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Pursuing Justice for the Child: The Forgotten Women of In re Gault

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PURSUING JUSTICE FOR THE CHILD: THE FORGOTTEN WOMEN OF *IN RE GAULT*.*

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I. INTRODUCTION

Since the 1970s historians of social movements in the United States have often contrasted the Progressive Era (c. 1890 to 1920) with the 1960s. Whereas progressive reformers at the turn of the twentieth century focused on the needs of dependent populations, the rights-conscious reformers of the 1960s emphasized their constitutional rights. The post-World War II generation of reformers used litigation to secure rights for these "prisoners of benevolence" caught in the social welfare institutions, which the progressives had created half a century earlier.[1]

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** Professor and Chair of History and James E. Rogers Professor of History and Law, University of Nevada, Las Vegas. I would like to thank Jennifer Mertus and the Center for Children's Rights for the invitation to participate in the 2013 Distinguished Speaker Series. It was a great honor to deliver a public lecture at a law school that has such an enduring commitment to children's rights. I would also like to thank Felice Batlan, Felicia Kornbluh, Karen Tani, and Mary Wammack for commenting on an early draft of this article. Special thanks to my mother Gussie Tanenhaus, my sister Beth Winsten, and my wife Virginia Tanenhaus for encouraging me to say more about the lives of the women who have been so central to the history of American juvenile justice. Finally, special thanks to Annette Amdal and Lynette Webber, who took time out of their busy schedules keeping the UNLV History Department running efficiently, to hear and comment on the first version of this public lecture

1. *See, e.g.*, WILLARD GAYLIN ET AL., DOING GOOD: THE LIMITS OF BENEVOLENCE (Pantheon ed., 1978) (in recent years, historians have revised our understanding social movements and the development of the American welfare state); *See* Felicia Kornbluh,

Scholars of American juvenile justice use this narrative to frame their field.[2] This overarching narrative is problematic, however, because it combines a nuanced historical interpretation of the Progressive Era with a less developed accounting of the Great Society. The outpouring of scholarship on women, the state, and welfare, for example, has demonstrated the central roles that women played in the creation, implementation, and spread of innovative social welfare policies in the early twentieth century, such as mothers' pensions and juvenile courts.[3] Yet the standard account of "the constitutional domestication of the juvenile court" focuses almost exclusively on the role that men played as litigators and justices in a trilogy of U.S. Supreme Court cases, beginning with *In re Gault* in1967.[4] This landmark case was the first time that the U.S. Supreme Court addressed what elements of due process the Constitution requires in a juvenile court proceeding.

In this article, I first draw on my recent book *The Constitutional Rights of Children* (2011) to introduce the facts of the case and place the case in the larger context of the history of American juvenile justice.[5] I then focus specifically on the role of four remarkable women in the history of this landmark decision: Marjorie Gault, Gerald's mother; Amelia Lewis, Gerald's lawyer; Lorna Lockwood, an Arizona lawyer who became the first woman to serve as the Chief Justice of a State Supreme Court; and Getrude "Traute" Mainzer, who assisted in the litigation of Gerald's case before the U.S. Supreme Court. Focusing on the role of these women as mothers, children's advocates, lawyers,

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Disability, Anti-professionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s, 97 J. OF AM. HIST. 1023 (2011); *See* ANTHONY CHEN, THE FIFTH FREEDOM: JOBS, POLITICS AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972 (Princeton Univ. Press, 2009) (in addition, scholars, such as the sociologist Anthony Chen, have highlighted the importance of the immediate post-World War II era for later developments in the twentieth-century social policy).

2. *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (Oxford Univ. Press, 1999); *See also* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS?, (Harvard Univ. Press, 2005).

3. *See* David S. Tanenahus, *The Elusive Juvenile Court: Its Origins, Practices, and Re-Inventions*, in THE OXFORD HANDBOOK OF JUVENILE DELINQUENCY AND JUVENILE JUSTICE (Barry C. Feld and Donna M. Bishop, eds., 2011).

4. CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE ix (Univ. Press of Kan., 1998).

5. DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE 4 (Univ. Press of Kan., 2011).

legal researchers, and state actors challenges the conventional framework for the history of social welfare law. For instance, these women articulated visions of social justice that challenged the paternalistic justifications used to legitimate juvenile justice for much of the twentieth century. They also did not accept the strict individualistic constitutional based argument of prominent male lawyers, such as Justice Abe Fortas. Their stories, I believe, suggest that instead of contrasting the Progressive Era and the 1960s, historians must pay closer attention to the parallels and continuities between these two historical eras, including the strikingly similar role of women reformers in both periods.

Collectively, I will use these women's stories to help to shed light on how American constitutional law is made by people who challenge the conventional wisdom or status quo. And I will then conclude with a few observations about the most recent Supreme Court decisions in the field of juvenile justice and highlight Justice Elena Kagan's majority opinion in *Miller v. Alabama* (2012) that inscribed the political and biological principle that children are different from adults into constitutional law.[6]

II. *GAULT* IN CONTEXT

The facts of *Gault* have disturbed audiences for more than forty years, including the justices of the U.S. Supreme Court who heard them recited by American Civil Liberties Union [ACLU] attorney and New York University law professor Norman Dorsen. As Dorsen recounted, on June 8, 1964, the police arrested fifteen-year-old Gerald Gault and a friend at his home in Globe, Arizona, for allegedly making an obscene phone call to a neighbor, Mrs. Ora Cook. The police took Gerald, without informing his parents, to the Children's Detention Home of the Juvenile Court. A probation officer then filed a delinquent petition against Gerald. It simply declared that he was "under the age of eighteen years, and is in need of the protection of this Honorable Court; and that said minor is a delinquent minor." When Gerald's mother returned from work that evening, she could not find her son. A few anxious hours later, she learned from a friend of the family that Gerald had been arrested. She

6. David S. Tanenhaus, *The Roberts Court's Liberal Turn on Juvenile Justice*, N.Y. TIMES (June 27, 2012), http://www.nytimes.com/2012/06/27/opinion/the-roberts-courts-liberal-turn-on-juvenile-justice.html?_r=0 [hereinafter Tanenhaus, *The Roberts Court's*].

went to the Detention Home and was told that her son's hearing would be held in the Juvenile Court at 3:00 p.m. the following day.

The next day Gerald, along with his mother, appeared before Judge Robert McGhee of the Juvenile Court. Mrs. Cook, the complainant, was not there. No one was sworn at this initial hearing. No transcript or recording was made. No record of the proceedings was prepared. After the hearing, the judge ordered Gerald returned to the Detention Home. The next week, Gerald again appeared before Judge McGhee. Once again, the complainant was not present and no record of the hearing was kept. After listening to Gerald's account of what occurred, Judge McGhee declared Gerald a juvenile delinquent and committed him to Fort Grant until he turned 21 or was discharged. Fort Grant, the State Industrial State, was a remotely located juvenile boot camp popularly known in Arizona as "desert Devil's Island." Gerald's punishment was, in effect, a six-year prison sentence for having allegedly made an obscene phone call to a woman who never was called to testify for or against him. If an adult had committed the same offense, he or she could have been fined between $5 and $50 and could have been imprisoned for no more than two months. Worse, and unlike the right of appeal afforded adults, Arizona law permitted no appeals in juvenile cases.

At that time, fifteen-year-old Gerald Gault, like every other American girl and boy, had no constitutional rights to due process in a juvenile court proceeding, even though a judge could declare him "delinquent" and sentence him to be incarcerated in an "industrial school" until he celebrated his twenty-first birthday. In 1964, the year that the nation's post–World War II baby boom ended, seventy-one million Americans (more than 36 percent of the population) were subject to the jurisdiction of a juvenile court. As FBI Director J. Edgar Hoover testified to Congress, about 4 percent of American youth could expect to find themselves in juvenile court.[7]

The U.S. Supreme Court heard *Gault* near the end of its due process revolution (1961–1968), which nationalized criminal procedure. Beginning in 1961, the Warren Court extended protections in the Bill of Rights, which had previously applied only in federal courts, to the accused and defendants in state criminal courts. In *Gault,* the issue was whether juvenile courts, like adult criminal courts, must

