Abe Fortas and Juvenile Justice: The Revolution Secured in *In re Gault*

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Abstract

In In re Gault *(1967), the Supreme Court held that juveniles in delinquency adjudications are entitled to certain due process protections. This marked a critical change in the development of American juvenile justice. In decades prior, the philosophy guiding this system (which was distinct from its adult criminal counterpart) advanced the perspective that separate, informal procedures enhanced young people's treatment and led to rehabilitation according to individualized need. However, cases such as Gerald Gault's made it evident to many this system had failed. Absent due process protections, juveniles were vulnerable to the whims of state prosecutors and local judges. Retributive aims had undermined the purported goal of rehabilitation. The state acted, not as a guardian of children's interests, but as a thief of their rights.*

Abe Fortas, as a new Supreme Court justice, articulated this sentiment in his majority opinion in Gault*. This thesis argues that, as a legal realist and ardent supporter of the rights of defendants vis a vis the state, Fortas was individually inclined to protect vulnerable juveniles facing the courts, a sentiment evident in the text of his opinion. This predisposition was a product of the liberal, pro-defendant, anti-Communist cultural context in which Fortas was educated, worked, and lived. Fortas's opinion in* Gault*—contemporaneously called the "Magna Carta" for juveniles and, retrospectively, the "Bill of Rights" for young defendants—provides a window into Abe Fortas as an individual intellectual and, more broadly, the 1960s cultural war that surrounded him. Fortas secured a juvenile justice revolution in* In re Gault*. Recovering this history allows us to ask the question, though: Was this the revolution we should have wanted?*

Part I: The Story of *In re Gault*

In June of 1964, fifteen-year-old Gerald Gault and his friend, Ronald Lewis, placed a prank call to their neighbor, Mrs. Cook. According to the juvenile court judge who initially handled the case, Gerald had made these "silly calls, or funny calls, or something like that" in the past.[1] As described by Supreme Court Justice Abe Fortas, this particular communication was "of the irritatingly offensive, adolescent, sex variety."[2] It remains disputed whether Gerald *actually* made

[1] *In re Gault*, 387 U.S. 1, 9 (1967).
[2] *Id.* at 4.

any of the indecent remarks (as the officer asserted), or if it was rather only Ronald (which Gerald's mother maintained). However, at least one of the boys jokingly lodged questions and made licentious remarks at the expense of Mrs. Cook. In response, she lodged a complaint with local authorities.

At 10:00am on Monday, June 8, 1964, Gerald was removed from his home and brought into custody by the Sheriff of Gila County, Arizona. His parents, who had been at work, were uninformed of his detention. Instead, they returned home eight hours later to find him missing; only after inquiring with neighbors did they discover his whereabouts. They immediately traveled to the Detention Home where he was being temporarily held, only to be told their son would be tried by a juvenile court judge the next day for allegedly delinquent behavior. After one week and two informal hearings—notice of which was provided only through verbal communication and scrawled, unofficial notes—the juvenile courts declared Gerald a delinquent youth, due to his participation in the "nuisance phone call" and for being "habitually involved in immoral matters."[3] The court committed Gerald to an industrial school until his twenty-first birthday—a six-year detention for one prank call. Strikingly, if he had been an adult and were convicted of the same crime, he would have received a maximum of two months in jail or a $50 fine.[4]

While his adjudication in juvenile court lacked formal procedure, this was both accepted and expected at the time. Neither Gerald nor the Gault family was given notice of the particular charges lodged against him. Instead, the official paperwork the family received simply stated the time and place at which Gerald's "delinquency" hearing would be held. No witnesses were sworn at the first hearing, and there was no official documentation or recording of the proceedings. Mrs.

[3] Thomas A. Welch, Kent v. United States *and* In re Gault: *Two Decisions in Search of a Theory*, 19 HASTINGS L.J. 29, 32 (1967).
[4] *In re Gault*, 387 U.S. at 29.

Cook, the sole complainant, did not attend any of the proceedings to present her testimony; instead, the probation officer delivered the content of the complaint to the court, which Mrs. Cook had purportedly shared with him during a phone conversation.[5] There was no cross-examination, of either Mrs. Cook or the officer. The judge, when questioned after-the-fact about his decision on Gault's delinquency, noted it was based in part on an unrelated allegation that Gault had stolen a baseball glove two years before and lied to police about it. This allegation, however, had never been proven nor officially adjudicated in court due to "lack of material foundation."[6] Finally, fifteen-year-old Gerald did not have an attorney during any of these initial proceedings, nor was he informed of his right to be accompanied by one.

At the time of this decision in 1964, juvenile court adjudications could not be appealed in Arizona. Therefore, following the Arizona Supreme Court's dismissal of a petition for a writ of habeas corpus, Gerald's case appeared before the United States Supreme Court, with representation from the American Civil Liberties Union. As framed by Gault's counsel, the question presented was to what "extent [the] requirements of procedural fairness guaranteed by the Due Process Clause of the Fourteenth Amendment are applicable to juvenile proceedings."[7] Justice Abe Fortas, writing for the majority, concluded that juveniles facing adjudication must be granted the right to notice of the charges against them,[8] to counsel,[9] to confrontation and cross-examination of witnesses,[10] and against self-incrimination,[11] none of which were satisfied in Gerald's case.

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[5] *Id.* at 43.
[6] *Id.* at 9.
[7] Oral Argument at 0:54, In re Gault, 387 U.S. 1 (1967) (No. 116), https://www.oyez.org/cases/1966/116.
[8] *In re Gault*, 387 U.S. at 31-34.
[9] *Id.* at 34-42.
[10] *Id.* at 56-57.
[11] *Id.* at 44-56.

Fortas rooted two of the procedural rights recognized—to notice and counsel—in the broad protections guaranteed by the Fourteenth Amendment. He first discussed juveniles' constitutional right to notice of the charges against them,[12] asserting that lower courts' practices, which required only notice of a conclusion of delinquency (but not the charges beforehand), were insufficient. Instead, Fortas affirmed, notice "must be given . . . in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded," and furthermore, that any claim must "set forth the alleged misconduct with particularity."[13] He then addressed the right to counsel, asserting that, since juveniles were vulnerable to extended periods of incarceration following delinquency adjudication, representation of counsel was constitutionally required "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the juvenile alleged to be delinquent] has a defense [so the attorney can help] prepare and submit it."[14] Ultimately, each of the justices, aside from Stewart, signed on to these portions of the majority opinion.[15]

The next two constitutional rights Fortas discussed—to confrontation/cross examination and against self-incrimination—were more substantive in nature. To justify the protection against self-incrimination, Fortas leaned on the Fifth Amendment's specific mandate,[16] as incorporated to the States through the Fourteenth Amendment.[17] This was the most challenged aspect of the

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[12] *Id.* at 33.
[13] *Id.* "It is obvious, as we have discussed above, that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the [notice] procedure approved by the court below." *Id.*
[14] *Id.* at 36. "A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel." *Id. See also United States v. Kent*, 383 U.S. 541, 561 (1966), where Fortas—writing for the majority—emphasized that, "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."
[15] DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN 85 (2011).
[16] The Fifth Amendment reads, in relevant part, that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.
[17] *In re Gault*, 387 U.S. at 49-50. *See also* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 154–55 (1984).

majority opinion by Fortas's fellow justices, likely due to the fact that even Gault's attorneys, on appeal, had not asked that the Supreme Court "go this far."[18] However, Fortas contended "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[19] Consequently, he ultimately held that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[20] Lastly, he turned to confrontation and cross examination of witnesses. Given that there was no reason to have "a different rule [for] sworn testimony in juvenile courts than in adult tribunals," Fortas believed that the rights of children to confront and cross-examine witnesses against them should match that of accused adults.[21] Gault, therefore, had been deprived of this right when his only accuser did not provide her testimony in court.[22] Six justices, including Fortas, signed on to these parts of the majority opinion; Harland, Stewart, and White did not.[23]

The most noteworthy element of Fortas's opinion, though, was not its reliance on doctrine, but rather on social science. Throughout his fifty-nine-page opinion, Fortas lamented the real-life consequences of the juvenile justice system's poor functioning, proven through data and empirical study.[24] As mentioned by Fortas, juvenile court judges were underqualified for their work: Half "[had] no undergraduate degree, a fifth [had] no college education at all, a fifth [were] not members of the bar, and three-quarters devote[d] less than one-quarter of their time to juvenile matters." Additionally, juvenile courts were generally under-resourced: "About one-third of all judges [had]

[18] TANENHAUS, *supra* note 15, at 83.
[19] *In re Gault*, 387 U.S. at 47.
[20] *Id.* at 55.
[21] "Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years." *Id.* at 56.
[22] *Id.*
[23] TANENHAUS, *supra* note 15, at 85.
[24] *See, e.g., In re Gault*, 387 U.S. at 22 (referencing a study "conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia").

no probation and social work staff available to them; between eighty and ninety percent [had] no available psychologist or psychiatrist."[25] In light of this reality, Justice Fortas called for reform. The beneficial aspects of a separate juvenile justice system, he assured the Court, "[would] not be impaired by constitutional domestication,"[26] and their decision in *Gault* "[would] not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[27] Instead, juveniles would be guaranteed fairness *in practice* in a way they previously had been denied.

The only justice who penned a dissent against all the Court's holdings was Justice Stewart. He claimed juvenile adjudications were "simply not adversary proceedings" and constitutional safeguards would stymie the juvenile courts' overarching goal of discretion and rehabilitation.[28] Given the unique purposes of juvenile courts, he found it preferable that "a juvenile hearing [not] be framed with all the technical niceties of a criminal indictment."[29] In addition to the theoretical shortcomings of the majority's position, Stewart also believed the facts of this particular case did not raise the issues on which the majority was deciding, since the Gaults "knew of their right to counsel, to subpoena and cross examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency. . . [in addition to] the exact nature of the charge against Gerald from the day he was taken to the detention home."[30] In an

[25] *Id.* at 14 n.14.
[26] *Id.* at 22.
[27] *Id.* at 21
[28] *Id.* at 78 (Stewart, J., dissenting). While Justice Stewart's philosophy is valid, Norman Dorsen, Gault's counsel on appeal to the Supreme Court, indicated a potential alternative motivation. Prior to serving on the Supreme Court, Justice Stewart was a judge in Ohio, and notably, "[t]he Ohio juvenile court judges wrote an amicus brief in the Gault case saying that Supreme Court intervention was inappropriate and wrong, that none of the constitutional protections should apply, and that the good old- fashioned juvenile court system—which was informal, involved treatment and personal dealings with the boy or girl-—should be continued." Norman Dorsen, *Reflections on* In Re Gault, 60 RUTGERS L. REV. 1, 9 (2007). This was the only amicus brief submitted on the side of Arizona.
[29] *In re Gault*, 387 U.S. at 81 (Stewart, J., dissenting).
[30] *Id.* (Stewart, J., dissenting).

eloquent and extensive narrative, however, Fortas rejected this viewpoint and demanded improvement in the United States' system of juvenile justice.

