Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation

Mae C. Quinn[*]

ABSTRACT: This Essay advocates expansion of the right to and role of juvenile-defense counsel under the Fourteenth Amendment as articulated by the Supreme Court in In re Gault. *It makes this move in light of the evolution of juvenile-court practices over time and modern understandings of adolescent development principles. In doing so it takes a different approach than many advocates and academics who have called for greater reliance on the concepts established in* Gideon v. Wainwright *and its progeny, relating to the right to and role of counsel in adult-criminal proceedings. Instead it suggests that standards of representation for juveniles must move beyond the limited "critical stage" and "offense-focused" analyses used under right-to-counsel doctrines that have evolved under the Sixth Amendment for accused adults.*

Given that many facets of juvenile-court prosecutions allow for largely unchecked discretionary action by judges and court-related actors—both before and after adjudication—it rejects a trial-centered defense framework for effective juvenile representation. These ancillary parts of the process, too frequently below the law and lawyering radar, have the capacity to threaten youthful privacy, autonomy, and liberty more than a finding of guilt itself. And given what we now know about the capacities of young people to process information and make future-based decisions, the guiding hand of counsel is essential for the entire time a young person is involved with the juvenile justice system's web.

Accordingly, this Essay urges revisiting and re-envisioning the right and role of juvenile counsel under the Fourteenth Amendment rather than repeatedly mining the Sixth Amendment to establish a more robust

* Professor of Law, Washington University School of Law. Many thanks to the law student organizers of this important Symposium, including Kate Rahel, and their faculty advisor, Professor James Tomkovicz. I am also grateful to my research assistants Jessica Albert, Claire Botnick, John Laughlin, and Meredith Schlacter for their contributions to this project.

conception of effective juvenile-court representation. Armed with recent findings about adolescent development and competence, and in light of the unique nature of such proceedings as they have evolved over time, we should fundamentally reconsider lawyer competence within juvenile prosecutions to ensure greater justice—both procedural and substantive—for court-involved youth.

I. INTRODUCTION

For nearly fifty years, clients, courts, and commentators have grappled with the right to, and role of, juvenile-defense counsel in this country. When the Supreme Court decided *In re Gault* in 1967, it provided youths facing charges in juvenile court with a constitutional right to representation.[1] It also gave young people a range of additional constitutional trial rights, including timely notice of the charges, the ability to remain silent in the face of accusation, and to cross examine any witnesses against them.

The Court handed down *Gault* just four years after it decided *Gideon v. Wainwright*[2]—the landmark decision affording the right to counsel to adults accused of crimes. But it did not rely directly upon the Sixth Amendment to support its decision to extend the right of representation in juvenile prosecutions. Instead, unlike *Gideon*, *Gault* looked to the Fourteenth Amendment and the Due Process Clause for deciding when and what kind of representation juvenile courts must provide to youth facing accusations.

Over the years, scholars and others have both celebrated and lamented the Supreme Court's decision in *Gault*. It has been cited as an important part of the Warren Court's due process "revolution." But it has also been criticized as too stingy in the list of protections it provided to court-involved youth. Many detractors have argued that the Court should have more fully incorporated the Bill of Rights within juvenile-court proceedings—as was done for accused adults.

In particular, academics and advocates have faulted *Gault* for failing to tap into the Sixth Amendment and its protections. They have repeatedly urged greater reliance on criminal court right-to-counsel principles to more fully protect accused youth against substandard representation and serve as a bulwark against systemic injustice in our juvenile courts. This call has been renewed and reinvigorated in recent years—particularly given juvenile courts' ever expanding reach, more punitive treatment of youth, and disproportionately negative impact on communities of color.

But this Essay argues our current adult-criminal-justice system and its provision of appointed counsel are nothing to celebrate—much less replicate—in the juvenile-justice system. This is especially true if we are interested in reducing lived injustice for, and improving the life chances of, vulnerable youth of color. Instead, particularly given what we now know about the unique nature of both juveniles and juvenile prosecutions, this paper takes a different tack. Modern understandings of young people, their ability to understand juvenile-court processes, and our own adult understanding that juvenile proceedings are becoming ever more complex and less trial-focused in nature, militate in favor of a more modern and nuanced approach to the right and role of juvenile-defense counsel.

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1. *In re* Gault, 387 U.S. 1, 34–42 (1967).
2. Gideon v. Wainwright, 372 U.S. 335 (1963).

