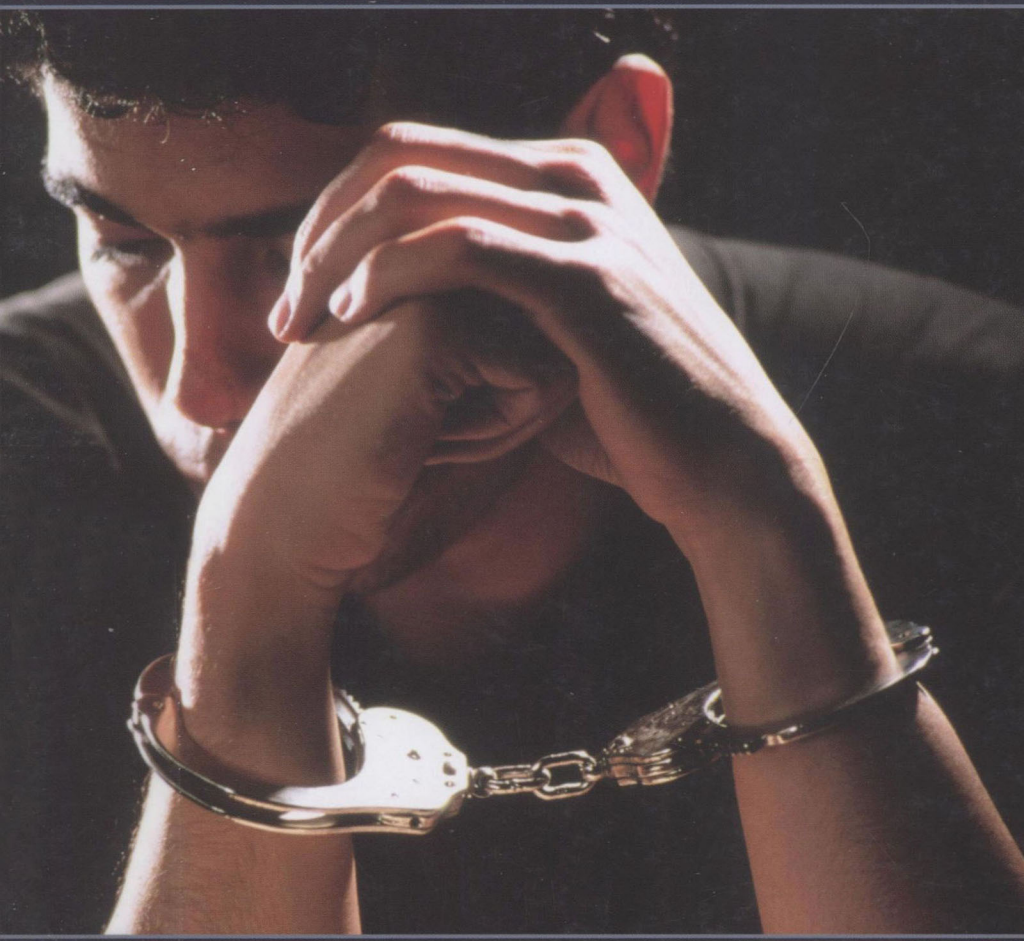
David S. Tanenhaus

# The Constitutional Rights of Children



## *In re Gault* and Juvenile Justice

DAVID S. TANENHAUS

# *The Constitutional Rights of Children*

## *In re Gault* and Juvenile Justice



UNIVERSITY PRESS OF KANSAS

Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University

Library of Congress Cataloging-in-Publication Data

Tanenhaus, David Spinoza.
The constitutional rights of children : in re Gault and juvenile justice /
David S. Tanenhaus.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7006-1813-2 (cloth : alk. paper) — ISBN 978-0-7006-1814-9 (pbk. : alk. paper)
1. Gault, Gerald Francis, 1949 or 50- Trials, litigation, etc. 2. Juvenile justice, Administration of—United States—Cases. 3. Due process of law—United States—Cases. 4. Children Cases.—Legal status, laws, etc.—United States I. Title.
KF228.G377T36 2011
342.7308'772—dc22
2011010716

British Library Cataloguing-in-Publication Data is available.

