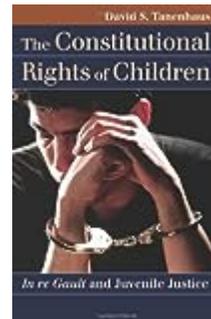




David Spinoza Tanenhaus. *The Constitutional Rights of Children: In re Gault and Juvenile Justice.* Lawrence: University Press of Kansas, 2011. xviii + 152 pp. \$29.95 (cloth), ISBN 978-0-7006-1813-2; \$16.95 (paper), ISBN 978-0-7006-1814-9.



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Published on H-Law (January, 2014)

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The Best, or Worst, of Both Worlds

Is a child's basic right that of liberty or custody? In 1967, Justice William Brennan posed this question during oral arguments in *In re Gault*. Nearly fifty years later, David S. Tanenhaus's elegant analysis of this interesting case demonstrates the legal and historical complexities underlying Justice Brennan's deceptively simple question. For the millions of young citizens who have found themselves enmeshed within the United States' juvenile justice system, the answers to Justice Brennan's question have carried life-altering consequences. For historians and legal scholars, exploring various responses in differing times and places reveals a great deal about Americans' fundamental beliefs and values. Since its inception the juvenile justice system has occupied an ambiguous space, meting out both social welfare and social discipline. But whether its dual nature provides minors with the best or worst of both worlds has remained a difficult question. Appearing at the turn of the twentieth century, juvenile courts were the product of social and legal reformers' insistence that children's natural state of dependency obligated the state to ensure

their protection; *parens patriae* was, for these reformers, a very broad mandate and they endowed the new juvenile courts with a deep reach into children's lives. By mid-century, however, it had become clear that minors' dependent status could hurt as well as help them, particularly since states took widely varying approaches in dispensing juvenile justice. The problem came into sharp focus when fifteen-year-old Arizonan Gerald Gault faced six years of incarceration in a brutal state institution for allegedly making a lewd phone call intended as a prank. As Tanenhaus demonstrates, *In re Gault* provided the U.S. Supreme Court a rare opportunity to address crucial questions about whether the protean character of the American juvenile justice system rendered children powerless to defend themselves against its own worst excesses. The Warren Court's ruling established that minors do indeed have a limited set of due process rights. Delivered just one week after *Miranda v. Arizona*, however, the opinion also signaled that the Court's "due process revolution" was rapidly approaching the end of its controversial run.

Tanenhaus divides his meticulous study into three sections. Part 1, "Desert Justice," contextualizes *In re Gault* within the troubled Arizona juvenile justice system of the mid-twentieth century. Under Arizona law juvenile court judges wielded such vast informal and discretionary powers they seemed to be operating in the Wild West of legend. Although Jerry Gault faced grave consequences, Judge Robert E. McGhee was free to run the proceedings and issue rulings exactly as he saw fit. Neither young Gault nor his parents had the benefit of counsel; the alleged victim did not appear in court; there was no transcript of the proceedings; there could be no appeal. The "front end" of Arizona's juvenile justice system appears even more alarming when viewed in conjunction with its "deep end" at Fort Grant, an old and isolated facility with such a vicious reputation it had been the subject of national headlines in 1952. Two juvenile court judges had attempted to hold Fort Grant's administrators in contempt for meting out harsh physical punishments, including beatings and forced barefoot marches, to the minors the judges sent to the desert "industrial school." But the Arizona Supreme Court ruled that the suit exceeded the judges' juridical boundaries, drawing a hard and fast line between the state's judicial and executive branches. Thus, Tanenhaus points out, although juvenile court judges had the power to send children to Fort Grant "for their own good," as it were, they had no control over what actually happened to the young inmates once they arrived there. Shocked and horrified by the sentence their child received for an offense that would have landed an adult no more than sixty days in jail and a fifty-dollar fine, Paul and Marjorie Gault hired attorney Amelia Lewis, who filed a habeas corpus petition charging that Judge McGhee had violated due process when he deprived them of the custody of their son. Although their petition was denied, the Gaults now had grounds to appeal to the Arizona Supreme Court. The opinion was written by Charles Bernstein who, in an interesting plot twist, was the former juvenile court judge who had battled Fort Grant's administrators thirteen years earlier. Bernstein concluded that both the juvenile court case and the habeas corpus hearing had met the minimal requirements of procedural due process. At this point the American Civil Liberties Union agreed to take *In re Gault* to the U. S. Supreme Court.