7. TANENHAUS, *supra* note 5, at xv.

protect these constitutional rights, such as the Fifth Amendment's privilege against self-incrimination and the Sixth Amendment's guarantee of assistance of counsel. At the same time that the Supreme Court decided to answer this question, the nation was experiencing an ostensibly terrifying crime wave and persons under eighteen years of age were responsible for more than 20 percent of all police arrests and nearly 50 percent of all arrests for serious offenses. In 1964, juvenile courts committed 39,511 minors, including Gerald Gault, to juvenile prisons. Other were prosecuted as adults in the criminal justice system and sentenced to federal and state penitentiaries. In 1963 alone, for example, criminal courts sent 88,824 persons younger than eighteen years of age to adult prison.[8]

As I argue in my book, *Gault* is thus much more than a selection from the canon of American constitutional law. It also invites serious analysis of tough questions about the appropriate legal response to youth crime. How should juveniles who break the law be treated? Should they be tried in the same criminal justice system that prosecutes and incarcerates adults? Or should their cases instead be handled in a separate justice system designed specifically for them? Should adolescents be treated more like young children or more like adults? Should a fifteen-year-old, for example, be punished the same way as either a ten-year-old or a thirty-year-old? Should chronological age, mental capacity, prior record, alleged offense, or life history be factored into making these decisions?[9]

As a historical study of a landmark Supreme Court decision, my book does not provide definitive answers to such normative questions. Yet, I argue, the past is a valuable place to begin this conversation. Studying the history of the "juvenile court," which admittedly sounds like a dusty set piece from a Victorian drama, reminds us that crime and the state's response to it are legally defined categories of conduct that have changed dramatically over time. In the American experience, legislatures have primarily defined what is illegal, and appellate courts have used specific cases like *Gault* to define how the state can respond legally to illegality. Thus, my book examines why states initially created juvenile courts at the turn of the twentieth century, and how they operated before and after the U.S. Supreme Court's landmark

8. *Id.* at xv-xvi.
9. *Id.* at xvi.

decision in *Gault*.[10]

III. THE WOMEN OF *GAULT*

I'd like to begin by asking you to imagine an awkward car ride. On August 1, 1964, Paul and Marjorie Gault drove from their home, a trailer park in the small mining town of Globe, Arizona, to Sun City, a retirement community outside of Phoenix. They were scheduled to meet with Amelia Lewis, a transplanted New Yorker and experienced attorney, to discuss what had happened to their 15-year-old son, who had already been incarcerated for six weeks in Fort Grant.[11]

We can only imagine what Gerald's parents were thinking as they drove to see Lewis. Did they blame themselves (or perhaps each other?) for what had happened to their son? Was Jerry really going to spend six years in prison because of a phone call? Could this lawyer get Jerry released? Could they even afford to pay her?

Lewis, who was born in the Bronx in 1903, graduated from St. Lawrence Law School (now Brooklyn Law School) and became one of the few women admitted to the New York bar in the 1920s. She practiced law in New York City for thirty-three years, was actively involved in the American Civil Liberties Union, raised three sons, and moved to Arizona after her husband died in 1957. She passed the Arizona Bar Examination in 1958, opened her own law practice in Sun City, and did pro bono work for the local chapter of the ACLU.[12]

The year that Gerald Gault was incarcerated, 1964, was also the heyday for legal liberalism. Proponents of this philosophy believed that courts, especially the Supreme Court under Chief Justice Earl Warren, could be used as instruments to bring about meaningful social change nationwide for historically disadvantaged groups, such as African Americans, women, and children. Accordingly, the ACLU itself flourished during the 1960s. Its membership doubled to more than 100,000, local chapters formed in almost every state, and the organization implemented a new legal strategy. Instead of primarily filing amicus curiae ("friend of the court") briefs in U.S. Supreme Court cases to alert the justices to specific issues, the ACLU would

10. *Id.*
11. *Id.* at 33.
12. *Id.*

directly represent clients like the Gaults.[13]

The Gaults' story horrified Lewis. As a mother who had raised three boys of her own, she felt for the parents. As a lawyer who believed strongly in the due process of law, she was outraged by how arbitrary the juvenile court process was. Lewis agreed to take the case and had both Paul and Marjorie recount the facts of the case in affidavits, which Lewis, as a Notary Public, then notarized. She planned to use these affidavits as the basis for an appeal of the juvenile court judge's decision.