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This thesis discusses the factors that influenced Fortas to write such a groundbreaking opinion in *In re Gault*. This general intellectual territory has been extensively covered by scholars since the 1960s. Biographers have documented the life of Abe Fortas, including, in particular, his years on the Supreme Court.[31] In these depictions, though, biographers rarely engage in deep analysis of Fortas's *Gault* opinion, though *Gault* does make a notable but brief appearance. Historians have also chronicled the story of *In re Gault*, such as David Tanenhaus's *The Constitutional Rights of Children*.[32] Stories such as this, however, center more around substantive issues of juvenile justice than they do Fortas. Finally, *Gault* has provided extensive fodder for discussion on juvenile justice policy and criminal justice reform by activists and academics alike.[33] While this literature challenges the future direction of juvenile justice advocacy, it often neglects to consider the historical contingency of how the modern system came to be.

My contribution, amongst this literature, will be to explain *Gault* from the perspective of the man who wrote the opinion: Abe Fortas. In describing the history of how he came to write such a revolutionary opinion, I hope to illuminate the policy decisions that were effectively made by Fortas in the course of deciding this case. His own lived experiences, as well as the culture in which he lived and was educated, unquestionably influenced his perspectives on the promise of

[31] *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY, YALE UNIVERSITY PRESS 250 (1990); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 532 (1988).
[32] TANENHAUS, *supra* note 15.
[33] *See, e.g.*, Barry C. Feld, In Re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988); N. Lee Cooper et al., *Fulfilling the Promise of* In Re Gault: *Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651 (1998); Robin Walker Sterling, *Fundamental Unfairness*: In Re Gault *and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

rehabilitative juvenile justice. I also offer space to reflect on the merits of his choices reflected in *Gault*.

Students of public policy have long understood that government engagement can sometimes produce unintended consequences. During the Progressive Era, well-meaning advocates believed that young people were different than adults; in order to nurture and rehabilitate them, a different approach to criminal justice was needed, one that offered judges even more discretion than was previously available. Yet, this system produced unequal and inequitable results, as is seen in the case of Gerald Gault. Justice Fortas, as someone deeply influenced by the criminal justice revolution surrounding him, sought to remedy these problems through procedure. Ironically, these reforms, too, produced unintended outcomes in the lives of many.

Juvenile justice reforms of the late nineteenth century created a system of informality and paternalism; however, *In re Gault* marked a dramatic reconceptualization of the purpose and functioning of juvenile justice. In this thesis, I will explore the individual and circumstantial factors that inspired Fortas to advocate for and ultimately author this opinion. I will first describe the juvenile justice system as it operated from 1899 to 1960, emphasizing the points of reform and contention during that period. Then, I will introduce Abe Fortas and discuss how individual characteristics and elements of his personal legal philosophy led, in part, to his *In re Gault* decision. I will place these factors in the context of national political movements happening at the time; the criminal procedure revolution and the liberalism of the Warren Court, among other social movements, dramatically impacted the way individuals—including Fortas—viewed a state's obligations to its citizens. Each of these factors manifested in distinct portions of Fortas's penned opinion in *In re Gault*. Fortas's opinion—contemporaneously called the "Magna Carta"[34] for

[34] Honorable Earl Warren, *Equal Justice for Juveniles*, 15 JUV. CT. JUDGES J. 14 (1964).

juveniles and, in retrospect, the "Bill of Rights"[35] for young defendants—exemplifies Fortas's legal philosophy and, more broadly, manifests the cultural battles waged inside and outside the Supreme Court during the 1960s.[36] Fortas forged a juvenile justice revolution in *In re Gault*. Today, though, we must reflect upon this reality and ask: Was this the proper revolution to fight for?

Part II: Getting to *Gault*—A History of United States Juvenile Courts

Prior to *In re Gault*, procedural informalities were viewed by many not as deficiencies, but *strengths* of juvenile adjudications. Until the 1890s, the United States criminal justice system did not distinguish between children and adults who committed crimes.[37] Thus, when discovered by local authorities, children—like their adult counterparts—were brought into court, convicted, and sentenced by a local judge to serve their time in a jail or other penal institution. According to the Honorable Richard Tuthill, a Cook County circuit judge from the nineteenth century:

> Under such treatment [the children] developed rapidly, and the natural result was that they were thus educated in crime and when discharged were well fitted to become the expert criminals and outlaws who have crowded our penitentiaries and jails. The State had educated innocent children in crime, and the harvest was great.[38]

This system of the 1890s—motivated by punitive, retributive, and deterrent aims—purportedly did not prevent crime on the part of young people, but instead *inspired* delinquent behavior. Punishment, which was meant as a tool to remedy past harm, was in actuality perpetuating it.

In response, Progressive Era reformers of the early twentieth century advocated for a transformation of system and values. Rather than punishing bad behavior, they promoted the

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[35] MURPHY, *supra* note 31, at 532.
[36] CHRISTOPHER MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE xi (1998).
[37] *Id.* at 25.
[38] SAMUEL J. BARROWS. CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 1 (1904).

rehabilitation of young offenders through a separate juvenile court system. These advocates of reform—who were predominantly white and middle class individuals, oftentimes affiliated with local advocacy organizations or the government[39]—relied on the English chancery principle of *parens patriae*, an idea that "the King of England was the ultimate parent and guardian of all the children within his realm" and was therefore responsible for their care and protection.[40] This new court would be designed to consider the myriad factors influencing a juvenile's life—including school record, home environment, socioeconomic status, psychology, and general lifestyle[41]—to develop comprehensive plans for their rehabilitation. The role of the state in this system would be to act as a compassionate caretaker for the wellbeing of the child, taking over parental control in order to inspire improved behavior.[42]

Courts took note of these calls for reform, and on July 1, 1899, the first juvenile court in the United States opened in Cook County, Illinois. Courts in major cities across the country—including in New York, Denver, Philadelphia, Newark, Indianapolis, and Milwaukee—quickly adopted the Cook County model and established their own juvenile courts at the turn of the century.[43] The structure of these institutions was fundamentally different from criminal courts.[44] All proceedings were conducted outside the public eye, so as to avoid community condemnation and stigmatization of juvenile offenders. Even the terminology describing proceedings was modified to further distinguish the process from criminal procedures. Instead of being *convicted*,

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[39] ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 176–77 (1969); Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, *in* JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 94 (Frederic L. Faust & Paul J. Brantingham ed. 1974).
[40] ELLEN RYERSON, THE BEST-LAID PLANS: AMERICAN'S JUVENILE COURT EXPERIMENT 63 (1978).
[41] *Id.* at 43; B27
[42] BARROWS, *supra* note 38, at 3; MANFREDI, *supra* note 36, at 124; RYERSON, *supra* note 40, at 45–46.
[43] BARROWS, *supra* note 38.
[44] Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, *in* THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, VOL. 381, THE FUTURE OF CORRECTIONS 28 (1969).

juveniles were *adjudicated*. Instead of facing *sentencing*, they would face *disposition*. In place of *criminal* proceedings, juvenile adjudications were entirely *civil* findings. And, most essentially, instead of finding a child to be *guilty*, the courts would determine "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[45] Finally, once the court determined the juvenile was delinquent, it would place the individual in an "industrial school" or other rehabilitative institution, rather than imprisoning the child alongside adult convicts. While this was meant, in theory, to provide a space for the education of children by positive adult role models, in practice, these institutions were essentially detention centers in which adjudicated juveniles were imprisoned.[46]

In an effort to comprehensively and qualitatively adjudicate claims, the juvenile justice system rejected the structural inflexibilities of criminal courts. Most starkly, this meant that procedural informality and discretion replaced the rigid procedural protections—such as the rights to notice of charges, to counsel, or to a jury trial comprised of peers—granted to adults.[47] The courts broadly defined the behaviors for which juveniles could be punished; as an example, young people faced adjudication for status offenses that described patterns of "antisocial" behavior without reference to particular criminal acts.[48] Additionally, this latitude in juvenile court did not immunize the children from the dangers of criminal courts. Indeed, if juvenile court judges felt as though the juvenile would be better served in criminal court (either due to the severity of the crime or the recalcitrance of the juvenile to reform), they possessed the authority to transfer the juvenile's case to be heard in criminal court. This broad jurisdiction and flexibility were purportedly retained

[45] *In re Gault*, 387 U.S. 1, 15–16 (1967).
[46] *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).
[47] Platt, *supra* note 44, at 28.
[48] MANFREDI, *supra* note 36, at 31.

in the hopes of promoting "the protection and proper development of children, the protection of society, and the establishment of respect for, and protection of, the family."[49]

At the time, many reformers and contemporary juvenile courts believed their revolutionary movement was a success. Chicago's Judge Tithull in 1904 commented that, "Had it been possible to keep all of these 326 boys in the school [for] one to two or three [more] years, I am confident that 90 per cent of the boys brought into court would have been successfully cared for."[50] According to Judge Murphy from New York that same year, those placed on probation from the system "[took] to heart the lessons that probation was designed to teach" and did not "offend[] after their first experience with the law."[51]

Despite the optimism exhibited by Progressive Era reformers, the system faced many opponents.[52] In the first decade of the twentieth century, critics launched "public investigations and newspaper campaigns" against the juvenile courts,[53] alleging the juvenile justice system harmed, instead of helped, youth.[54] The court's techniques, which took into account the personal characteristics of each "offender," were viewed as more coercive than traditional models of justice because they obscured punishment behind procedural informality and enabled judges to punish unconstrained by legal safeguards.[55] Furthermore, the private nature of the proceedings created a total lack of transparency, which "protected juvenile justice officials from the effects and implications of their decision making."[56]

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[49] *Id.* at 28.
[50] BARROWS, *supra* note 38, at 6.
[51] *Id.* at 14.
[52] MANFREDI, *supra* note 36, at 32.
[53] RYERSON, *supra* note 40, at 78.
[54] PLATT, *supra* note 39, at 4.
[55] *Id.* at 15. *See also* MANFREDI, *supra* note 36, at 43.
[56] REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 80–81 (Robert L. Johnson ed. 2013).

Inherent in these critiques was a pressing question: Which actor(s) involved in the juvenile justice system are best able to represent the interests of a child accused of delinquent behavior? Juvenile courts operated under the assumption "that the state, delinquent children, and their parents shared identical interests in the treatment of delinquency."[57] However, opponents claimed this was a fundamentally erroneous assumption, as these parties would necessarily hold different interests and should be represented accordingly.[58] Judges, juveniles, parents, social workers, psychologists, and other actors in the juvenile justice system exhibited a variety of perspectives and oftentimes disagreed over what outcome was best for the child. With the judge acting as "prosecutor, defense lawyer, and impartial arbiter" in delinquency proceedings, though, it was likely outcomes would reflect their perspective and bias more so than those of parents or, importantly, the juveniles themselves.[59]

The nineteenth century juvenile courts were created amidst this contentious debate. On the one hand, Progressive Era reformers believed deeply in the use of compassionate and individualized care, delivered through the power of the state. Skeptics, however, saw the juvenile court system as a charlatan, taking the liberty of vulnerable juveniles behind the guise of *parens patriae* and delinquency adjudication. This debate raged throughout the twentieth century and reached its peak six decades later in *In re Gault*.

