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## REFLECTIONS ON *IN RE GAULT*

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Good morning. It's sort of a cliché—you receive a nice introduction, lower your eyes modestly, and hope somebody's taping it. I must say, partly because of what Randy<sup>1</sup> has himself done and the fact that I have known him for so many years since he joined our faculty, I am very touched and moved by what he said, and I hope my talk will not be a disappointment to you.

I have been asked to speak about the *Gault*<sup>2</sup> case. It was decided on May 15, 1967, almost forty years ago. It was argued in December 1966, and it was my first argument in the Supreme Court. I am going to speak a bit about the case substantively, and also, since I was asked to do so, say a few words about how I got into it—what happened at my end. And, since there aren't too many people around who were there, I'm going to speak very freely.

When *Gault* was argued, we were at the high point in the Warren Court. There were all kinds of cases of importance to the United States and its people being decided in new and exciting ways—*Baker v. Carr*,<sup>3</sup> *Griswold v. Connecticut*,<sup>4</sup> and many First Amendment issues.<sup>5</sup> The revolution in criminal justice was underway, as the Supreme Court was finally exercising its authority

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1. Randy Hertz, Professor of Clinical Law and Director, Clinical Advocacy Programs, New York University School of Law.

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

3. 369 U.S. 186 (1962).

4. 381 U.S. 479 (1965).

5. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

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.

The *Kent* case was decided by the Court in early 1966.<sup>6</sup> It held that a due process hearing was required before you could waive a juvenile from juvenile court to adult court to stand trial as a criminal. (Incidentally, I am very conscious of the fact that, since I am no longer active in the field, virtually everyone here knows a great deal more about the juvenile justice system today than I do.) *Kent* was decided under a District of Columbia statute.<sup>7</sup> There was broad language about fairness to juveniles in the opinion that led to the filings of cases like *Gault*. People in the field—lawyers in criminal defense, the few lawyers in juvenile justice, social workers, a few ministers—all felt that something was wrong and something had to be done about the system, but the public was generally unaware. Juveniles were getting the worst of both worlds. If they lost their case, they went to jail or to confinement for a long period of time. On the other hand, there were no established procedures whereby it was determined fairly and constitutionally whether or not they were in fact guilty. This is the context in which the *Gault* case began.

In regard to my own role, I came to NYU as a young law professor early in 1961 to head a small civil liberties group called the Arthur Garfield Hays Civil Liberties Program. In about 1964, because of all the things happening in the poverty field and the federal resuscitation of some interest in the rights of poor people, I raised money to start something known as the Project on Social Welfare Law at NYU—which involved not just welfare benefits, but included housing and employment rights, and the rights of young people.

One day, a package arrived for me from Phoenix, Arizona, sent by Amelia Lewis, the local lawyer in the *Gault* case. I happened to know Amelia Lewis. I had been elected to the ACLU board of directors perhaps a year or so before. I was not yet general counsel, much less president. In any event, she wrote, "Here is a case that may interest you." She thought of me because I had written amicus briefs in the *Gideon*<sup>8</sup> case and a number of other cases. Amelia and I got to know each other because her son and I were on the basketball team at Columbia University.

In any event, Amelia described the *Gault* case and what happened in the lower courts in Arizona. I didn't know much about juvenile justice, and at the time I was busy, so I gave the material to

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6. *Kent v. United States*, 383 U.S. 541 (1966).

7. D.C. CODE ANN. § 11-1553 (1965).

8. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Traute Mainzer, who worked with me at the Project on Social Welfare Law. And while she was not an expert on juvenile law either, she came back to my office a couple of days later and said, "Norman, this is very important. This raises a very serious issue in the area of juvenile justice." So, naturally, I looked at the papers, saw that she seemed right, and brought the case to the ACLU director, who decided to appeal to the United States Supreme Court.

While we were drafting a jurisdictional statement,<sup>9</sup> the Supreme Court granted certiorari in a case from Kentucky<sup>10</sup> that raised almost all the issues eventually raised in *Gault*. When we saw that certiorari was granted in that case, we decided to continue, but we also understood the usual practice—when the Supreme Court gets two or three cases raising the same issues, the Court often decides the first one, and then remands the other cases for reconsideration below, in light of the Court's decision in the first case.