Lawyers, such as Lewis, help their clients to frame their stories as legal issues. Gerald Gault's parents' affidavits thus combined legal concepts with ordinary accounts of their experiences. There are two striking passages in Marjorie Gault's Affidavit, which I'd like to highlight. The first described, from Marjorie's perspective, what had happened to her son during the fateful hearing in judge's chambers:

> The petitioner asked the Judge why the complainant, or victim, as alleged, Mrs. Ora Cook, was not present, to testify. Judge McGhee informed petitioner that it was not necessary for here to be there . . . Judge McGhee then ruled that Gerald should be sent to Fort Grant. Petitioner asked to kiss him goodbye, which the Judge refused, and told petitioner that she ought to be sent down to Fort Grant.14

This remarkable of piece of evidence reveals how powerless a parent could feel in a juvenile court hearing, in which the judge had autocratic control over his chambers. It also suggested that a mother in 1964 had to be careful not to offend the sensibilities of a male judge in a small town in Arizona, especially when that same judge could punish her son.

The second passage suggests that the mother believed that she, and not Judge McGhee, was in a better position to determine the appropriate punishment for her son.

> Petitioner has consulted with an attorney of the Arizona Civil Liberties Union now and believes that there is not sufficient [evidence?] to show her child to be delinquent; she has not found him anything than an obedient boy who has gotten into some trouble, not of a serious enough nature for the

13. *Id.* at 49.

14. *Id.* at 33.

punishment meted out to him.[15]

This passage, which blends the voices of Marjorie Gault and Amelia Lewis, is an example of ordinary folks questioning the conventional wisdom of official policy and practices.

Yet the law stood in their way. Although Amelia Lewis had assumed that the Gaults could appeal Judge McGhee's ruling, she soon learned that Arizona barred appeals in juvenile court cases. Her only option was to file a *habeas corpus* petition. A *habeas corpus* hearing focuses on the legality of the process by which the individual has been detained, not on his or her innocence or guilt. For centuries English and American jurists, including Sir William Blackstone and Chief Justice John Marshall, had considered *habeas corpus* the "great writ of liberty." If a judge determined that a person was being held illegally, the court would order immediate release of the prisoner.[16]

On August 3, Lewis met with Justice Lorna Lockwood of the Arizona Supreme Court, the third woman who played an instrumental, but forgotten, role in this history, to discuss filing a *habeas corpus* petition. Born in Douglas, Arizona, in 1903, Lockwood was the same age as Lewis. Her father had served on the Arizona Supreme Court and, perhaps more importantly, had introduced his daughter to Sarah Herring Sorin. In 1902, Sorin had become the first woman admitted to the Arizona bar. She practiced mining law in Globe and became the twenty-fifth woman to argue a case before the U.S. Supreme Court. Sorin inspired Lorna Lockwood to become a lawyer.[17]

Lockwood graduated from the University of Arizona and in 1925 became the first woman to graduate from the university's law school. Due to gender discrimination, she had difficulties finding work as a lawyer and spent fourteen years as a legal stenographer and secretary. She then formed the first all-woman law practice in the state. In 1939, she was elected to the Arizona House of Representatives and then worked as the District Price Attorney for the Office of Price Administration during World War II. After the war, she returned to the state legislature. In 1949, she became the first woman to serve as Assistant Attorney General for Arizona. Two years later, she became the first woman trial judge in the state. She served for ten years on the

15. *Id.* at 35.
16. *Id.* at 34.
17. *Id.*

Maricopa County Superior Court and presided over its juvenile department from 1954 to 1957.[18]

As a juvenile court judge in Phoenix, Lockwood stressed that the juvenile court "has a two-fold purpose—to protect human rights and to enforce human responsibility." She was also concerned about the conditions of confinement. After inspecting the county juvenile detention center, Lockwood ordered two iron cells welded shut because no child should be held in them. She also organized the Arizona Conference on Crime and Delinquency Prevention and Control and helped found the Arizona Chapter of Big Brothers and Big Sisters, as well as a residential treatment center for delinquent girls.[19]