By the 1960s, the then-established norms of juvenile justice approached imminent collision with the criticisms of the early twentieth century. This was due in part to public concern about delinquent behavior, which had increased dramatically since the early parts of the century.[60] *Uniform Crime Reports* data from 1960 indicated a 125 percent increase in juvenile arrests since

[57] MANFREDI, *supra* note 36, at 27–28.
[58] REFORMING JUVENILE JUSTICE, *supra* note 56, at 49–50.
[59] Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694, 700 (1966).
[60] MANFREDI, *supra* note 36, at 33.

five years prior, with the number of juvenile arrests for crimes against persons rising by 179 percent.[61] Described as a "juvenile crime wave," many believed delinquent behavior was on the rise and required addressing through social policy.[62] In addition, the legal profession—which had previously paid little attention and engaged infrequently with the juvenile justice system (due in part to its design)—began to note the procedural and substantive deficiencies of this allegedly rehabilitative system.[63] The apparent lack of protections for children's liberty motivated a national dialogue.

In the face of rising crime, President Johnson convened the President's Commission on Law Enforcement and Administration of Justice in 1965 to analyze the state of U.S. criminal justice.[64] The Commission's report, released in early 1967, fueled dissenters and bolstered arguments that the juvenile justice system was in need of reform. The report indicated there was a disjunction between the ends the system purported to serve, such as rehabilitation, and the means by which the system attempted to accomplish them.[65] Given "[s]tudies conducted by the Commission, legislative inquiries in various States, and reports by informed observers," the Commission commented, "the great hopes originally held for the juvenile court have not been fulfilled."[66] The report, which closely preceded *Gault*, called for increased procedural protections for the young people coming in contact with the juvenile justice system in order to protect their liberty interests against the powers of the state.[67]

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[61] *Id.* at 34, *citing* Federal Bureau of Investigation, *Uniform Crim Reports* (1950—1965).
[62] *Id.* at 36.
[63] *Id.*; *see also* RYERSON, *supra* note 40, at 147.
[64] EDMUND F. MCGARRELL, JUVENILE CORRECTIONAL REFORM: TWO DECADES OF POLICY AND PROCEDURAL CHANGE 8 (1988).
[65] *See also* MANFREDI, *supra* note 36, at 49.
[66] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 80 (1967).
[67] PLATT, *supra* note 39, at 162; RYERSON, *supra* note 40, at 147.

Abe Fortas recognized this system had become grossly insufficient to meet the needs of juveniles. While he admitted that "goodwill and compassion were admirably prevalent" during the Progressive Era, he looked to the present and saw that "recent studies[], with surprising unanimity, entered sharp dissent as to the validity of this gentle conception."[68] Among the judiciary, Justice Fortas was not alone. Sixty years earlier, Judge Julian Mack (who at the time was active in Chicago social reform) had warned that "if a child must be taken away from its home, if for the natural parental care that of the state is to be substituted, a real school, not a prison in disguise, must be provided."[69] Fortas feared Judge Mack's concern was coming true, as the state was operating, not to protect, but to punish, young social deviants.

Despite these concerns, Justice Fortas also recognized the benefits that did—or could—emerge from a rehabilitative, non-punitive system. The 1960s, therefore, provided a critical juncture in the trajectory of the juvenile justice movement. While many believed in the aims of the institution, they lamented changes that had allowed it to more closely resemble its criminal counterpart, most notably the lengthy imprisonment of children.[70] At least three possibilities remained: The juvenile justice system could continue as it existed, be eliminated entirely, or face modification through the import of due process protections from the criminal justice system (reforming, but not eliminating, juvenile justice).[71] Justice Fortas chose the third, as in his mind, the state's dual obligations to social control and juvenile wellbeing conflicted too starkly for the state, unbridled by due process restrictions, to fully uphold young people's rights. His own

[68] *In re Gault*, 387 U.S. 1, 25–26 (1967).
[69] RYERSON, *supra* note 40, at 96.
[70] *Id.* at 138.
[71] JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 383 (Frederic L. Faust & Paul J. Brantingham ed. 1974).

personal experience, as well as a burgeoning rights revolution, strongly influenced Fortas's choice and provided the foundation for his *In re Gault* opinion.

Part III: An Introduction to Abe Fortas

Justice Fortas, throughout his life, exhibited profound interest in the plight of the marginalized.[72] He was born in a poor, Jewish area of Memphis, Tennessee, in 1910, to parents who had both immigrated from Eastern European countries.[73] The Fortas family came from modest means, though according to biographers, Abe was always well cared for.[74] He performed exceptionally well in high school, gaining a full scholarship from his rabbi's scholarship fund to attend Southwestern College at Memphis.[75] Subsequent to college, Fortas attended Yale Law School in Connecticut, choosing Yale over Harvard. He served as editor-in-chief of the *Yale Law Journal* and graduated second in his class in 1933[76] As prophesized by his Yale interviewer, "[He] . . . probably will wind up as in instructor and author, or in some kind of social welfare work."[77]

According to Fortas, his passion in defending the marginalized stemmed in part from his upbringing as a Jewish man. He—along with close family and friends—experienced social exclusion with regularity. At this time in American history, anti-Semitism was a socially-acceptable and commonly-held sentiment, which resulted in the exclusion of Jews from full participation in American professional and social life.[78] He understood what it meant, and how it felt, to be excluded.[79] He was one of only six Jews at Southwestern,[80] and in later periods of his

[72] "Rosenbloom, one of his clerks at the time, thought that Fortas's position proved his sympathy for the underprivileged 'sprang from the gut . . . In terms of the downtrodden and the poor, Fortas had a real feeling.'" KALMAN, *supra* note 31, at 258.
[73] *Id.* at 7; MURPHY, *supra* note 31, at 3.
[74] KALMAN, *supra* note 31, at 8.
[75] MURPHY, *supra* note 31, at 6. Today, Southwestern is called Rhodes College.
[76] *Id.* at 10.
[77] *Id.* at 8 n.15.
[78] *Id.* at 132.
[79] TANENHAUS, *supra* note 15, at 82.
[80] MURPHY, *supra* note 31, at 6.

life, he described experiencing anti-Semitism "even in the new meritocracy."[81] As affirmed by one of Fortas's contemporaries, "because Fortas was Jewish, he sympathized with persecuted outsiders."[82]

Additionally, he understood what it was like to face exclusion, as he—a Southerner—was a nonmember in elite, Northern spaces. At Yale, he stood out as the only representative of his small university in Tennessee.[83] Later in life, his wife noted his desire to behave and speak more Northernly toward members of his social and professional circles.[84] Finally, having grown up in the South, Fortas was also acutely aware of the presence and impact of systemic racism in his nation. "As a Southerner . . . I recall the outrages of the Ku Klux Klan, directed against Jews, Catholics, and Negroes."[85] In his childhood, he witnessed firsthand the dark ways in which society targeted, harmed, and excluded. Empathetic impulses encouraged him to, not only care, but to act on those emotions in his professional capacities as a lawyer.

After graduating from Yale, Fortas served as a faculty member at Yale and worked for a variety of federal agencies within the United States government. In 1946, he founded a prestigious, private law firm in Washington, D.C.—Arnold, Fortas & Porter.[86] Fortas quickly developed a reputation as a high-powered, well-connected Washington lawyer.[87]

One of the most formative projects on which Fortas worked during his time with the firm was challenging loyalty boards created during the Red Scare. At the close of World War II,

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[81] KALMAN, *supra* note 31, at 45.
[82] KALMAN, *supra* note 31, at 167 (citing Interview with Inés Muñoz Marín, Aug. 1985).
[83] MURPHY, *supra* note 31, at 9.
[84] KALMAN, *supra* note 31, at 44–45.
[85] *Id.* at 12 n.40, *citing to* Fortas, Speech Delivered at a Convocation of the Jewish Theological Seminary (Dec. 12, 1965).
[86] Fortas, according to contemporaries, "was known as a 'lawyer's lawyer' because of his brilliance both as a strategist and an advocate." LUCAS POWE, THE WARREN COURT AND AMERICAN POLITICS 213 (2000). One of his earliest clients, in fact, was then-senator Lyndon Johnson. *Id.*
[87] ANTHONY LEWIS, GIDEON'S TRUMPET: HOW ONE MAN, A POOR PRISONER, TOOK HIS CASE TO THE SUPREME COURT—AND CHANGED THE LAW OF THE UNITED STATES 51 (1964), *quoted in* TANENHAUS, *supra* note 15, at 54.

American-Soviet relations reached an all-time low, and American suspicion of Communism reached an all-time high.[88] American culture feared and demonized its Cold War adversary, and President Truman committed to "meet[] the communist menace" through a variety of measures, all of which aimed to identify Communist sympathizers and fetter the ideology's spread.[89] As one example, during this time, the federal government conducted examinations through loyalty boards to test whether or not public servants and other private individuals were loyal to the United States.[90] These tribunals were notorious for their procedural informality and secrecy. While major law firms in Washington, D.C., universally did not take on these cases, Arnold, Fortas & Porter was the sole exception, bravely accepting cases and arguing that ad hoc tribunals such as these violated defendants' procedural due process rights.[91]

On the one hand, Fortas's dedication to representing these accused individuals stemmed from his philosophical belief that the state must protect, and not trample on, individuals' rights.[92] As described by one contemporary, inside these tribunals:

> There are no issues—no specific points to be determined—except that everything that the accused has thought, done or read, and everybody with whom he has ever seen or with whom he has ever talked, are within the scope of the inquiry. There are no standards of judgment, no rules, no traditions of procedure of judicial demeanor, no statute of limitations, no appeals, no boundaries of relevance and no finality. In short, anything goes; and everything frequently does.[93]

Fortas and others at his firm believed that formal procedure—rather than anarchy—would be the best tool to determine if one truly posed a threat to the state.

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[88] KALMAN, *supra* note 31, at 126–27.
[89] PHILLIP DEERY, RED APPLE: COMMUNISM AND MCCARTHYISM IN COLD WAR NEW YORK 5 (2014).
[90] *Id.* at 6. *See also id.* at 8 (describing how "McCarthyism wrecked the lives of a group of American citizens" and how this "national crisis . . . test[ed] reliance, destroy[ed] careers, and endanger[ed] liberties").
[91] KALMAN, *supra* note 31, at 138–39.
[92] *Id.* at 130.
[93] *Id.*, *citing* Abe Fortas, *Outside the Law*, 192 ATLANTIC MONTHLY 42 (August 1953).

Importantly, though, Fortas's identity as a Jew also likely greatly motivated this desire to represent accused Communists. Disproportionately, those accused by the loyalty boards—and thus his clients—were Jewish.[94] The harsh reality was that, had circumstances been different, he might have been called to the tribunal himself.