And then an amazing thing happened. On June 14, 1966, the Supreme Court dismissed the case from Kentucky on the ground that certiorari was improvidently granted.<sup>11</sup> Six days later, on June 20, the Court noted probable jurisdiction in our case,<sup>12</sup> and *Gault* became the spearhead for the movement. The game was on.

Before I tell you what happened next, let me remind you of what had happened to Gerald Gault. He had been taken into custody as a young boy of fifteen by an officer of the juvenile court—a sheriff who was also the superintendent of the detention home for juveniles. No notice was given to his parents, or to any other relative or friend, and no notice was left at their home. A petition was never served on Gault, and he was not informed officially what it was that he was supposed to have done wrong. The sheriff did say at one point, although it is not clear exactly when, that Gault was being taken into custody for lewd phone calls made to a teacher in the school that Gault was attending. Of course, there were a lot of other boys in that school.<sup>13</sup>

In the juvenile proceeding there was no lawyer for Gault. There was no notice of the charge, and the only person who testified was the sheriff. There was no cross-examination of the sheriff, no transcript, and no right of the privilege against self-incrimination. The judge then put off the final hearing for a week or so, and they

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9. In those days, there were certain cases that went to the Supreme Court on appeal that the Court had to decide. The procedures were somewhat different, but a jurisdictional statement was similar to a petition for certiorari.

10. *Howard v. Kentucky*, 383 U.S. 924 (1966).

11. *Howard v. Kentucky*, 384 U.S. 995 (1966).

12. *In re Gault*, 384 U.S. 997 (1966).

13. The teacher said that it was a boy who made the call.

went back and did almost exactly the same thing at the subsequent hearing. At the end of it, Gerald was found to be a delinquent and was remanded to a juvenile detention facility until he reached the age of twenty-one. If he had been an adult, subject to the criminal justice system and the beneficiary of its constitutional protection, and was convicted of making a lewd phone call, the maximum sentence that he could have received was sixty days. Instead, he was put away at age fifteen for five and a half years.

After the Supreme Court noted probable jurisdiction, we turned to the brief. I realized my knowledge of juvenile law and criminal justice procedure was limited, and I solicited help from several colleagues. One of the main persons involved was Charles Ares, who later became the dean of Arizona Law School; he clerked for Justice Douglas, and taught criminal law. The other person, who was even more involved, was Daniel Rezneck—a former law clerk for Justice Brennan—who was in private practice in Washington. Dan is a brilliant guy, and he knew the criminal justice system and the cases in a way that I did not.

We began writing the brief over the summer. Right at the beginning, I was getting phone calls from people all over the country saying, "Do you realize how important this is? Have you ever had a case like this? Do you need help?" Maybe that's when I brought Chuck Ares and Dan Rezneck into the picture, and Amelia from Arizona gave us some advice. All summer I received these calls and I became more and more nervous about what was going on, and therefore worked as hard as I could with the excellent partnership—assistance would be understating their role—of the others.

We had one big strategic question. There were all the issues I have mentioned: no notice of charges, no transcript, no cross-examination, no right to call witnesses, no lawyer. It was a candy store full of constitutional issues. So, how do you write the brief? The obvious way is to set out the facts, explain each of the issues, and say why there were multiple violations of the Fourteenth Amendment. And we ended up doing this.

But before we did, Dan Rezneck suggested that this was not the way to go about the brief. He said that because we were probably going to lose some of those issues, we would be dispersing our ammunition. The thing to do, he argued, was to write a brief focusing on the right to counsel. *Gideon* had been decided, and Dan said that we should argue that this boy had a right to counsel, either retained, if it could be afforded, or appointed. (Gault came from a poor family and they could not have retained one.) Now why did Dan make that argument? He said, first, in view of *Gideon* we certainly will win. And second, if a juvenile gets a lawyer, the lawyer will know how to raise all the other issues. The lawyer will say, "Where is the notice of

charges? I want to put on a witness. I want to cross-examine your witness. I do not want my client to answer that question on the ground of the Fifth Amendment."