Printed in the United States of America
10 9 8 7 6 5 4 3 2 1

The paper used in this publication is recycled and contains 30 percent postconsumer waste. It is acid free and meets the minimum requirements of the American National Standard for Permanence of Paper for Printed Library Materials z39.48-1992.

*The Constitutional Rights of Children*

## LANDMARK LAW CASES
## &
## AMERICAN SOCIETY

Peter Charles Hoffer
N. E. H. Hull
*Series Editors*

RECENT TITLES IN THE SERIES:

*The Detroit School Busing Case,* Joyce A. Baugh
*The DeShaney Case,* Lynne Curry
*The Battle over School Prayer,* Bruce J. Dierenfield
*Nazi Saboteurs on Trial,* Louis Fisher
*Little Rock on Trial,* Tony A. Freyer
*One Man Out: Curt Flood versus Baseball,* Robert M. Goldman
*The Free Press Crisis of 1800,* Peter Charles Hoffer
*The Treason Trials of Aaron Burr,* Peter Charles Hoffer
Roe v. Wade: *The Abortion Rights Controversy in American History,* 2nd ed., revised and expanded, N. E. H. Hull and Peter Charles Hoffer
Gibbons v. Ogden: *John Marshall, Steamboats, and the Commerce Clause,* Herbert A. Johnson
Griswold v. Connecticut, John W. Johnson
*Fugitive Slave on Trial: The Anthony Burns Case and Abolitionist Outrage,* Earl M. Maltz
*The Snail Darter Case,* Kenneth M. Murchison
*Capital Punishment on Trial,* David M. Oshinsky
*The Michigan Affirmative Action Cases,* Barbara A. Perry
*The Sodomy Cases,* David A. J. Richards
*The Supreme Court and Tribal Gaming,* Ralph A. Rossum
Mendez v. Westminster, Philippa Strum
*The Sleepy Lagoon Murder Case: Race Discrimination and Mexican-American Rights,* Mark A. Weitz
*The Miracle Case,* Laura Wittern-Keller and Raymond J. Haberski, Jr.
*The Zoning of America:* Euclid v. Ambler, Michael Allan Wolf
Bush v. Gore: *Exposing the Hidden Crisis in American Democracy,* abridged and updated, Charles L. Zelden

For a complete list of titles in the series go to www.kansaspress.ku.edu

*For Margaret Keeney Rosenheim (1926–2009),*

*whom Mr. Justice Fortas cited in* Gault,

*and for Virginia L. Tanenhaus,*

*who teaches justice to our child,*

*Isaac Joseph*

# EDITORS' PREFACE

There are some law cases where the injustice is so notorious and the indifference of the authorities so casual, that the reader can only scratch his head and ask what was going on. *In re Gault* (1967) seems to be such a case. That an alleged obscene telephone call, unproven (no evidence existed on precisely who made the call or if it was made at all), unsubstantiated (the alleged victim never gave testimony in court and obviously was not cross-examined by counsel), and unrefuted (the suspect did not have the right to confront the accuser, nor were his parents notified in timely fashion), could lead to a young man's incarceration for six years in a house of correction seems a scandalous miscarriage of justice. But the juvenile court judge who handled the case and the Arizona Supreme Court that heard an appeal from his handling of the case agreed that under Arizona law, the discretion of the juvenile court system was unimpeachable. Fifteen-year-old Gerald Gault could be punished far more severely than an adult for an alleged offense with none of the procedural rights the U.S. Constitution guarantees adult defendants.

As in Globe, Arizona, where a neighbor complained that she thought Gault had used obscene language in a telephone call, all over the country juvenile courts exercised similarly untrammeled discretion in a wide variety of juvenile cases. The judges in these courts might or might not be lawyers themselves and might or might not be learned in the law. Designed as a Progressive Era reform to remove juveniles from the adult system's harsh penalties and allow for flexible, child-friendly discretion, by the 1960s the system was a creaking antiquity.