At the practice's zenith, cases involving loyalty made up twenty to fifty percent of the firm's work.[95] Fortas himself took on numerous pro bono loyalty board cases, including that of Own Lattimore,[96] director of the Page School of Intentional Relations at Johns Hopkins and expert on China; Dorothy Bailey,[97] an employee of the United States Employment Service in the Federal Security Agency; and John Peters,[98] a professor at Yale Medical School. Fortas ultimately never achieved his goal of having the loyalty boards declared unconstitutional, despite persistent attempts and persuasive argumentation at the Supreme Court.[99] However, this failure galvanized Fortas and reinforced his skepticism of unfettered state power. More generally, Fortas remained sympathetic to claims made by individuals harmed by state's judicial apparatus.

Fortas's convictions about the rights of society's most vulnerable were also the product of his social environment at this time. He entered the professional world during the New Deal, and his contemporaries—who included, most notably, Lyndon Johnson—"championed domestic reform and civil liberties."[100] At the time, there was a national conversation surrounding the obligations of government to combat poverty and injustice, and this produced a generation of

[94] *Id.* at 132.
[95] *Id.* at 133.
[96] MURPHY, *supra* note 31, at 82.
[97] KALMAN, *supra* note 31, at 138.
[98] *Id.* at 141.
[99] *Id.* at 144. *But see* Platt, *supra* note 44, at 29 ("Today most people believe that the Supreme Court made a grievous error in declining to stand up for freedom of expression and association when confronted with the excesses of the McCarthy era."). *See also* Tushnet, *supra* note 133, at 761 (describing the Court's actions as reflecting "prudent sensitivity to the Court's political surroundings").
[100] *Id.* at 248.

attorneys who upheld their calling as social welfare lawyers, working for nonprofits like the American Civil Liberties Union and as legal academics.[101] As a result of this political and social environment, Fortas was "preoccupied with social justice."[102] According to his former clerk, Daniel Levitt, Fortas possessed a "determination to reduce the number of 'non-persons' in our society—people who are left out of due process and equal protection because of some exclusionary formula."[103] In a speech at Syracuse University, Fortas offered his perspective on the way in which mid-century social programs had "transformed American law and society."[104] "We have crossed the threshold of a new world—whether we like it or not. We have created a vast new assortment of legal rights—rights to welfare benefits of various sorts; rights to medical care, to pensions, to unemployment compensation; rights against employers; rights to vote; rights to equal treatment."[105] His recognition of these rights, and his defense of them, stemmed from his exposure to his particular social environment.

Perhaps in part because Fortas and his wife did not have children, Abe also seemed to have a particular proclivity for young people. According to biographer Laura Kalman, "[H]is feeling about children was clear. . . . Friends noted that he would drop anything, no matter how important, to play with a child."[106] Fortas got along with children particularly well because he "treated them as equals and never talked down to them."[107] His understanding of how juveniles ought to be treated by the criminal justice system was derived from his personal attitude towards young people: "When we talk about juvenile offenders . . . and what's done to or about those offenders, we're

[101] TANENHAUS, *supra* note 15, at 52.
[102] KALMAN, *supra* note 31, at 3.
[103] *Id.* at 249.
[104] TANENHAUS, *supra* note 15, at 88.
[105] *Id.*
[106] KALMAN, *supra* note 31, at 194–95.
[107] *Id.*

talking about '*us*,' not '*them*.'"[108] From his perspective, children were people, with identical rights to their adult counterparts. It was unsurprising to many, as a result, that Fortas took up the mantle of defending the rights of children in his professional career.

Part IV: Fortas's Judicial Philosophy—Legal Realism

At Yale, Fortas was introduced to legal realism, an intellectual framework he adopted for the duration of his career. Harvard was renowned for its employment of the conceptualist case study method, in which students were instructed to inflexibly identify the law and apply it to facts to yield legally accurate, objective conclusions.[109] Yale, alternatively, viewed the law more functionally. Instructors encouraged students to evaluate the judge-made, subjective nature of judicial decisions and to employ tools from the natural and social sciences to best understand how these decisions functioned in practice.[110] Legal realism prized the application of social and empirical realities to judicial and legal thought, as these "could prove as important as knowledge of legal concepts in enabling a lawyer to predict how this judge would resolve a particular dispute."[111] While Fortas did not expressly vow his allegiance to this thinking during his time at Yale, it was evident that the philosophy impacted him both then and in the future.[112]

This development of Fortas's jurisprudential philosophy, in part, was the product of the era in which he was educated. His time at Yale corresponded with the height of sociopolitical and New Deal liberalism, which encouraged public servants to think about the idiosyncrasies of institutions and how real-life problems required institutional solutions.[113] Fortas understood the law as a tool for social policy, so he, alongside other New Deal legal realists, "felt no compulsion to hide their

[108] *Id.* at 250, *citing* Abe Fortas, Beyond Gault: The Juvenile Offender (paper delivered to the Juvenile Court Practice Institute, Washington, D.C., Nov. 20, 1969).
[109] *Id.* at 15.
[110] MURPHY, *supra* note 31, at 8.
[111] KALMAN, *supra* note 31, at 16.
[112] *Id.* at 17.
[113] *Id.* at 3.

commitment to results over process" and viewed it instead as a "great engine of social change."[114] While Fortas acknowledged this philosophical and intellectual bent, he did not embrace it for the purpose of adopting a philosophy; he, simply, wanted results.[115]

Fortas's commitment to legal realism was also due to the impact of one particularly salient mentor: William O. Douglas.[116] Though best known as a former Supreme Court Justice (who served contemporarily to Fortas), Douglas had previously been a prominent faculty member at Yale Law. Fortas and Douglas developed a profound professional relationship and friendship. This was due in part to Fortas's intellectual gifts; as described by Douglas in a letter to Colonel William J. Donovan regarding Fortas's employment prospects, Fortas was brilliant, and "[i]n my seven or eight years of teaching I have seen but few men equal to him."[117] Fortas was top of his class after two semesters at Yale, and Douglas took note.[118] However, this relationship also seemed to be the product of the two men's shared backgrounds. Just as Fortas was an outsider from Yale's White Anglo-Saxon Protestant, elite, Northern culture, so too was Douglas, who was raised in Yakima, Washington, as part of a poor family.[119] Fortas's relative poverty and his obvious talent struck Douglas for the resemblance to himself, and Douglas went out of his way to foster Fortas's formative legal career.[120] This started with a firm grounding in legal realism.[121]

[114] *Id.* at 29.
[115] *Id.* at 276.
[116] MURPHY, *supra* note 31, at 11.
[117] KALMAN, *supra* note 31, at 25.
[118] MURPHY, *supra* note 31, at 12.
[119] *Id.* at 11. *See also* KALMAN, *supra* note 31, at 19.
[120] MURPHY, *supra* note 31, at 12.
[121] This aid continued on a personal level too; Douglas served as the best man at Fortas's wedding to Carol Agger in 1935. KALMAN, *supra* note 31, at 45.

Douglas, during his time at Yale and as a Supreme Court Justice, was a strong proponent of legal realist thinking.[122] While Fortas described Douglas as an "idealist,"[123] other scholars less favorably depicted him as "a moralist [and] political visionary"[124] who exercised extreme discretion and skirted judicial self-restraint.[125] Douglas, in his own words, described his thinking as guided by a "sociological jurisprudence"[126] which took into account understandings from other areas of study in making legal decisions. He believed, as other legal realists did, that pure legal reasoning ought to give way at times to pragmatism and real-life consequences, as a method to build a more just society.[127] Douglas—as well as numerous other Yale faculty—imparted this understanding to the young Abe Fortas.[128]

The impact of realism on Fortas was evident throughout his time in private practice and as a Supreme Court Justice. According to one biographer, instead of emphasizing theory, "Fortas preferred to examine the practical, real-world consequence of his decisions, based on his analysis of the 'progression of history,' social science, current business practices, and of course his own view of the spirit and 'fairness' of the Constitution."[129] In some ways, he believed the ends justified the means—"but the means had to be legal, and if they were not, he devised a way of bringing them within the law."[130] As a salient example, one day, Fortas's clerk John Griffiths drafted an

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[122] For a defense of Douglas's practices, *see* Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L. J. 133 (1991).
[123] Abe Fortas, *William O. Douglas: An Appreciation*, 51 IND. L. J. 3, 3 (1975).
[124] Yosal Rogat, *Mr. Justice Pangloss*, N.Y. REV. OF BKS., Oct. 22, 1964, at 5 (reviewing WILLIAM O. DOUGLAS, THE ANATOMY OF LIBERTY (1963) and WILLIAM O. DOUGLAS, FREEDOM OF THE MIND (1964)).
[125] Urofsky, *supra* note 122, at 135.
[126] WILLIAM DOUGLAS, GO EAST, YOUNG MAN 160 (1974).
[127] TANENHAUS, *supra* note 15at 27.
[128] Interestingly, Fortas, during his confirmation hearings, attempted to distance himself from his mentor's philosophical reputation. "Douglas complained to Fred Rodell about the way Fortas 'threw off' on him in the hearings, in an effort to separate the two men in the senators' minds. How could Fortas portray his own mentor as a 'leftist' who was moved only by what he thought should be the result in the case, while portraying himself as a moderate relying on "reason and history" to decide cases? . . . ." MURPHY, *supra* note 31, at 539.
[129] *Id.* at 530.
[130] KALMAN, *supra* note 31, at 2.

opinion. A frustrated Fortas declared it insufficient and demanded a rewrite. To give the clerk a starting point, Fortas drafted a memo with his desired structure and ordered Griffiths to "decorate it." The memo contained an amalgamation of the facts of the case; the "decorations" he expected were the legal provisions to support the conclusion he had already drawn.[131] Similarly, when reviewing *Epperson v. Arkansas*,[132] Fortas's law clerk concluded the case was unripe and therefore ineligible for Supreme Court review. While Fortas thought his law clerk's conclusion might be correct, the Justice commented that he would rather hear the case and "see us knock [the statute] out."[133] Law, to Fortas, was not necessarily an objective reality, but rather an ever-changing target made up of the rules established by the preferences of courts. In Fortas's words, the rule of law was "[t]he state, the courts and the individual citizen [being] bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual [accepting] the courts' determinations of what those rules are and mean in specific instances."[134] Judicial power could—and should—be used to protect the marginalized and disenfranchised, using whatever means necessary to do so that were within Constitutional bounds.[135]

Fortas's embrace of legal realism is similarly evident throughout his opinion in *In re Gault*. According to a past clerk, even before taking the case, Fortas desired to address the procedural rights of juveniles.[136] While a previous case had broached the topic of juvenile justice, it was decided on statutory (and not constitutional) grounds and, therefore, was not applicable to the rest of the country. However, Fortas believed juveniles deserved due process protections and wanted a case to address that concern. The irony is not lost that Fortas, in *Gault*, castigated the juvenile

[131] Interview with John Griffiths, Past Clerk for Justice Fortas (June 1987), *cited in* KALMAN, *supra* note 31, at 271–72.
[132] 390 U.S. 941 (1968).
[133] Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 754-55 (1995).
[134] KALMAN, *supra* note 31, at 249.
[135] *Id.* at 250.
[136] *Id.* at 252.

justice system for providing insufficient procedural protections for young people while he, in his own practice, placed ends before means. However, Fortas truly thought, given the peril of the juvenile justice system, that the most effective contribution he could make as a justice would be by mandating procedural reform.[137]

Fortas, the critic of proceduralism, embraced this solution when it came to juvenile justice because he was a legal realist. His reliance on the practical realities of the ways in which juveniles experienced the court system trumped theory, particularly the theory embraced by legal formalists.[138] The American Civil Liberties Union, who represented Gault on appeal, framed its argument in such a way that made the Court consider the question: Did this form of treatment deprive children of their liberty?[139] According to Fortas, the answer was yes; young people like Gerald Gault were not placed in industrial schools for personal improvement, but rather for punishment under a façade of reform. Consider, for example, his unambiguous commentary on punishment in his *Gault* opinion.