Well, that advice made some sense, but I rejected it because I felt that each of the constitutional issues was important. Imagine being in a proceeding that ends up in your being incarcerated for five and a half years, not having notice—written notice—of charges. That's not a minor thing. Or, imagine not being able to call a witness or cross-examine anyone else. I felt the case was strong enough that we could proceed on many fronts and have a good chance of winning, including on the right to a lawyer—so that's what we did.

There was still the issue of how to write the brief. When we looked at the Supreme Court, I felt that we had five votes. We had Justices Black and Douglas, Brennan and Fortas, and thought we had Chief Justice Warren. But, how do you frame the arguments? In a case like this, it is much better to win eight to one rather than five to four. You want to lock in the decision because people are going to be looking at ways of chipping it away.

So how do you write? What is the right constitutional approach? As most of you know, Justice Black long maintained in his full incorporation theory that every protection in the Bill of Rights also applied to proceedings under state law. So, if a person is accused of burglary by Pennsylvania, that person is entitled to every protection that the Bill of Rights provides for someone in a federal court.

A big problem was this was not a criminal case. Juvenile cases are not brought in a criminal format. Therefore, all the new protections of criminal trials are arguably irrelevant. We countered by stressing that what was happening to Gault (and all those accused of juvenile delinquency) was realistically the same as what happened to adults in criminal court. They were being charged, convicted, and sentenced. How could you say that it is not a criminal case? That's the essence of formalism. Justice Stewart took that view in his dissenting opinion. He said, "Well there are similarities, but the history of juvenile law is different, with treatment and the express goal of rehabilitation. We should not say that the Fourteenth Amendment applies to juvenile cases, even if it applies to state criminal cases."

The main argument against Justice Black's full incorporation theory came from Justice Harlan, who followed Justice Frankfurter's theory of fundamental fairness. Under this approach, individual protections of the Bill of Rights do not automatically apply in state cases. Instead, we look to see if a constitutionally fair system requires certain types of protections. We will not include protections from the Bill of Rights that apply to the federal government because

they are in the Bill of Rights; we are applying them only because they are "fundamental."

There was one other theoretical argument that ultimately prevailed, and that is selective incorporation of Bill of Rights protections by a route that Justice Brennan, more than anybody else, was developing. That is, we are not going to say that every provision of the Bill of Rights applies to the states, but that most of these protections will be incorporated because most are critical to a fair trial. Of course, you have to justify the criteria you use to decide which of the Bill of Rights provisions applies through the selective incorporation test.

Louis Henkin, a distinguished Columbia professor, now retired, wrote a scathing article attacking selective incorporation, saying that it was purely a convenience, a way to get around the fact that the Court will never accept full incorporation. He said there are no available criteria to decide which provisions of the Bill of Rights should apply and which should not.<sup>14</sup> Justice Brennan served on the Supreme Court of New Jersey. If he were here, he would smile and say, "Henkin had a point." And what Brennan did was come up with what I will call a second-best argument. We could not win on full incorporation, but why not take seventy or eighty percent of the Bill of Rights? He thought he knew how to pick out the ones that should be applied. It is a little like fundamental fairness with Harlan and Frankfurter, but not quite because you are applying the actual amendment and not a general standard of fairness. In any event, the opinion by Justice Fortas was essentially a selective incorporation opinion, although not so acknowledged.

This was my first oral argument. At that time, arguments in the Supreme Court were one hour on each side, and an hour is a long time—think how long you've been listening to me. I knew by then that this was very serious business. When you step back and think of all the tens of thousands, maybe hundreds of thousands, of kids who are accused of delinquency, and this case is largely going to determine the way in which they are tried, you do get rather nervous.

Before the oral argument, Dan Reznick and I went up to the lawyer's room in the Supreme Court for a few minutes, for me to compose myself, and for us to talk about a few last questions. There was a table in the middle of the room. I sat down at the table, and Dan Reznick started walking around the table and around my back faster and faster. I finally said, "Dan, please sit down. I'll never make the oral argument at this rate!" That image has stayed in my mind—of Dan's excitability right before the argument, which of course

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14. Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).

traced to his deep concern over the 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. This was in the mix of my thinking and gave me more enthusiasm and confidence.

