly might point to other potentially interesting phenomena, such as a spike in federal court usage in 1994 (in the heart of the “Get Tough” era of juvenile justice),<sup>89</sup> a similar spike in state supreme court references in 2004, and years of

<sup>88</sup> See *supra* Figures 6 and 7 (showing headnotes 4 and 11, respectively).

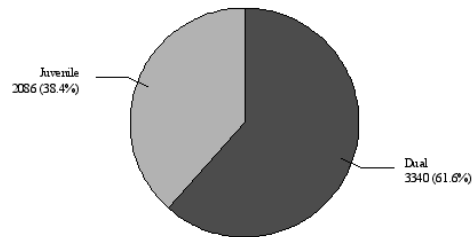
<sup>89</sup> See Nystrom & Tanenhaus, *supra* note 64, at 151.

relatively little overall use by higher or federal courts, such as 1997–98 and 2002–03.

The data about cases citing *Gault*, and particularly the notation of specific headnotes, which might stand in as proxies for their topics, can help us analyze other ideas about the juvenile justice system. For example, scholars such as Franklin Zimring have argued that scholars and policymakers should consider juvenile and criminal courts to be part of a “dual system.”<sup>90</sup>

FIGURE 9

Gault headnotes by system of justice



We divided the headnotes into two categories to test Zimring’s insights about the dual system. Headnotes 2, 3, 4, 5, 7, 8, 11, and 12 all address due process matters across the whole dual system (and perhaps beyond). On the other hand, Headnotes 1, 6, 9, 10, and 13 specifically focus within the juvenile justice system.<sup>91</sup> Headnote 5, which we include here in the “dual system” category, is based on *Kent*<sup>92</sup> and is the most explicit acknowledgement of the border between the two courts in the dual system (i.e., inter-court transfer) and the consequences of moving from one system to the other. Divided in this way, over 61 percent of the uses of *Gault* headnotes show a dual system use.<sup>93</sup>

<sup>90</sup> Zimring, *supra* note 79.

<sup>91</sup> Headnote 1 is somewhat of an outlier because it cites the Arizona legislation, but since it is so infrequently cited by other cases, it does not have much impact on the eventual results.

<sup>92</sup> *Kent v. United States*, 383 U.S. 541, 554–56 (1966).

<sup>93</sup> The numbers here represent individual invocations of headnotes by cases citing *Gault*. Cases citing *Gault* that do not have headnotes specified are not represented in these numbers, and if a case uses multiple headnotes, it is counted once for each of them.



FIGURE 10

Gault cites referencing the dual system

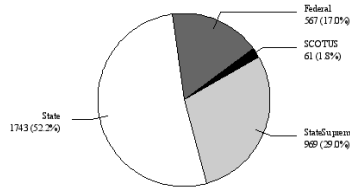
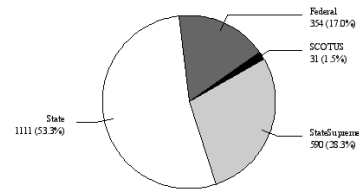


FIGURE 11

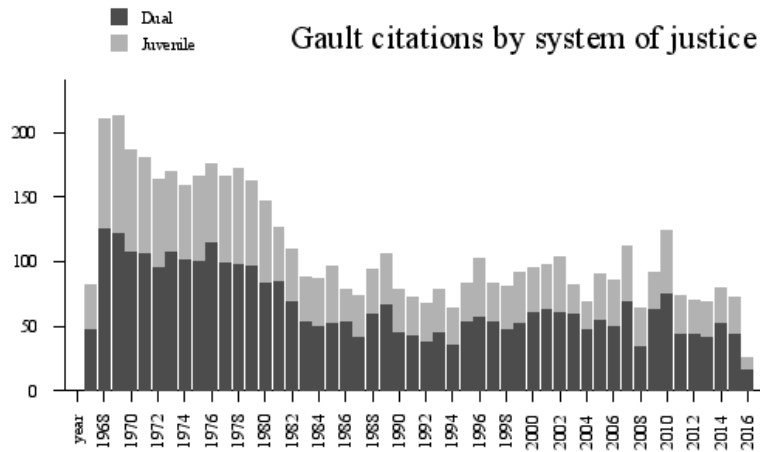
Gault cites referencing the juvenile system only



Grouping headnotes and using them as proxies for distant reading of opinions citing *Gault* gives us an opportunity to more fully flesh out the dual system of justice in light of court levels, change over time, and regional/geographic variations.

There seems to be little difference in the usage rate by the various types of courts between the dual system cites and those specific only to juvenile courts. Indeed, the proportions shown above seem close to those for cases citing *Gault* generally.

FIGURE 12



When placed in chronological context, however, a slightly different pattern seems to emerge. While overall citations of *Gault* (and thus headnote-cites grouped together here) declined over time until a resurgence in the last decade or so, the graph above suggests that headnote-citations representing the dual

system have become slightly more prevalent as the legacy and meaning of *Gault* evolves.

We can dig down further to see if regional patterns can emerge from the headnote-cite data. If courts from the state level through federal appellate courts are grouped together by their controlling federal circuit level, we might be able to see some regional variation in the treatment and usage of citations of *Gault*.