> It is of no constitutional consequence -- and of limited practical meaning -- that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide. . . . In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.[140]

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[137] *Id.* at 250–51.
[138] *See* Feld, *supra* note 17, at 152 ("The Court examines the realities of juvenile incarceration rather than accepting the rehabilitative rhetoric of Progressive juvenile jurisprudence.").
[139] MURPHY, *supra* note 31, at 128–29.
[140] *In re Gault*, 387 U.S. 1, 27-28 (1967).

Fortas wanted to address what others had disguised as rehabilitation and reform; juveniles faced incarceration when adjudicated delinquent—regardless of the label applied—and the system could not constitutionally take away their liberty absent proper procedural protections. This case provided Fortas a ripe opportunity to emphasize that juvenile courts were executing their "child welfare mission" in a way he considered, in practice, undeniable and untenable.[141]

Fortas similarly found the "civil" (versus "criminal") description of juvenile adjudications to be misleading. The state of Arizona, in support of its practice of allowing juvenile self-incrimination, declared that because the process was civil, it required less stringent procedural protections. Fortas, however, disagreed, emphasizing that these procedures were actually criminal, as "to hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience."[142] During the last ten minutes of Arizona's time in oral argument, Fortas exclaimed:

> I don't get anywhere by trying to solve this problem in terms of the use of a word like *crime* or *not a crime*. The question is that we are dealing here with proceedings in which persons may be deprived of liberty and put in a place for 24 hours a day, they're in custody. You can call it a crime or you can call it a horse, they are still deprived of liberty.[143]

Whether labeled civil or criminal, Fortas believed the disposition imposed caused "deprivation of liberty" and "incarceration against one's will," which could not Constitutionally be imposed absent procedural protections.[144] This view was incontrovertibly shaped by Fortas's refusal to obscure reality in theory.

[141] MURPHY, *supra* note 31, at 100.
[142] *In re Gault*, 387 U.S. at 49.
[143] TANENHAUS, *supra* note 15, at 81.
[144] *In re Gault*, 387 U.S. at 49–50.

Justice Stewart's dissent illuminated Fortas' approach. Stewart took a much more formalist tack in his opinion,[145] as in his mind:

> Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.[146]

Unlike the majority, Stewart was not willing to look past how the law had long characterized juvenile justice. Juvenile courts, according to his perspective, were sufficiently different and could not be compared to more punitive criminal processes, as the majority proposed. Fortas, though, guided by legal realism, viewed the situation differently.

Fortas's legal realist values grounded his commitment to social science research,[147] and this sentiment is evident throughout his majority opinion in *Gault*. In Footnote 14 alone, Fortas cited five practical sources (manuals, empirical studies, and statistical bulletins) from which he drew unfavorable inferences about the state of juvenile justice.[148] Fortas relied especially heavily on the aforementioned report from the President's Commission on Law Enforcement and Administration of Justice;[149] what was unusual, though, was that none of the parties cited this report in their briefs submitted to the Court.[150] The report highlighted what Fortas believed to be an essential shortcoming of the juvenile justice system: Since "the welfare and the needs of the child offender are not the sole preoccupation of the juvenile court, which has the same purposes

[145] See Dorsen, *supra* note 28, at 5.
[146] *In re Gault*, 387 U.S. at 78–79 (Stewart, J., dissenting).
[147] David S. Tanenhaus & Eric C. Nystrom, *Pursuing Gault*, 17 NEV. L.J. 351 (2017).
[148] *In re Gault*, 387 U.S. at 14 n.14.
[149] He also cited to a study on recidivism conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia, *Id.* at 22, and the Standards for Juvenile and Family Courts published by the Children's Bureau of the United States Department of Health, Education, and Welfare, *Id.* at 38–39.
[150] MURPHY, *supra* note 15, at 122–23.

that mark the criminal law . . . the justification for abandoning the protective procedural guarantees associated with due process of law disappears."[151] The real-life issues of juvenile justice "preoccupied [Fortas] more than the legalities," and because of this, he spent significant time in his opinion simply discussing how the system failed young people.[152] In doing so, he wanted to prove that, in practice, "the features of the juvenile system which its proponents . . . asserted are of unique benefit" simply could not stand without parallel due process protections.[153]

Finally, Fortas thought—in archetypal legal realist fashion—that his proposed solution was desirable simply because it was better than alternatives or the status quo. This utilitarian perspective is evident throughout the opinion, as Fortas comments on how granting procedural due process rights to juveniles in delinquency adjudications would couple protection of juvenile defendants without "compel[ling] the States to abandon or displace any of the substantive benefits of the juvenile process."[154] In this way, the weaknesses of the system could be remedied without losing the "valuable innovations of juvenile courts."[155]

Part V: The Criminal Procedure Revolution and Rights of Defendants

Fortas's intellectual convictions about the rights of defendants in criminal justice greatly influenced his perspective on, and motivated his desire for, juvenile justice reform. According to biographers, "In matters of criminal procedure, Fortas was generally considered a staunch advocate of defendants' rights over state interests."[156] Given the fact that he had a deep interest in protecting those traditionally excluded from society, this is unsurprising. This meant that, as an attorney and ultimately as a Justice, Fortas fought to grant generous protections to the accused. In

[151] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 66, at 85.
[152] Kalman, *supra* note 31, at 253.
[153] *In re Gault*, 387 U.S. at 22.
[154] *Id.* at 21.
[155] MURPHY, *supra* note 31, at 122.
[156] MANFREDI, *supra* note 36, at 9.

Fortas's own perception, this was necessary because "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[157] In order to guarantee fair encounters with the criminal justice system for all, Fortas advocated for more generous protections and approaches than his judicial counterparts and contemporaries.[158] Taking away the liberty of any defendant required process, because in his view, "*the* significant question [of judicial tribunals] is the integrity, fairness, decency and humanity of the processes of the state."[159]

Fortas demonstrated this conviction through action. He argued as an attorney, and wrote as a Supreme Court justice, some of the most influential cases and opinions on juvenile justice in the twentieth century. Throughout Fortas's career, he advocated for fair process on behalf of defendants and for the law to reflect these higher social policy ideals. For example, in 1962, Fortas was appointed to represent Clarence Gideon in his appeal to the Supreme Court.[160] In 1961, Gideon was accused of breaking and entering at a Florida establishment; he was ultimately convicted in state court and sentenced to five years in prison. He objected to the proceedings on the grounds that he was too poor to afford counsel, but the Florida court, at the time, did not recognize the right to be represented by counsel in state criminal proceedings and therefore overruled his objection. This was an ideal case for Fortas to advance his view of the rights of the accused, and he developed a sophisticated legal strategy that involved both structural and practical arguments. In 1963, the Court ruled unanimously in his favor, holding that the Fourteenth Amendment protected defendants' right to counsel in all criminal proceedings.[161]

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[157] *In re Gault*, 387 U.S. at 18–19.
[158] MURPHY, *supra* note 31, at 532.
[159] KALMAN, *supra* note 31, at 130 (emphasis added).
[160] *Id.* at 180.
[161] *Id.* at 183; RYERSON, *supra* note 40, at 60. *See also* Tanenhaus & Nystrom, *supra* note 147, at 352 ("Fortas's role during this revolutionary era for American constitutional law is remarkable. . . . His victory in *Gideon* made *Gault* not only possible but seemingly inevitable.").

From early in his judicial tenure, Fortas was similarly involved in decisions in which he worked to extend procedural protections to the accused. In the mid-1960s, Morris Kent—a sixteen-year-old African American boy from the District of Columbia—was charged with housebreaking, robbery, and rape in connection to an alleged break-in.[162] Judge Ketcham, the juvenile judge who would have been responsible for the adjudication, believed Kent did not belong in the juvenile system (due in part to his previous adjudications) and subsequently transferred him to criminal court, where he was convicted and sentenced to 30-90 years in prison. While the question appealed to the Supreme Court was whether the federal Court of Appeals for the District of Columbia had properly interpreted the relevant statute, there was a lingering possibility that the court would also address the appropriate standard to apply when waiving juvenile jurisdiction and allowing transfer.[163]

The appeal was taken to a Supreme Court that was highly attentive to the rights of criminal defendants, and Abe Fortas felt this most acutely of all.[164] The majority opinion, authored by Fortas, determined that the waiver of jurisdiction to the criminal court was not proper. The Juvenile Court Act (under which the waiver was granted) established "basic requirements of due process and fairness."[165] Since Kent lacked access to his records and to counsel prior to the waiver, and because this transfer happened without any official hearing, Fortas held that Kent had been deprived of this legally-necessary due process.[166]

Fortas reached his conclusions on statutory, and not constitutional, grounds.[167] However, he was determined to use *Kent* as a tool to emphasize what he saw as profound shortcomings in

[162] TANENHAUS, *supra* note 15, at 54–55.
[163] *Id.*
[164] MANFREDI, *supra* note 36, at 74.
[165] *Kent v. United States*, 383 U.S. 541, 553 (1966).
[166] TANENHAUS, *supra* note 15, at 57.
[167] Under the doctrine of constitutional avoidance, judges are meant to decide cases on the narrowest ground possible and avoid constitutional questions if the case can be decided on a non-constitutional basis. CALEB NELSON,

the juvenile court system. Given the country's "special concern for children," Fortas found it unfathomable that the system would expose Kent to "jail along with adults, and . . . the possibility of a death sentence" without hearing, counsel, or even a pithy articulation of the court's justifications before transfer from the juvenile court.[168] Despite the system's "original laudable purpose," in practice, studies "raise[d] serious questions as to whether actual performance measure[d] well enough against [this] theoretical purpose."[169] In Fortas's approximation, as the juvenile court system stood, "the child receive[d] the worst of both worlds: that he [got] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[170]

When Fortas decided *Kent*, he was already scheming his next jurisprudential move to take the recognized due process requirements and apply them to the Constitution.[171] Fortas affirmed in his opinion that, despite the state's reliance on the *parens patriae*, "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."[172] Instead, these procedures "must measure up to the essentials of due process and fair treatment."[173] Fortas deeply believed that juveniles, like adults, ought to be granted procedural protections when confronting the juvenile justice system, and he desired an opportunity to apply these mandates broadly.[174]

Fortas's sentiment, though certainly revolutionary when considered against the Progressives' vision of juvenile justice, was in part a product of the judicial context in which he

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STATUTORY INTERPRETATION 182 (2011). *See also* JUVENILE JUSTICE PHILOSOPHY, *supra* note 71, at 256 ("*Kent* itself was decided on the basis of violations of the District of Columbia juvenile court statute so that the Supreme Court did not reach legal issues of constitutional dimension.").