The case arose at a critical moment in the history of juvenile justice. In the 1950s, the problem of juvenile delinquency became the subject of a national debate. Progressive psychological, criminological, and social work authorities were pressing for a more sophisticated and socially aware definition of the problem that would replace older, spare-the-rod-spoil-the-child customs, but local authorities often resisted. Some of the states had introduced modifications in juvenile justice, a standard of "essential fairness" replacing the no-rules of earlier days. But in Arizona, harsh correction, a kind of boot camp for bad boys and girls, was the preferred solution of many juvenile court judges. At these correctional institutions, corporal punishment was common—again subjecting youthful, often first-time

offenders to physical harm that adult, more serious offenders did not face in state and federal penitentiaries. Corrupted by the same system, in particular the absence of due process controls on the hearings, some judges in juvenile courts became more arbitrary and tyrannical.

For the Supreme Court, the case came at the end of what constitutional scholars call the "due process revolution," a series of landmark cases in which the Court extended the procedural protections of the Bill of Rights to the states through the "incorporation" of the Fourteenth Amendment's due process and equal protection clauses. These cases included the imposition of a right to counsel (provided by the state if the defendant could not afford to pay), the right to confront accusers, protection against coercion and self-incrimination, and the right to have access to evidence that the prosecution would use in its case. In 1964, U.S. Supreme Court Chief Justice Earl Warren had weighed in on the subject with a plea for reform of juvenile justice. In the same year, Arizona senator Barry Goldwater called for more law and order and less leniency in criminal courts. In a sense, *In re Gault* was an appropriate test and coda to that sweeping reformation of criminal justice practices.

Hidden not very far beneath the surface of the case were vexing questions about the status of children as citizens. Were they, until their majority, actually in the custody of their parents? Did not juvenile courts merely duplicate (or assume) parents' relatively untrammeled discretion in punishing their children? What rights under the Constitution did children have as persons apart from their families? These were questions that went far beyond the possibility of a miscarriage of essential fairness in one juvenile court.

Author David Tanenhaus's informed, elegant, and fully persuasive indictment of "the desert vision of punitive juvenile justice" takes the case from a corner of Arizona all the way to the Supreme Court, and from the frontier-like days after World War II up to the present controversies over strip searches in our schools. He lets the evidence tell its own story, following the words of participants such as the Gault family, Pennsylvania migrants to the copper mining country east of Phoenix. Arizona reformers like Jesse Udall and hardliners like Robert McGhee speak their lines, and we listen in. Lest anyone forget how important it is to have able counsel, Tanenhaus introduces us to Amelia Lewis, the Gaults' attorney, who took on the state of Arizona and its legal officers. Her appeal to the Arizona Supreme Court failed. In the words of Chief Justice Charles Bernstein,

himself an early critic of the worst aspects of juvenile justice, the state court agreed that "good intentions do not justify depriving a child of due process of law," but in Gault's case the minimum requirements under the state and federal constitutions had been met.

Lewis then turned to the Northern Arizona branch of the American Civil Liberties Union, and they to the national office in New York. Director Melvin Wulf would take the case to the Supreme Court, and Norman Dorsen would spearhead the litigation. On the Court, newly appointed Justice Abe Fortas was watching closely. As a lawyer, he had developed an interest in juvenile justice reform. But opposition was brewing—federalism, the cost of extending full procedural rights, and the brooding omnipresence of the law-enforcement community raised questions in some jurists' minds about interfering with the juvenile court judges' discretion.

Tanenhaus cracks open the door to the Supreme Court conference room and the chambers of the justices as Justice Fortas labors on his opinion and other justices suggest changes. Is *In re Gault* about a child's rights or his parents' rights? Is it about federal-state relations? We will not reveal how the Court decided the case or local courts' compliance with the decision in later years, but from its first pages to its last, Tanenhaus's retelling is compelling reading and a cautionary tale.

# ACKNOWLEDGMENTS

Doing justice to all those who helped me to write this book is a tall order. At the outset, I must thank Peter Hoffer and Michael Briggs for encouraging me to propose the project and for recruiting Barry Feld and Christopher Manfredi to evaluate my proposal. Barry also provided an exceptionally helpful reading of the penultimate draft. I could not have asked for more conscientious editors and readers.