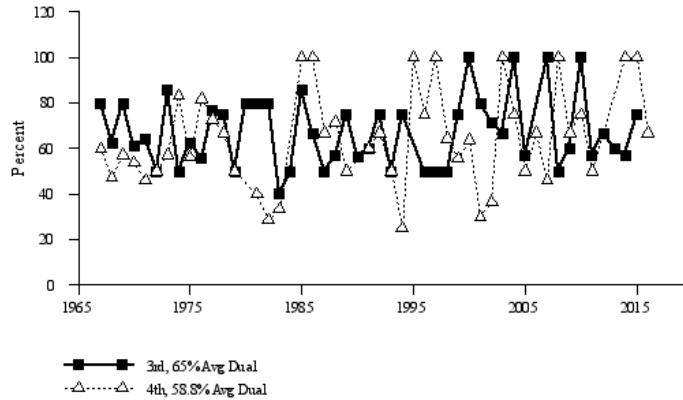
TABLE 3: GAULT HEADNOTE-CITES REFLECTING DUAL SYSTEM OR JUVENILE-ONLY APPROACHES, GROUPED BY CONTROLLING CIRCUIT (DATA COMPILED FROM SHEPARD'S, SEPT. 16, 2016, WITH CORRECTIONS BY AUTHORS)

Controlling Circuit	Dual System HN	Juvenile-only HN	Percent Dual
DC	72	24	75.0
National	70	33	67.96
3 <sup>rd</sup>	259	139	65.08
10 <sup>th</sup>	201	108	65.05
6 <sup>th</sup>	519	299	63.45
8 <sup>th</sup>	243	141	63.28
1 <sup>st</sup>	88	53	62.41
TOTAL	3340	2041	62.07
11 <sup>th</sup>	142	87	62.01
7 <sup>th</sup>	314	198	61.33
5 <sup>th</sup>	284	184	60.68
2 <sup>nd</sup>	347	230	60.14
9 <sup>th</sup>	604	407	59.74
4 <sup>th</sup>	197	138	58.81

To adjust for differing sizes and rates of activity in each circuit's controlled geography, we have considered the percentage of each controlling circuit's headnote-cites that represent a dual system understanding (rather than raw numbers of cites). The table above suggests that there might be regionally variable phenomena relating to the citation of *Gault* that could be explored further in future work.

FIGURE 13

Gault, Dual/Juvenile systems, 3rd and 4th Circuit Controlling



A closer look at these breakdowns over time, however, complicates easy stories of regional variation. The graph above compares the two extremes of the circuit groupings (if the national circuit groups are excluded). When viewed through time, it is clear in the graph above that variation is an essential part of the story. Courts that are under the Fourth Circuit’s southern coastal jurisdiction had a percentage of headnote-cites that reflected the “dual system” that varied tremendously over time. Despite having the lowest overall average percentage reflecting a “dual system” understanding, in some years 100 percent of the Fourth Circuit-area’s courts’ headnote-cites reflected a “dual system” approach. Though such a graph can merely be suggestive, further research might investigate rapid changes in direction, substantial differences between controlling circuit areas in times of rapid change or substantial activity, or other phenomena. Clearly, these digital tools can be tremendously valuable in raising—and occasionally helping to answer—fresh questions about the use of important cases, even those as venerable and contested as *In re Gault*.<sup>94</sup>

#### CONCLUSION

As this article has argued, Abe Fortas played a remarkable role during the 1960s in litigating, and then promulgating the principle that trying a person without the right of assistance of counsel in a case that could lead to punitive incarceration is fundamentally unfair and unconstitutional. Moreover, he used *Gault* to argue for attaching the privilege against self-incrimination in “any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory” because “it protects any disclosures which the witness may rea-

<sup>94</sup> *In re Gault*, 387 U.S. 1, 43–44 (1967).

sonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*<sup>95</sup> Although some jurists continue to cite this part of *Gault* (i.e., Fortas's *Gault*),<sup>96</sup> the impact of *Gault* in non-juvenile justice contexts appears negligible. Instead, *Gault's* enduring significance remains in the field of juvenile justice. The prominent role of *Gault*, for example, in Feld's and Berkheiser's essays<sup>97</sup> (and careers) reflects the enduring significance of this landmark decision for the pursuit of juvenile justice.

Chasing *Gault's* citations can help scholars to better understand the history of American juvenile justice. Behind every citation and case is a legal history that includes children's advocates such as Feld and Berkheiser. By using digital tools, scholars can locate patterns of citations that may lead to promising sites for further investigation. Such research can help us to understand the significance of federal and state courts during the so-called "Get Tough Era"<sup>98</sup> in American juvenile justice during the 1980s and 1990s. This history, in turn, can help advocates in making critical decisions about whether litigation or legislation is a more promising avenue for juvenile justice reform.

Finally, as this article has shown, *Gault's* citation patterns demonstrate that since 1967, courts at all levels have explicitly recognized that juvenile and criminal courts are part of a dual system used to try the cases of juvenile offenders. How these patterns unfolded in the past is a history worth knowing, especially for those pursuing justice for juveniles in the twenty-first century.

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<sup>95</sup> *Id.* at 47–48.

<sup>96</sup> *See supra* Part I.

<sup>97</sup> *See* Feld, *supra* note 19; Berkheiser, *supra* note 19.

<sup>98</sup> Feld, *supra* note 19, at 299.