In the 1960s, Lockwood continued her pioneering legal career. In 1961, she was first woman elected to the Arizona Supreme Court. Four years later, she became the first woman in American history to become chief justice of a state supreme court. In 1967, President Lyndon Johnson considered nominating her to become the first woman justice of the U.S. Supreme Court. Johnson instead selected Thurgood Marshall, who became the first African American justice.[20]

When Amelia Lewis met with Justice Lockwood on August 3, Lewis had not yet prepared a formal *habeas corpus* petition but showed her Paul Gault's affidavit. It stated, "Deponent is advised by his attorney and therefore believes that his said son is being detained from his parents unlawfully; that his commitment was illegal." The judge, according to the affidavit, based his finding of delinquency "on insufficient evidence" and had advised neither Jerry nor his parents of their right to counsel. In addition, the process was flawed because "no testimony was taken," the parents did not know what their son had been charged with, and the victim did not testify. Thus, the court had deprived the parents of their right to the custody of their son. After reading the affidavit, Lockwood told Lewis to add only a caption and that she would accept the "petition in the form of affidavit." She then called the chief judge of the Maricopa County Superior Court to arrange for a superior court judge to hold a habeas corpus hearing.[21]

Significantly, two accomplished women lawyers had initiated an ancient legal process that could potentially free a modern adolescent

18. *Id.*
19. *Id.*
20. *Id.* at 34-35.
21. *Id.* at 35.

who may have been imprisoned not for what he allegedly said over the telephone, but for what his mother had said to a juvenile court judge. By August 17, the date set for the habeas corpus hearing, Jerry had already spent more than sixty days at Fort Grant—the maximum sentence he could have received if he were an adult convicted of making an obscene phone call.[22]

Although I will not describe the habeas hearing in detail, I do want to emphasize that it provided a forum for Amelia Lewis to question Judge McGhee, as well as a transcript that the Supreme Court of the United States would later rely on in its decision.[23] The following exchange, for example, demonstrated the potential for a juvenile court judge to abuse his or her power. Since the typical juvenile court hearing process was so informal and there was no appellate review of juvenile court cases, Judge McGhee was not accustomed to explaining his decision-making. He had a difficult time, for example, articulating how he applied the relevant laws or why he had sent Gerald to Fort Grant. Lewis began with a straightforward question. "Now, Judge, would you tell me under what section of, of the code you found the boy delinquent?" He replied,

> Well, there is a—I think it amounts to disturbing the peace. I can't give you the section, but I can tell you the law, that when one person uses lewd language in the presence of another person, that it can amount to—and I consider that when a person makes it over the phone, that it is considered in the presence, I might be wrong, that is one section. The other section upon which I consider the boy delinquent is Section 8–201, Subsection (d), habitually involved in immoral practice.

Thus, according to McGhee, Jerry had violated two different laws. The judge, however, emphasized the language in the juvenile code about being habitually immoral. Lewis then asked, "Judge, would you tell us the immoral matters in which he was involved in that led you to the decision?" He replied,

> Yes. Yes, I can tell you that. On July—let's see. On July the 2nd, 1962, there was a referral made to our office. Thought it was not—a referral was made, no follow-up was requested by the

22. *Id.*

23. *See generally id.* at 35-39 (for a more comprehensive account of the habeas hearing).