[168] *Kent*, 383 U.S. at 554.

[169] *Id.* at 555.

[170] *Id.* at 556.

[171] KALMAN, *supra* note 31, at 251.

[172] *Kent* 383 U.S. at 555. Note that an original draft for Fortas's majority opinion contained the word "despotism" in place of "procedural arbitrariness." KALMAN, *supra* note 31, at 251.

[173] *Kent*, 383 U.S. at 562.

[174] TANENHAUS, *supra* note 15, at 57.

was writing. The Supreme Court, beginning in the 1950s and continuing through the 1960s, undertook a criminal procedure revolution,[175] constitutionalizing the rights of criminal defendants vis a vis the state.[176] The Court, implicitly and explicitly, prioritized fairness over efficiency and procedure over informality.[177] Due process, in particular, was advanced considerably through the incorporation of the Fourteenth Amendment and the application of its demands to the states.[178] This movement dramatically "redefined the relationship between individuals and the State," as it "endorsed the adversarial model to resolve disputes[] and reflected the crucial link between race, civil rights, and criminal justice policies."[179]

At this time in history, the Court was making profound constitutional moves in criminal procedure and criminal justice, reflecting "an increased emphasis on individual liberty and equality, a distrust of state power, an unwillingness to rely solely on good intentions and benevolent motives, and skepticism about the exercises of discretion in the treatment of deviants."[180] In *Mapp v. Ohio*,[181] the Court held materials obtained in illegal searches and seizures could not be used against a defendant in subsequent criminal proceedings. In *Escobedo v. Illinois*,[182] the Court held *Gideon*'s guarantee of counsel at trial extends to any suspect in the custody of law enforcement. Just a week before taking up *Gault*,[183] the Supreme Court ruled in

[175] Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62 (1996).
[176] *See* Richard L. Fricker, *The Warren Court: A Retrospective*, 22 HUM. RTS. 46 (1995). At a four-day seminar at the University of Tulsa College of Law on the Warren Court, participants described the criminal justice system as "a fiasco," as "[i]n the early 1960s, the average criminal defendant was treated like a piece of meat on its way to dressing and processing."
[177] BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 111 (1999).
[178] TANENHAUS, *supra* note 15, at x; *see also* POWE, *supra* note 86, at 413.
[179] Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash*, 87 MINN. L. REV. 1447, 1447 (2003).
[180] *Id.* at 1476.
[181] 367 U.S. 643, 655 (1961).
[182] 378 U.S. 478, 490-1 (1964).
[183] POWE, *supra* note 86, at 437.

Miranda v. Arizona[184] that the Constitution requires the articulation of procedural protections to prevent unintentional self-incrimination by criminal defendants.[185] Across a variety of issues, the Supreme Court was intentionally decreasing the authority of the police while correspondingly increasing the power held by criminal defendants.[186] This movement, though, was highly contentious. While some believed these decisions made constitutional rights meaningful, others condemned them as being beyond the Court's legitimate scope of authority.[187]

Similar to the way Fortas preferred to guide his judicial decision-making by the realities of those experiencing the system (as opposed to by theory), the criminal defense revolution demanded a harmonization between criminal procedure practice and ideal. "The Court recognized, on the one hand, the genuine needs of law enforcement officers to deal with the protean variety of crime and dangers that confront communities daily, and on the other hand, the importance of controlling police discretion in order to protect liberty."[188] By ensuring procedural protections for all defendants—including, ultimately, juveniles—the Court hoped to increase the accuracy of factfinding and contribute to the legitimacy of the nation's system of justice.[189]

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[184] 384 U.S. 436 (1966). "When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required." *Miranda*, 384 U.S. at 479.

[185] See also POWE, *supra* note 86, at 407 "*Miranda* was the highpoint of the Warren Court's criminal procedure revolution."

[186] Feld, *supra* note 179, at 1478–79.

[187] Stephen A. Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 DRAKE L. REV. 179, 179–80 (1993). There was fierce backlash to what some viewed as advocatory decision-making by the Supreme Court. Many people "simplistically blamed [subsequent] increase[es in] crime and urban disorder on the Warren Court's criminal procedure and civil rights decisions," Barry C. Feld, A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed, 34 N. Ky. L. Rev. 189, 206 (2007), which in part led to the "get tough on crime" era of the 1980s and 1990s. *Id.* at 253. *Compare* William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997), condemning the Court for its focus on procedure at the expense of prioritizing equity of outcome. "The system might be better off today had Warren and his colleagues worried less about criminal procedure, and more about criminal justice." *Id.* at 76.

[188] Saltzburg, *supra* note 187, at 202.

[189] See, e.g., FELD, *supra* note 177, at 101; *see also id.* at 97 ("Increasingly, whenever state action affected individuals, whether to punish, to classify for benefits, or even to assist them, the Court required the states to provide the people affected by those actions with an opportunity to participate in the process and be heard.").

This criminal procedure revolution reinforced and emboldened Fortas's already progressive thinking with respect to the rights of accused, as is evident in both his written and spoken word. For example, just three weeks prior to deciding *Gault*, Fortas gave a lecture at Syracuse University[190] in which he addressed criminal justice. He directed particularly fiery remarks to combat "those who say that the Constitution and the Supreme Court are coddling criminals,"[191] as from his vantage point, this was far from the reality. Juveniles, at the time, were dealt with:

> as constitutional nonpersons and heretofore outside of the scope of the Supreme Court interpretations of the constitutional principles…the police arrest them and interrogate and search them with abandon, and there is evidence that they did so. They could obtain confessions without *Miranda* warnings, and they did so. Juveniles could be and were tried without the benefit of appointed counsel. Generally, they couldn't appeal, so that the Supreme Court decisions did not stand in the path of eliminating crime.[192]

These all, in his mind, were examples of how the state abused its power and acted as an antagonist to individual rights. He aspirationally demanded that "we [] insist upon maintaining the guarantees of our Constitution, generously construed and applied,"[193] as "[f]reedom's advance has always been assailed . . . [but] with care and prudence, our progress will continue."[194] He called, in particular, for an expansive understanding of the Fourteenth Amendment.[195]

From this perspective, no demographic was harmed more by the coercive powers of the state than juveniles. The juvenile justice system was premised on a conception of the state, through its power of *parens patriae*, as juveniles' omniscient protector. However, the court in actuality had

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[190] According to Tanenhaus, he was in attendance to "dedicate the Arnold M. Grant Auditorium at its law school and receive an honorary degree." TANENHAUS, *supra* note 15, at 88.
[191] *Id.*
[192] *Id.* at 89.
[193] *Id.* at 88.
[194] *Id.* at 89.
[195] MURPHY, *supra* note 31, at 531.

a "dual role[]" in its responsibility for two equal and oppositional considerations, namely the "needs of the child and the adequate protection of society."[196] Dissenters lamented that the system structurally could not—and empirically did not—protect juveniles while simultaneously ordering their imprisonment. Procedural due process rights, therefore, were viewed as necessary to combat the State's intrusion on juveniles' liberties.[197]

Gault served as Fortas's diatribe against this perceived injustice. He likened delinquency adjudication to felony prosecution, because regardless of rhetoric used, both systems "subjected [the convicted] to the loss of his liberty for years."[198] As mentioned above, he similarly doubted the purportedly "civil" nature of juvenile proceedings, as they could lead to extended "incarceration against one's will."[199] Citing *Kent*, decided just one year before, Fortas criticized how the juvenile justice system continued to deny young people "the basic requirements of due process and fairness."[200] He found this reality particularly preposterous when juxtaposed with the fact that similarly-situated adults were given substantially more generous protections.[201]

In particular, Fortas lambasted the mixed motives of those who ostensibly worked to protect young people involved in the system, but who realistically did not. During delinquency adjudication, no one was, so to speak, on the juvenile's team. Probation officers, for example, were not representatives of the juveniles, as their "role in the adjudicatory hearing, by statute and in fact, [was] as arresting officer and witness against the child."[202] The judge similarly could not fully embrace the child's wellbeing, given that they were ultimately accountable for public safety.[203]

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[196] Warren, *supra* note 34, at 15. Warren went on to comment that, given this reality, "the [juvenile] court must function within the framework of law and that in the attainment of its objectives it cannot act with unbridled caprice." *Id.*
[197] FELD, *supra* note 177, at 1489.
[198] *In re Gault*, 387 U.S. 1, 36 (1967); *see also* MURPHY, *supra* note 31, at 122.
[199] *Gault*, 387 U.S. at 49–50.
[200] *Kent v. United States*, 383 U.S. 541, 553 (1966).
[201] KALMAN, *supra* note 31, at 251.
[202] *Gault*, 387 U.S. at 36.
[203] *Id.*

Perversely, juveniles were not only left alone, but were "protected" by those ultimately responsible for their demise.

This is why Fortas found the privilege against self-incrimination to be so vital. It functioned, in his words, "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."[204] These rights were essential from a point of process, of course, but stemmed more deeply from the "basic stream of religious and political principle [that]—in a philosophical sense—insists upon the equality of the individual and the state."[205] Children, he posited, were told that the system would treat them as a parent. Therefore, when they were instead given "stern disciplining," the children exhibited negative behaviors, as they felt "deceived or enticed."[206] According to Fortas, this harmed both the legitimacy of the institution and the effectiveness of its punishments.[207] In response, Fortas mandated in his opinion the expansion of due process protections, in the hope that "adversarial procedures would restrict the coercive powers of the state, ensure the regularity of law enforcement, and thereby reduce the need for continual judicial scrutiny."[208]

The *Gault* decision, for Fortas, transcended simple questions of process and triggered deeply-rooted, philosophical debates about what protections and respect we owe, as a society, to the liberty interests of criminal defendants. Fortas's intellectual predisposition as a legal realist, in conjunction with the criminal defense revolution during which he served, led to the landmark extension of procedural protections to marginalized young people in the juvenile justice system.

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[204] *Gault*, 387 U.S. at 47; *see also* TANENHAUS, *supra* note 15, at 84.
[205] *Gault*, 387 U.S. at 47.
[206] *Id.* at 26; *see also* KALMAN, *supra* note 31, at 253.
[207] *Gault*, 387 U.S. at 26.
[208] FELD, *supra* note 177, at 102.