I stepped into the courtroom, which I had done many times as a law clerk and otherwise. The place was packed to the gills. Every seat was taken. Some of you may know the name David Bazelon, who was Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit. He was an extremely liberal judge, possibly Brennan's closest personal friend, he had a special interest in juvenile law, and he was very senior.<sup>15</sup> Bazelon looked around and saw there wasn't an available seat, so he went off to the side to the press gallery, grabbed a chair, and put it down next to mine at the counsel table—which somewhat unnerved me, I must say. But there he was, and he was, of course, giving me psychological support.

The oral argument started. One thing I am proud of, and that Dan and I did together, was our careful statement of the facts and what happened in the lower court. I timed it. It took eleven minutes to set this out. Not one Justice interrupted, which would be unthinkable today. Today you would get ninety seconds, if you were lucky, and then someone on one side or another, for whatever reason, would jump in. Possibly Justices were more restrained in those days, possibly they knew they had sixty minutes, so they were not under the same pressure to raise their points.

At the end of the eleven minutes, Earl Warren leaned forward and said, "I'd like to ask you a question. This boy, has he been in trouble before?" I had already said that he was on probation, so I replied, "Well, Mr. Chief Justice,"—that's we called him in those days—"yes, Gerald was with another boy who apparently took somebody else's baseball glove, but—" And he interrupted, and said, "No, I'm not interested in that. Has he ever done anything like this, making these telephone calls?" I said "Absolutely not, Mr. Chief Justice." He leaned back, and the case was over, at least for him. If I had the nerve—I once did this in a lower court—I would have said, "If there are no more questions," and sat down.

The rest of the argument is mainly a blur. One of the two things I remember was that most of the time was consumed by a debate

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15. Nowadays, you can be chief judge of a circuit for only seven years, and the reason for that is Bazelon. Conservative members of Congress said, "How can we have a guy like that there for twenty years?" So they passed a law saying that a judge can be chief judge of a circuit only for seven years.

between Black and Harlan over full incorporation versus fundamental fairness.<sup>16</sup> I felt like a soldier in the trenches watching shells from both sides lobbing over him. The other detail I remember was that Justice Clark—Tom Clark, the father of Ramsey Clark<sup>17</sup>—was sitting next to Justice Brennan, who was whispering to him. Justice Clark was essentially a conservative person, but not conservative in a way that we now know conservatives can be. He was very big on the powers of the federal government, almost always voted with the liberals to regulate industry, and would vote in favor of strong antitrust enforcement. On the other hand, he was very anticommunist and pro law and order, and would vote with the more conservative members of the Court to deny constitutional claims of people who were accused of being security risks. About three-quarters of the way through my argument he said, "Mr. Dorsen, if we accept your contention, what is left of the juvenile justice system?" My answer was, "Mr. Justice Clark, the best part. The best part, of course, is rehabilitation and treatment, and all the rest." Things we now know have not happened.

Justice Fortas wrote the opinion of the Court. There was a concurring opinion by Black on full incorporation theory, and a concurring opinion by Harlan on fundamental fairness theory. Justice White wrote a short opinion essentially adopting Dan Reznick's view that Gault should be afforded a lawyer and the case remanded to consider the other constitutional issues. As noted earlier, Justice Stewart dissented.

What the Court eventually held was that there was a constitutional right to written notice of charges, to be represented by a lawyer, to have a lawyer appointed if you could not afford one, to assert the privilege against self-incrimination, and to have the right to swear witnesses and cross-examine witnesses of the other side. All of these were held to be constitutionally required protections. The Court did not comment on hearsay rules, on the burden of proof in juvenile cases, or whether there was a right to a transcript. Nor did the Court comment on whether there was a right to an appeal, and even whether a lower court judge had to state grounds for the decision. The Court deferred these matters for later cases. The Court was totally silent on whether there was a trial-by-jury requirement, whether a juvenile delinquency case should be a public proceeding under the Constitution, and whether there must be compulsory process for witnesses. The Court also did not decide anything about

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16. Eventually, it turned out that neither position prevailed. After a number of years, selective incorporation triumphed, in which some of the provisions in the Bill of Rights were incorporated and others were not.