> Globe Police Department, where the boy had stolen a baseball glove from another boy and lied to the Police Department about it.
>
> Also. . . .
>
> Lewis interrupted, "Excuse me, was there a hearing held in your Court on this matter?" McGhee answered, "There was no hearing. No hearing." Lewis asked, "There was no accusation, then?" McGhee said, "There was no accusation."[24]

Despite the informality of the original juvenile court hearing and the judge's vague answers during the habeas hearing, both the Superior Court and Arizona Supreme Court ruled that Gerald Gault and his parents had received adequate due process. Significantly, however, Lewis's advocacy had laid the foundation for a potential appeal of the Arizona Supreme Court's decision against her clients to the U.S. Supreme Court. She then sent all the case files to the New York office of the ACLU to consider moving forward with an appeal to the nation's high court.[25]

At this stage, a fourth woman played an essential role in litigating the *Gault* case. On March 16, 1966, the ACLU asked Gertrude "Traute" Mainzer to work on the jurisdictional statement for *Gault*. The statement needed to demonstrate that the Supreme Court had jurisdiction to hear the appeal and, more importantly, it had to convince the justices that the case presented a substantial federal question. Identifying and explicating the substantive constitutional issues raised by Jerry's case was the critical task at this stage of the litigation.[26]

The lawyers who worked on *Gault*, including Mainzer, had to explain why this obscure Arizona case mattered for all of the nation's children and youth subject to the jurisdiction of juvenile courts. Mainzer brought a unique perspective to the issues involved.[27] She was born in Germany in 1914 to an intellectual family—her father was one of the founders of German labor law, a criminal lawyer, and law professor. After the Nazi seizure of power, Mainzer, her husband, and two young children (Gabriele and Frank) fled to Holland. After the

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24. *Id.* at 38.

25. *Id.* at 44.

26. *Id.* at 49.

27. *See* Gertrude Mainzer, "WHEN THEY CAME TO TAKE MY FATHER" VOICES OF THE HOLOCAUST 100-103 (Leona Kahn & Rachel Hager eds., 1996).

Nazi invaded Holland, her husband was arrested and placed in a prison in Germany. Eventually, Mainzer and her family had to go into hiding. For safety's sake, a Christian family took in her children and pretended that the children were their own. Mainzer herself stayed with another family, who built a hiding place in a closet for her. She later learned that her children had been found and arrested. She decided to turn herself into the authorities even though she risked being sent to Auschwitz. She had learned, however, if she could prove that she had relatives in the United States, then she could have her family sent to Bergen-Belsen instead. Bergen-Belsen was a work camp instead of a death camp, so there was a chance that she and her two young children might survive.

After they were liberated from the camp, her family moved to the United States and Mainzer later graduated from New York University Law school after World War II. Like Lorna Lockwood, however, as a woman Mainzer could not find work in the private sector. Instead, she accepted a position as the research consultant for the Arthur Garfield Hays Civil Liberties Program at New York University's Law School. Founded in 1958, it was the only legal center in the United States that focused on civil liberties. Its director, staff, and law students worked closely with the ACLU, the National Association for the Advancement of Colored People, the Congress on Racial Equality, the American Jewish Congress, the Anti-Defamation League, and the Workers Defense League.[28]

After reviewing the *Gault* case file, Mainzer told her boss and friend Norman Dorsen that *Gault* raised important constitutional questions.[29] She not only helped to draft the jurisdictional statement, but needed to know more about "the conditions at the type of 'Industrial School' in which Gault and others are confined." As Norman Dorsen explained, "The idea, of course, is to show that the confinement is not a pleasant sojourn, but has elements of criminal punishment." It took Mainzer, a Holocaust survivor of Bergen-Belsen, to suggest that the conditions of imprisonment were significant issues in the *Gault* litigation.[30] Mainzer, who later became a family court judge in New York City, never forgot a lesson she learned during the Holocaust. "Everybody thinks freedom is something inborn, but it

28. TANENHAUS, *supra* note 5, at 49-50.

29. *Id.* at 50.

30. *Id.* at 68.

isn't. It is something that has to be taught and experienced."[31]

Marjorie Gault, Amelia Lewis, Lorna Lockwood, and "Traute" Maizner all contributed to building a case that forced the U.S. Supreme Court to consider whether juvenile justice, without adequate due process safeguards, deprived children of their constitutional rights.

Chief Justice Warren assigned Associate Justice Abe Fortas, who had a strong interest in social welfare issues, to write the court's opinion in *In re Gault*. Drawing on studies of juvenile courts by leading social scientists that were funded by grants from the U.S. Department of Health, Education, and Welfare, Fortas demonstrated how much the reality of the administration of juvenile justice in the 1960s contradicted the benevolent rhetoric that had justified its informal proceedings. This state of affairs led Fortas to conclude that "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[32] Instead, Fortas argued that an adversarial process similar to how criminal courts were run would help ensure that juvenile courts discovered the truth and protected an individual's freedom from arbitrary governmental oppression, while simultaneously not hindering these courts' ability to rehabilitate youthful offenders.