Part VI: Civil Rights and Warren Court Liberalism—The Dawn of Reform

> *When Gault was argued, we were at the high point in the Warren Court. . . . The revolution in criminal justice was underway, as the Supreme Court was finally exercising its authority to make sure that criminal cases in state courts, as well as federal courts, were decided consistently with due process. But we were only at the dawn of juvenile justice.*[209]

Fortas arrived to the Court inherently suspicious of the state's power vis a vis juvenile defendants, and his appointment occurred in an era when this sentiment was promoted with equal fervor by his judicial contemporaries. The 1950s and 1960s Supreme Court, led by Chief Justice Earl Warren, was a Court acutely aware of social inequality and primed for activism.[210] American society was riddled with inequality, discrimination, and social unrest; in response, the Justices of the Supreme Court abandoned the laissez-faire approaches of the past[211] and acted as activists in defense of individuals' rights, in a way previously unseen.[212] Fortas—appointed in 1965 at the height of the Warren Court—and his results-oriented, pragmatist counterparts were ready for a juvenile justice revolution.

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[209] Dorsen, *supra* note 29, at 1–2 (commenting on his experiences in and the future of juvenile justice law).

[210] See Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1243–44 (1965), describing the span of Supreme Court terms from 1961 and 1964 as "one of the most creative and daring periods in constitutional history." ("It is during this time that the remarkable extent of the Warren Court's will-to-govern becomes fully manifest. This tendency is reflected not only in a handful of great, landmark decisions but in the cumulative effect of many others in which the Justices chipped away at the doctrinal roadblocks to a judicially-defined good society. So many developments have occurred so recently that there is neither space nor need to describe them in detail."). *See also* TANENHAUS, *supra* note 15, at 49 ("It was the heyday of 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.").

[211] McCloskey, *supra* note 210, at 1234.

[212] *Id.* at 1236–67; *see also id.* at 1233 (affirming "the Warren Court [] used its legal authority more boldly than any Court has ever done before . . . with the significant arguable exception of the 1920-1936 period."). There are, according to Professor Lucas Powe, two ways to conceptualize the judicial movement that was occurring on the national stage. Some affirm the Warren Court was guided by Footnote Four of *United States v. Carolene Products*, which suggested that the "Court must enforce the specific limitations on governmental power found in the Bill of Rights," POWE, *supra* note 86, at 214-15. Others more cynically depict the Warren Court's activism as a disregard for constitutional theory and attempt at obtaining "results that conformed to the values that enjoyed significant national support in the mid-1960s." *Id.* at 215. *See also* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 759 (1992) ("To conservatives, the Warren Court converted constitutional law into ordinary politics.").

This movement was motivated, in part, by exposure of profound ethnic and socioeconomic inequalities that were inherent in the juvenile justice system. Children who came from poor and immigrant families were disproportionately targeted by the power of the juvenile courts, as broad definitions of what qualified as delinquency (such as "engaging in conduct harmful to himself or others"[213]) left significant room for culturally-biased interpretation and implementation of the law.[214] Adjudications were based, therefore, not on objective acts of deviance, but on subjective understandings of what it meant to live a productive and law-abiding life.[215] As opposed to promoting social order, therefore, the juvenile court system "consolidat[ed] and protect[ed] the safety and status of the more fortunate."[216] Warren Court-era reforms, in response, attempted to level this unequal playing field, particularly emphasizing rights that would extend to politically powerless groups.[217]

Race was another focal point of 1960s judicial reforms.[218] Non-white individuals were disproportionately impacted and marginalized by criminal justice policies, an especially stark

[213] Paulsen, *supra* note 59, at 700.
[214] PLATT, *supra* note 39, at 180 (1969); Platt, *supra* note 44, at 29.
[215] Paulsen, *supra* note 59, at 700; *see also* RYERSON, *supra* note 40, at 47. As expertly described in REFORMING JUVENILE JUSTICE, "The varying level of a youth's personal resources could affect system behavior as well. Youth who are disrespectful or contemptuous of authority are more likely to find themselves arrested and handled harshly. Youth who have the skills to be articulate and polite are more likely to be warned than arrested, offered services rather than sanctions, and treated rather than incarcerated. In other words, decisions about the status of juveniles as delinquents are determined not just by the characteristics of the offense, but also by the personal characteristics of the juveniles and the social and emotional resources of their families." REFORMING JUVENILE JUSTICE, *supra* note 56, at 86 (citations omitted).
[216] RYERSON, *supra* note 40, at 47. Earl Warren himself, in a 1964 address he gave to the Annual Conference of Juvenile Court Judges entitled *Equal Justice for Juveniles*, admonished that "figures show, unmistakably, that delinquency strikes most frequently among the low socio-economic groups, a fact which gives special urgency to President Johnson's compelling call for a broad frontal attack upon the problems of poverty in our country." Warren, *supra* note 34, at 14.
[217] Feld, *supra* note 179, at 1475–76. Writing contemporaneously in response to these Warren Court reforms, A. Kenneth Pye commented that "[t]he gulf between the illusion and reality of constitutional protection has been narrowed" and "[t]he quality of justice meted out to the poor more closely approximates that available to the rich." A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. R. 249, 256 (1968).
[218] There is a vast amount on the Warren Court and racial justice, a topic which itself deserves broad scholastic attention. See, e.g., FELD, *supra* note 177; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

reality given the discriminatory application of law throughout the United States.[219] The Warren Court's responses in criminal procedure and civil rights, then, attempted to mitigate the disproportionate impact of the criminal and juvenile justice systems on people of color.[220] By fortifying the Fourteenth Amendment, the Court hoped to limit police and judicial discretion and provide fairness in what was previously a patently inequitable system of justice.[221]

Warren himself recognized the critical juncture at which juvenile justice found itself in the mid 1960s. In 1964, just one week after Gerald Gault was detained,[222] Warren spoke to the Annual Conference of Juvenile Court Judges in a talk entitled "Equal Justice for Juveniles.[223] In his address, Warren discussed what he dubbed a "national problem."[224] It was true, he acknowledged, that the "formal and sometimes awesome trappings of a criminal trial can be avoided and the informal atmosphere of the conference achieved[] without sacrificing the fundamental purposes of the proceeding."[225] However, in his mind, this promise of juvenile justice was "yet to be proved."[226] While unwilling to comment on whether young people facing juvenile court should be entitled to the presence of an attorney,[227] he did coyly note that "lawyers can be most useful and helpful to the court" in order to "prevent miscalculations and minimize the possibilities of miscarriages of justice."[228] He further emphasized a "growing awareness on the part of the courts

[219] FELD, *supra* note 177, at 201.
[220] Feld, *supra* note 187, at 1475. *See also* Stephen Reinhardt, *Guess Who's Not Coming To Dinner!,* 91 MICH. L REV. 1175, 1181 (1993) ("we must always remember that it was the Court, not Congress or the President, that put an end to official segregation in this country").
[221] Feld, *supra* note 187, at 201. *See also* Stuntz, *supra* note 187, at 5 ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").
[222] TANENHAUS, *supra* note 15, at 41.
[223] Note that this was prior to the Court's acceptance of cert in *Gault*.
[224] Warren, *supra* note 34, at 14.
[225] *Id.* at 16.
[226] *Id.*
[227] "It would not be proper and I now you would not wish me to say here whether I think, for instance, that every child brought before the court must be represented by counsel. That will have to wait until the proper cases come before the court." *Id.* at 15.
[228] *Id.*

and the public of the right of each individual, whether child or adult, to a full and fair hearing."[229] In his view, in fact, children ought to be "entitled to comparable, if not greater, safeguards."[230] During the four years Warren and Fortas served together, they agreed in judgment between 83 to 92 percent of the time (depending on the term), and both agreed with the opinions of the court around 80 percent.[231] These men, who comprised part of the activist, liberal wing of the Warren Court, were prepared for a due process revolution, and their perspective toward juvenile justice was no exception.[232]

The expansive language in which Fortas couched his *Gault* decision matches this liberal, activist tone set by the Warren Court. Fortas based the Court's holding on the broad due process guarantees of the Fourteenth Amendment,[233] as in his words, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[234] He justified juveniles' right against self-incrimination in the substance of the Fifth Amendment, affirming that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[235] This was especially so given the fact that "[t]he language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception [a]nd the scope of the privilege is comprehensive."[236]

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[229] *Id.* at 16.
[230] *Id.* at 15.
[231] POWE, *supra* note 86, at 212.
[232] *Id.* at 216. See also Dorsen, *supra* note 28, at 7, for a first-hand account from Gerald's ACLU defense team on what it was like to approach the Warren Court with this issue ("At another level I was confident. First, I was counting the votes without knowing exactly how it would play out, but it looked good. Second, as I said earlier, this was a high point in the Warren Court. Would the Court have taken this case to affirm a complete denial of due process? It just did not make sense.").
[233] See FELD, *supra* note 177, at 101 (affirming that Fortas "based the Court's ruling on the Fourteenth Amendment's broad and general guarantee of 'due process' and 'fundamental fairness,' rather than on specific requirements of the Bill of Rights").
[234] *In re Gault*, 387 U.S. 1, 13 (1967).
[235] *Id.* at 47.
[236] *Id.*

Fortas capitalized on the prioritization of equality and social justice by the activist Warren Court to advance his reform agenda in juvenile justice. Addressed generally, the Warren Court promoted "a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements" and initiated "great changes . . . and protected those who sought to implement them."[237] The success secured by *Gault* in the juvenile justice movement, therefore, ought to be viewed as caused by, and part of, a more expansive narrative.

Part VII: *Gault*—The Decision and the Aftermath

> *"Yes, Gault was a famous victory, and I only hope that the revolution turns out to be a benign one."*[238]

Fortas ultimately achieved dramatic reform in juvenile justice system. Prior to *Gault*, young people "were getting the worst of both worlds," as "if they lost their case, they went to jail or to confinement for a long period of time," but "there were no established procedures whereby it was determined fairly and constitutionally whether or not they were in fact guilty."[239] Fortas recognized the fatal shortcomings of this arrangement and was determined to chart a new path that guaranteed procedural protections for allegedly delinquent youth. *Gault* guaranteed that those encountering the juvenile justice system be granted due process rights, including the right to written notice of charges, to counsel, to confront and cross-examine witnesses, and against self-incrimination.[240] Justice Brennan called it "a really magnificent opinion [he was] honored to join;[241] Warren affirmed it would "be known as the Magna Carta for juveniles."[242]

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[237] Owen Fiss, *A Life Lived Twice*, 100 YALE LJ. 1117, 1118 (1991).
[238] TANENHAUS, *supra* note 15, at 91 (letter from Norman Dorsen, counsel for Gerald Gault, in response to a friend's congratulations following the Supreme Court's favorable decision).
[239] Dorsen, *supra* note 28, at 2.
[240] *Gault*, 387 U.S. at 33–56; *see also* Norman Dorsen and Daniel A. Rezneck, In Re Gault *and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 3 (1967).
[241] Letter from Justice William Brennan, Jr., to Justice Abe Fortas, *quoted in* TANENHAUS, *supra* note 15, at 85.
[242] 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), *quoted in* TANENHAUS, *supra* note 15, at 85; Tanenhaus & Nystrom, *supra* note 147, at 351.