In part 2, "Legal Liberalism," Tanenhaus switches the focus from Arizona to the national scene in the 1960s. He argues that this decade saw a "new legal frontier" in testing whether a recently expanded welfare state now intruded too deeply into the private lives of its clien-

tele (p. 52). While some ACLU attorneys were eager to foray into this new area, an older generation, including the Union's eighty-two-year-old founder Roger Baldwin, adhered to the Progressive-Era vision of juvenile courts as vital links between social services and disadvantaged children. They worried the suit could jeopardize the courts' ability to help kids who needed them; by the 1960s American juvenile courts heard more than a million cases a year (p. 56). While *In re Gault* was being prepared, the U.S. Supreme Court heard its first juvenile justice case, *Kent v United States*, involving a District of Columbia juvenile court judge's transfer of a sixteen-year-old to the adult criminal justice system. The youth was convicted of breaking into and robbing a house and sentenced to thirty to ninety years in prison. Kent's attorneys asked the high court to consider the extent to which constitutional protections applied to juvenile court hearings. Writing for the Court's five-to-four majority, Justice Abe Fortas asserted that the juvenile court was obligated to provide Kent with procedural safeguards when considering whether to hand him over to the criminal court. Fortas then took up the question of whether the flexibility and informality that characterized the juvenile courts harmed children as much as it helped them. Famously, Fortas concluded that the system was fundamentally flawed, trapping children in "the worst of both worlds ... [where they received] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Tanenhaus points out that, although the Court's ruling applied only to the District of Columbia, Fortas's opinion had delineated the issues so that it "read like a prologue to a constitutional drama" (p. 58). Norman Dorsen, a rapidly rising star in constitutional law who took the lead in arguing *In re Gault*, could now focus the Court's attention on the due process rights belonging to Jerry Gault rather than to his parents. But Dorsen knew he must frame his arguments carefully in order to avoid dragging the case into the "whirlpool of the incorporation debate" engendered by the Warren Court's liberal rendering of the rights of the accused (p. 74). Fortunately for Dorsen, because specific due process protections had been addressed by the Arizona Supreme Court he could argue that it was appropriate for the nation's high court to review them. In a skillful parsing of the oral arguments, Tanenhaus follows Dorsen's careful maneuvering through the justices' minefield of questions as well as the difficulties faced by his opponent, Frank Parks. In crafting the Court's opinion Justice Fortas worked hard for the support of his fellow justices in delineating what specific due process rights attach in juvenile courts. He gained seven votes

for timely notice of charges and the right to counsel, but only six votes for protections against self-incrimination and the rights of confrontation and cross-examination; Tanhaus argues that the latter rights received less support because they presented bigger challenges to the juvenile court's role as a benevolent parent. Only Justice Potter Stewart refused to attach any due process requirements to juvenile courts.

Part 3, "Just Deserts," traces post-*Gault* developments as the increasingly conservative Burger, Rehnquist, and Roberts Courts built in only a limited way on the foundation that Justice Fortas laid down in *Gault*. One significant change occurred in 1974 with the enactment of a federal law that required states to stop incarcerating minors for noncriminal offenses or else lose federal funding. Importantly, however, Tanenhaus reminds us that, regardless of what specific rights the Court might derive for minors, the social welfare functions of juvenile courts ultimately remain dependent on states to support them. In the 1970s and 1980s widespread fears that kids were out of control sharply curtailed public support for "coddling" young offenders in favor of meting out "just deserts." As a result, in many states children ended up with limited due process rights and only very meager social welfare provision—the worst of both worlds.

My criticisms of this book are only very minor. Tanenhaus has constructed a lucid narrative that for the most part avoids distracting the reader from the nuanced and engaging story he tells. My own preference would have been to omit some of the biographical details of the many characters he introduces and use the space to expand the analysis of the historical and legal contexts in which juvenile courts evolved in the twentieth century. Similarly, although his concluding chapter addresses events up to the year 2009, Tanenhaus devotes much of his limited space walking through the Court's personnel changes rather than exploring the wider social and economic climates in which juvenile courts have functioned in recent years. (For example, one particularly disturbing development has been the increasing reliance in many states on private, for-profit companies in incarcerating minors, a number of which have been associated with both severe abuse and financial fraud.) While many of these topics have been addressed elsewhere, in works written by Tanenhaus and others, I nevertheless would have welcomed in this volume the author's further insights into the significance of Jerry Gault's case for the broader picture of American juvenile justice, both yesterday and today.

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Citation: Lynne Curry. Review of Tanenhaus, David Spinoza, *The Constitutional Rights of Children: In re Gault and Juvenile Justice*. H-Law, H-Net Reviews. January, 2014.

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