17. Justice Clark later resigned from the Court when Ramsey became attorney general. He was replaced by Thurgood Marshall.



pre-judicial proceedings—Fourth Amendment rights of search and seizure, bail, and *Miranda*<sup>18</sup> warnings. Nor did the Court say anything about what happens after a juvenile is found to have committed the accused offense—about the right to a hearing on sentencing, or on the right of advocacy of treatment.

I teach a course at NYU Law School in judicial biography. Each student in the class picks a Supreme Court Justice from the twentieth century and prepares a packet of materials. The first part of the packet is on the life of the Justice—on upbringing and family, and what he did before he was on the Court. Then the student analyzes the Justice's cases, to see if connections can be made between the Justice's life and jurisprudence. There is a limitless opportunity here for discussion. Why do I interject that? Justice Stewart had been an Ohio judge before he went to the Sixth Circuit and then the Supreme Court. The 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. The theory was *parens patriae*—we are dealing with the young people as though they were children and we are not treating them as accused criminals. I think it was the only brief opposing our position. There were about four or five briefs by legal aid organizations and others on our side.

Justice Stewart basically followed what the Ohio judges said, and rejected every claim we made. He started by calling this an obscure case from Arizona, and of course it wasn't obscure afterwards. But I was struck, and the reason I mention my biography seminar is that Stewart undoubtedly knew all these judges, because he was himself a former judge in that system. To what extent did that affect his decision? We talked about that for a while in my seminar yesterday, although we came to no conclusive answer. Stewart is not as well-known a justice as some others, but he was a very intelligent and conscientious man. He sensed, I am sure they all did, that what was happening was very important and was going to transform juvenile justice substantially, and he was saying, "We shouldn't be doing this, this is too big a step for the Supreme Court." It's like *Miranda* or some of the other constitutional issues in the criminal field, and even more because we are dealing with the whole panoply of juvenile delinquency cases, not just one issue.

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18. *Miranda v. Arizona*, 384 U.S. 436 (1966).

What happened afterwards? First of all, what Laura<sup>19</sup> has said and what all of you know much better than I, there have been enormous disappointments in terms of the implementation of *Gault*. Soon after the case there were a few major Supreme Court decisions. I participated in two or three of them. One was the *Winship* case,<sup>20</sup> which held that the burden of proof is the same as in a criminal case. And then there was a question whether a jury trial was required in juvenile cases, and we lost that case.<sup>21</sup> But those were merely the highlights. What was happening on the ground is so much more important to juveniles, how the money is not there, and the defenders are stretched thin. Juveniles still often do not have lawyers. There is often pressure, psychological or what-not, for people to plea. So, in that sense, *Gault* has been a disappointment, but it would have been far worse if we had lost.

As for Gerald Gault, he was of course released. A year later he joined the army, and he spent a career there, rising to staff sergeant or master sergeant. Amelia Lewis one day showed me a picture of her with Gault twenty years later, Gault in his army uniform. Apparently he had a spotless record and was a very upstanding member of the community. Amelia was much older, probably in her sixties by the time *Gault* was decided. She was, at a time when there was not that many in Arizona, an ACLU cooperating attorney—she was part of the public interest world. There was no large public interest bar forty years ago. She was right there and she did wonderful things. We did not use her as much as we might have during the case, I now feel with a sense of contrition. The good news is that Amelia received recognition, including a major award from the American Bar Association. The awards were for *Gault*, but she did many other things, and it was just absolutely great that she got those awards. I saw her a couple of times when I went to Arizona for the ACLU. She was always in high spirits—and that is a good note to end on.<sup>22</sup>

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19. Laura Cohen, Clinical Professor of Law and Co-Director, Eric R. Neisser Public Interest Program, Rutgers School of Law-Newark.

20. *In re Winship*, 397 U.S. 358 (1970).

21. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

22. After the *Gault* decision, Dan Reznick and I wrote a law review article discussing the case in detail. Norman Dorsen & Daniel A. Reznick, *In Re Gault and the Future of Juvenile Law*, FAM. L.Q., December 1967, at 1.