Thus, the court held that children during the adjudicatory stage of a juvenile court hearing have the right to notice, counsel, confrontation, cross-examination of witnesses, and the privilege against self-incrimination.[33] In a congratulatory note to Fortas, Chief Justice Warren wrote, "I join your magnificent opinion. . . It will be known as the Magna Carta for juveniles."[34]

IV. BEYOND *GAULT*

The *Gault* opinion, however, left many questions about children's constitutional rights unanswered. For example, *Gault* did not say whether proof of delinquency must be established by either the "preponderance of evidence" or the higher standard, "beyond a reasonable doubt." In 1970, the Court held that the higher standard must be used (*In re Winship*, 397 U.S. 358 (1970)). In addition, the *Gault* court did not address whether the Fifth Amendment's double

31. Mainzer, *supra* note 27, at 103.

32. *In re* Gault, 387 U.S. 1, 28 (1967).

33. *Id.* at 1.

34. TANENHAUS, *supra* note 5, at 85.

jeopardy clause precluded criminal prosecution of a youth who had already been found delinquent for the same offense. In 1975, the Supreme Court held that it did.[35]

Yet, since *Gault,* the court has stopped short of granting children all the same constitutional rights that adults have in criminal court. For instance, in *McKeiver v. Pennsylvania* (1971), the court declared that children did not have a constitutional right to a jury trial in juvenile court.[36] In 1984, the court in *Schall v. Martin* upheld the constitutionality of a statute that authorized preventive detention of juveniles who posed a serious risk of committing a crime before their trial.[37] Thus, juveniles in juvenile court do not have the same right to bail.

V. CONCLUSION

In recent years, however, the Supreme Court once again has begun to grapple with these issues. And, as Terry Maroney has observed, juvenile justice advocates are on a winning streak, noting:

> In the space of the last decade we have seen the courts—most notably the U.S. Supreme Court—abolish the juvenile death penalty, severely cut back juvenile life without parole sentences, and demand greater attention to youths' vulnerability in police interactions; we also have seen a steady drip of state legislative measures to return older youth to the juvenile courts. The story of this era has yet to be told, unfolding as it is around us....[38]

In light of the history that I have recounted in this article, I find it especially striking that Justice Elena Kagan, a Jewish woman who once taught law in Chicago during the 1990s, wrote the majority opinion in *Miller v. Alabama* (2012), that banned mandatory life sentences without the possibility of parole for offenders younger than 18. Her opinion is an emphatic rejection of the "get tough" juvenile justice policies of the 1980s and 1990s, and it inscribed the principle that children are different from adults into constitutional law.[39]

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35. Breed v. Jones, 421 U.S. 519, 541 (1975).

36. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

37. Schall v. Martin, 467 U.S. 253 (1984).

38. Terry A. Maroney, *The Once and Future Juvenile Brain,* in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189 (Franklin E. Zimring & David S. Tanenhaus eds., NYU Press, 2014).

39. Tanenhaus, *The Roberts Court's, supra* note 6.

In conclusion, I would like to end with one of my favorite passages about American legal history, which was written in 1995.

> The study of law can be disappointing at times, a matter of applying narrow rules and arcane procedure to an uncooperative reality; a sort of glorified accounting that serves to regulate the affairs of those who have power—and that all too often seeks to explain, to those who do not, the ultimate wisdom and justness of their condition. But that's not all the law is. The law is also a memory; the law also records a long-running conversation, a nation arguing with its conscience.[40]

As it turns out, the author of that passage also taught law in Chicago during the 1990s. He later nominated Elena Kagan to serve on the Supreme Court of the United States.

The *Gault* case and more recent decisions, such as *Miller v. Alabama*, I believe, are part of that long-running conversation about who we are.

40. BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE 437 (Broadway Books, 2004).