Matthew Wright, the Head of Collections and Instructional Services at the William S. Boyd School of Law, University of Nevada, Las Vegas, and Marianne Alcorn, Head of Reference and Faculty Services, Ross-Blakley Law Library, Arizona State University College of Law, provided indispensable research assistance. I will forever be in their debt. I will also never be able to repay the kindness and support of Dick Morgan, the former dean of Arizona State University College of Law and the founding dean of the William S. Boyd School of Law. Dick not only found space for a historian at a new law school but also provided me with a primer on Arizona legal history and introduced me to former chief justice of the Arizona Supreme Court, Frank X. Gordon, Jr. Dean John Valery White, who succeeded Dick Morgan, and Associate Dean Kay Kindred have continued the law school's tradition of supporting legal history. They approved the summer research grants that made it possible for me to complete this project. Michael W. Bowers, interim executive vice president and provost of the University of Nevada, Las Vegas (UNLV), also took time away from his busy schedule to discuss Arizona law and politics with me. Dean Christopher Hudgins of the College of Liberal Arts has worked tirelessly to ensure that the UNLV History Department remains a green spot in the desert.

My fellow historians Michael S. Green and Mary D. Wammack graciously volunteered to be an audience-in-waiting for even the roughest drafts. Both provided invaluable editorial suggestions on the entire manuscript. Mike also invited me to discuss *Gault* with the students in his UNLV honors seminar on the Supreme Court in American history. Their feedback was encouraging and helpful. I especially appreciated Robyn Raymondo's reflections on growing up near Globe, Arizona. The graduate and law students in my 2009 Children and Society seminar also helped me to develop the concept of desert justice.

Other friends and family members also provided timely and instructive feedback on parts of the manuscript. These attentive readers included Winston Bowman, Al Brophy, Bill Bush, Kathleen Frydl, Joseph "Andy" Fry, Mike Grossberg, Sam Tanenhaus, Virginia Tanenhaus, Beth Tanenhaus Winsten, David Wrobel, and Frank Zimring. My mother, Gussie Tanenhaus, followed the book's progress over the course of our weekly phone calls. I had also a helpful conversation about the book's structure with Don Smith at Grinnell College.

I am thankful to Dan Hulsebosch and Bill Nelson for inviting me to present a draft of chapter 2 at the New York University Legal History Colloquium. The participants helped me to discover the slim book that was struggling to escape from a sprawling mess. I must also thank the late Philip Kurland, a leading critic of the Warren Court. He tutored me in constitutional law during the spring of 1991, teaching me that once you cannot stop thinking about a case, it is time to start writing about it.

My wife, Virginia Tanenhaus, and our son, Isaac Tanenhaus, provided the love and support necessary to write this book with passion. Now that it's complete, I can spend more precious time with them. When I told Isaac that I was nearly done, he asked, "Does that mean that I don't have to go to playschool anymore?" His question reminded me how difficult it is to provide justice to a child. We did, however, reenact *Percy Jackson & the Olympians: The Lightning Thief.* Isaac likes to be Medusa.

# PROLOGUE

The titling of court cases is hardly inspirational. *In re Gault,* 387 U.S. 1 (1967), the official citation for the first U.S. Supreme Court decision to address what elements of due process the Constitution requires in a juvenile court proceeding, is a perfect example. Its title combines a Latin phrase (*in re* = "in the matter of"), a surname (Gault = Gerald Francis Gault, born January 23, 1949), and reference information (i.e., volume 387 of *United States Reports,* beginning on page 1, and published in 1967). This dry title, however, is only the beginning of a remarkable story about how one teenager's legal experiences during the early 1960s in Globe, Arizona, an isolated mining town, ultimately transformed American constitutional law. 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.

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 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. Others 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.

*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?

As a historical study of a landmark Supreme Court decision, this book cannot provide definitive answers to such normative questions. Yet 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, this 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 decision in *Gault.*

On one level, *Gault* is a story of revolutionary constitutionalism. But it is also evidence of the tenacity of localism, often motivated by conservative impulses, in American legal history. In significant ways, the U.S. Supreme Court could not alter the everyday administration of juvenile justice in places like Globe, Arizona. Explaining such persistent continuity is as important as chronicling the radical changes that did occur during the 1960s. This book attempts to do both.