Fortas, however, was not entirely satisfied by the result in *Gault*—not because of what it did, but rather what it did *not*. "Although every justice, except for Potter Stewart, agreed that children in juvenile court should have the right to timely notice of the charges and assistance of counsel, Fortas wanted *Gault* to do much more."[243] As a particular example, Fortas desired that juveniles accused of felonies be granted the same right to trial by jury given to adult criminal defendants, a right that was not extended in *Gault* (and was later expressly rejected in *McKeiver v. Pennsylvania*).[244] Some even speculate that Fortas, if given the chance, would have extended all the rights possessed by criminal defendants to young people in the juvenile justice system.[245]

Despite these qualms, though, Fortas was proud of his work in *Gault*—so much so that he sent signed copies of the opinion to juvenile justice advocates across the country.[246] It was lauded contemporaneously by scholars and activists alike; as described by Sanford J. Fox, a law professor at Boston College, *Gault* marked the one of the three "great humanitarian effort[s]" in handling juvenile delinquents since the initiation of the juvenile justice system itself.[247] The Supreme Court, in subsequent terms, furthered its recognition of juveniles' due process rights, as was initiated by *Gault*. In *In re Winship*,[248] the court held that delinquency findings that are based on claims of

[243] Tanenhaus & Nystrom, *supra* note 147, at 351-52.
[244] Fortas, Memorandum for the Conference, No. 701, *In the Matter of Buddy Lynn Whittington*, *cited by* KALMAN, *supra* note 31, at 253. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Supreme Court held there is no such right to trial by jury for young people facing adjudication in juvenile court.
[245] KALMAN, *supra* note 31, at 253 (emphasis added). *See also* Tanenhaus & Nystrom, *supra* note 147, at 354 ("Fortas lobbied his fellow justices to secure as many procedural rights for children as possible. . . ."); MURPHY, *supra* note 31, at 533 ("[W]hile the court did not rule on the guarantee of an appeal from juvenile court hearings, or the free provision of a transcript of the proceedings for that purpose, it was clear that given time Fortas would provide those as well.").
[246] Tanenhaus & Nystrom, *supra* note 147, at 357.
[247] Fox, *supra* note 46, at 1187.
[248] 397 US 358, 368 (1970) ("We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, 'that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt.'"). *See also* Joanna S. Markman, In re Gault: *A Retrospective in 2007: Is It Working - Can It Work*, 9 BARRY L. REV. 123, 140 (2007); Feld, *supra* note 187, at 203–04.

criminal law violations must be proven beyond a reasonable doubt. In *Breed v. Jones*,[249] the court affirmed that Fifth Amendment protection against double jeopardy applies to juveniles in delinquency proceedings.

However, as indicated by Norman Dorsen (Gault's counsel in the Supreme Court), this revolution was desirable only so long as it "turn[ed] out to be [] benign." Importantly, reform had the potential to hurt, rather than harm. Fortas's legal realist outlook made him willing to mold the law to meet the ends he desired, as he thought these ends would better protect juveniles and ultimately improve society. What Fortas cared about were results, and in particular, how legal theory played out in practice. It remained to be seen, though, if the lives of juveniles and the system itself were actually improved by these measures. Just as the creation of juvenile courts during the Progressive Era increased the presence and power of the state in the lives of young people, so, too, could Fortas's solution to this problem have unintended consequences.

Juveniles, when granted procedural due process rights, were thrust into a system that was openly and unabashedly adversarial. With *parens patriae* dismissed as an ideal of the past, the juvenile justice system emerged as a formal court of law, presided over by juvenile court judges in their capacity as evaluator and punisher. This "fostered a convergence between the juvenile and criminal justice systems"[250] and led to "increased severity of delinquency sanctions, precipitated the transformation of the juvenile court into a 'wholly-owned subsidiary' of the criminal justice system, and legitimated the imposition of the punitive sentences."[251] Instead of being a provider

[249] 421 U.S. 519, 529 (1975) ("We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years."); *id.* at 531 ("We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing."). *See also* Feld, *supra* note 187, at 204; RYERSON, *supra* note 40, at 151.
[250] MURPHY, *supra* note 31, at 530–31.
[251] Feld, *supra* note 179, at 1451. *See also* FELD, *supra* note 177, at 107 ("By providing juveniles with most, but not all, criminal procedural safeguards, the Court ironically legitimated the imposition of more punitive sentences.").

of services and rehabilitation for young offenders, juvenile courts became where criminal behavior was proven and subsequently sanctioned; juveniles themselves, therefore, were simply young criminal defendants.[252] This was a profound declension from the original Progressive ideal, "obviat[ing] the juvenile court's rehabilitative agenda"[253] and ultimately forcing juveniles into a second-best version of criminal court.[254]

Culturally, the United States entered a "tough on crime" period following *Gault* and its progeny. According to Professor Feld, "[t]he confluence of guns, homicide and race provided the impetus for a political 'crack down' on youth crime generally and tougher juvenile justice waiver and sentencing policies."[255] Retributive legislation in the 1980s and the fear of "Super Predators" in the 1990s led to increased distrust and stigmatization of young offenders.[256] Empirically, the picture seemed equally bleak. One study from 1969 found that the procedural requirements articulated in *Gault* were often avoided or altogether ignored in actual practice.[257] In 1993, the American Bar Association published a report on the status of youth justice; in relevant part, the authors commented that "[m]any children go through the juvenile justice system without the benefit of legal counsel," and of those who do, many fail to provide "competent" representation.[258] A study conducted by David Duffee and Larry Siegel in 1971 found that, when juveniles were represented by counsel, they were actually *more likely* to be incarcerated than a juvenile who was

[252] Feld, *supra* note 187, at 205. *See also* FELD, *supra* note 177, at 107 ("As a consequence, the Court redefined delinquents as a subgroup of criminal defendants, rather than as a category of dependent children in need of services.").
[253] Feld, *supra* note 179, at 1493.
[254] Feld, *supra* note 187, at 253–54. *See, e.g.*, Feld, *supra* note 17, at 142 (arguing that, in Minnesota, "[T]he juvenile court has been effectively criminalized in that its current administrative assumptions and operations are virtually indistinguishable from those of adult criminal courts. At the same time, however, the procedures of the juvenile court often provide protections for juveniles less adequate than those afforded adult criminal defendants. As a result, juveniles receive the worst of both worlds, and the reasons for the very existence of a separate juvenile court are called into question.").
[255] Feld, *supra* note 187, at 213.
[256] Feld, *supra* note 179, at 1451; Feld, *supra* note 187, at 253–54.
[257] N. Lefstein et al., *In Search of Juvnile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969).
[258] A.B.A., AMERICA'S CHILDREN AT RISK 60 (1993); see also Feld, *supra* note 187, at 219–20.

not represented, which they attributed to the fact that, when a lawyer was present, authorities in the juvenile justice system perceived the defendant as "material for further processing," rather than as a child in need of services.[259] While in theory juveniles' rights to due process were recognized in *Gault*, in reality, this ideal appeared somewhat distant.

Ironically, this outcome was predicted by Justice Stewart in his *Gault* dissent. He mourned that "[t]he inflexible restrictions [of] the Constitution[, while] so wisely made applicable to adversary criminal trials[,] have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts."[260] He then retold the story of a boy who was tried in a New Jersey criminal court for murder. The boy was convicted, sentenced to death by hanging, and ultimately executed. He was twelve-years-old, and according to Justice Stewart, "[i]t was all very constitutional."[261] By leaving behind the view of juvenile courts as compassionate and parent-like protectors of children, Justice Stewart believed we were indelibly abandoning the system's potential for rehabilitating youth, as opposed to exclusively punishing. Children, instead of being reformed, would simply harden into life-long criminals.

Sadly, the story of Gerald Gault himself does not present us with much reason to hope. Gault, after his release from industrial school, served in the United States Army with a "spotless record."[262] In 2017, however, Gault was convicted on child sex abuse charges; having served over

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[259] David Duffee and Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, *in* JUVENILE JUSTICE PHILOSOPHY 394 (Frederic L. Faust & Paul J. Brantingham, eds., 1979) (attributing this trend to the fact that, when a lawyer was present, authorities in the juvenile justice system perceived the defendant as "material for further processing," rather than as a child in need of services).
[260] *In re Gault*, 387 U.S. 1, 79 (1967) (Stewart, J., dissenting).
[261] *Id.* at 79-80 (Stewart, J., dissenting), *citing State v. Guild*, 5 Halst. 163, 18 Am. Dec. 404 (N. J. Sup. Ct.)). *See also* Justice Black's concurrence, in which he affirms, "This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation. For this reason, there is much to be said for the position of my Brother STEWART that we should not pass on all these issues until they are more squarely presented. But since the majority of the Court chooses to decide all of these questions, I must either do the same or leave my views unexpressed on the important issues determined." *Id.* at 60 (Black, J., concurring).
[262] Dorsen, *supra* note 28, at 10.

a year in jail, he is now on probation and will remain until 2022.[263] His name will be on the sex offender registry for life.[264] Abe Fortas firmly believed that what Gerald needed when facing the juvenile courts were due process protections, in order to make the proceeding fair. What if, though, instead of focusing on the system, Fortas had focused on this child?

The case of which Gerald is namesake—*In re Gault*—provides one potential answer to an impossibly difficult question of how to handle deviant youth. Abe Fortas, along with a majority of the Warren Court, believed the solution was to be found in due process guarantees. If the juvenile justice system was intractably punitive, then juveniles must be given their constitutional rights in encounters with it. However, this was not the only path forward at this point of history. Instead of accepting the system's fate as adversarial, perhaps restorative, youth-centered reform could have been possible. Instead of discounting the Progressive Era's intentions as lost and unreachable, maybe the promise of their intentions could have been channeled to assist in juvenile reform. And, instead of denying the possibility, perhaps Fortas should have considered the prospect that our juvenile justice system *could* offer, not only adjudication, but social policy to youthful deviants.

Given the subsequent evolution of the juvenile justice system since 1967 and the reality of path dependency, these questions may today be irrelevant or obsolete. Perhaps Fortas was right; maybe, in fact, it was too late to turn back to the *parens patriae* ideal of the Progressive Era, and even in the mid-twentieth century, his chosen path forward was the best option for the future of juvenile justice. However, one must acknowledge that to advance this view is to advance the primacy of adversarial criminal justice, which may—or may not—correlate with the wellbeing of youth.

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[263] Gina Kim, Santa Maria man convicted of child sex abuse charges sentenced to probation, SANTA MARIA TIMES (April 27, 2017), https://santamariatimes.com/news/local/crime-and-courts/santa-maria-man-convicted-of-child-sex-abuse-charges-sentenced/article_241ff3a3-d2de-558e-b33d-6c164db689ee.html.
[264] *Id.*