To contextualize *Gault,* from its Progressive Era roots to its recent fortieth anniversary, the book proceeds in three parts. Part I, Desert Justice, examines the pre-history of the case. Chapter 1 begins with a 1952 scandal at the Arizona Industrial School for Boys, popularly known as Fort Grant. By examining the state response to the allegations that the superintendent and his staff had inflicted cruel and unusual punishments on the school's

inmates, the chapter describes and analyzes the two competing visions of juvenile justice in post–World War II Arizona. The first vision—progressive juvenile justice—saw juvenile delinquency as primarily a psychological condition that mental-health experts could treat and cure. The second vision—desert juvenile justice—focused on a boy's body, not his mind. Its proponents believed in the efficacy of corporal punishment and imprisonment. Even judges who abhorred the desert vision of punitive juvenile justice had to commit minors to Fort Grant because it was the only secure facility for male juvenile delinquents in Arizona. Gerald Gault spent nearly six months at Fort Grant. Chapter 2 recounts how he ended up in Fort Grant, his parents' legal efforts to free him, and the Arizona Supreme Court's final ruling.

Part II, Legal Liberalism, places the subsequent litigation of *Gault* in its ideological and constitutional contexts. Proponents of legal liberalism believed in using federal courts as agents of change to help historically disadvantaged groups in American society, such as African Americans, women, children, and prisoners. Chapter 3 takes the reader from Arizona to New York City to examine how the American Civil Liberties Union (ACLU), the nation's largest civil rights organization, litigated *Gault* during the heyday of legal liberalism. It examines how ACLU lawyers constructed a legal argument that questioned the Progressive Era assumption that juvenile courts fundamentally differed from criminal courts and should not follow criminal procedure. These lawyers, led by New York University law professor Norman Dorsen, argued that the Fourteenth Amendment required juvenile courts to provide fundamental due process rights during the adjudicatory stage of the process, when a judge determined whether a child was delinquent. The chapter also discusses Arizona's rejoinder to the ACLU's legal theory.

Chapter 4 takes the story from New York City to Washington, D.C., to analyze the oral argument before the justices of the Warren Court on December 6, 1966. It then examines how the Supreme Court decided *Gault,* focusing primarily on Justice Abe Fortas's majority opinion. On May 15, 1967, Fortas famously proclaimed, "Under our Constitution, the condition of being a boy does not justify a kangaroo court." The chapter also analyzes the concurring opinions, Justice Potter Stewart's lone dissent, and initial responses to the decision.

Part III, Just Deserts, explores the contested legacy of *Gault.* Chapter 5 charts changes and continuity in juvenile justice from the aftermath of

the decision until the present. In the process, it examines the Supreme Court's subsequent juvenile justice decisions. The chapter concludes that two contexts help to explain the path of the law after *Gault.* First, the ascendancy of conservative constitutionalism, beginning with the Burger Court (1969–1986), ensured that the constitutional domestication of the juvenile court remained incomplete. Thus, the juvenile court ended up as a Progressive Era institution retrofitted with only some basic due process safeguards. Second, although nobody involved in the *Gault* litigation on either side could have predicted it, Americans in the 1970s embraced mass incarceration as a penal strategy. Even though the juvenile court remained a flawed institution, it still spared hundreds of thousands of children and adolescents from this brave new world.

The book concludes with an epilogue about *Redding v. Safford,* a 2009 U.S. Supreme Court decision. The case, originating in 2003 in Safford, Arizona, involved then-thirteen-year-old Savana Redding, who was taken from her middle school classroom and forced to undress before the school nurse and an administrative assistant. The assistant principal believed that she had prescription painkillers in her underwear. This case, especially Justice Clarence Thomas's forceful dissent, reminds us why we should forget neither the Fort Grant scandal nor *Gault.*

*The Constitutional Rights of Children*

# CONTENTS