It is true that there has been some doctrinal expansion of the Sixth Amendment right to counsel in recent years, for instance, to encompass advice relating to collateral consequences of adult convictions.[3] But there has been backsliding too. More than this, adult-criminal representation has been largely analyzed as a charge-specific event that does not attach until the formal prosecutorial process has begun, and is to be afforded in thinly sliced portions consistent with those stages of the criminal process that are seen as "critical."

These doctrines are not sufficiently malleable or robust to provide for meaningful representation for young persons who find themselves involved in our more fluid and far-reaching juvenile-justice system. Their legal needs are more than event- or charge-specific. Indeed, in many states, juvenile cases continually unfold and grow over many years based upon the discretionary nature of juvenile-court processes. And a few juvenile prosecutions actually result in trial on the merits. Instead, youth are more frequently impacted by pretrial intake and detention processes, dispositional determinations, post-dispositional placement reviews, and aftercare requirements.[4] Thus a deeper and more holistic understanding of effective assistance of counsel—one that encompasses all phases of our modern juvenile-court process—is essential at this time.

Contrary to many advocates and scholars, this Essay argues that a return to the more pliable and potentially more expansive fundamental fairness principles espoused by the Fourteenth Amendment may be what is necessary to further infuse juvenile-court proceedings with meaningful legal and lawyering standards.

Part II begins by recounting how the right to counsel for juveniles was first established in *Gault* under the Fourteenth Amendment Due Process Clause. It notes that *Gault*, decided four years after *Gideon*, stood in stark contrast to *Gideon v. Wainwright*, which expressly extended Sixth Amendment right-to-counsel protections to accused adults in the state court system. At the time both were heralded as landmark decisions that would likely change justice systems around the country for the better.

Over the last five decades, *Gault* has been described as a great disappointment.[5] Given the expanding reach of our juvenile-court systems, the punishments being imposed in such venues, and their disproportionately negative impact on children of color, many wonder what *Gault* actually accomplished. In particular, juvenile advocates have repeatedly decried *Gault*'s seemingly restrictive Fourteenth Amendment framework and faulted the Court's failure to analyze the right to and role of juvenile-defense counsel through a *Gideon* Sixth Amendment prism. They

3. *See infra* Part IV.A.

4. *See infra* Part V.A.

5. *See infra* Part III.

claim such a reading, despite *Gault*'s clear Fourteenth Amendment basis, could have provided for improved protections and representation for youth—particularly poor youth of color. Legal scholarship has renewed and reenergized these arguments in recent years. Many are again calling for courts to revisit the juvenile right to counsel and infuse it with greater adult-like criminal protections as a way to improve the juvenile-justice system.

Part IV begins to respond to such calls by offering a somewhat different narrative about the right to criminal-defense counsel post-*Gideon*. It points out that *Gideon* itself has not delivered on its promises—as a matter of doctrine or in practice. Doctrinally, our right-to-counsel rules have provided very limited sources of protection. Both offense-specific rules and critical-stage analyses, now dominant rules under the Sixth Amendment, provide for little more than piece-meal protections.

As for court practices, front-page newspaper headlines inform the world that the right to counsel in American criminal courts is illusory at best.[6] Limited funds, overwhelming cases loads, modern "problem-solving" courts, and "debtors prison" practices are working to gut *Gideon*'s potential. And the thousands of young Black males publically lined up outside of our criminal courthouses each day demonstrate that the Sixth Amendment has done little to blunt racial bias in criminal proceedings.

Given this contemporary context, Part V goes on to challenge efforts to treat youth the same as adults under the Sixth Amendment. As noted, Sixth Amendment doctrine and procedures provide a bright-line, formalistic form of representation for accused adults. Such practices are fundamentally at odds with the more fluid and amorphous components of juvenile-court proceedings. Similarly, modern social-science data has demonstrated youthful defendants are far from older defendants in their capacity to comprehend and make long-term decisions—thus they require different legal representation and protection standards than those provided for adults.

In light of our criminal-justice system failings, as well as these differences between juvenile and criminal courts—in both the individuals being represented and the proceedings in which they find themselves—Part VI suggests that it might be time to revisit and reconsider the reach of the Fourteenth Amendment. It may be possible to further mine due process's depths to establish a more meaningful framework for the right to and role of counsel in juvenile-court proceedings. Returning to the Fourteenth Amendment analysis applied in *Gault*, contemporary evaluation of representational rights would take account of expert opinions and modern best practices.

Thus this Essay calls for an expansive constitutional conception of juvenile-defense lawyering—one that moves beyond the specific offense

6. *See infra* Part IV.B.

charged and narrowly framed stages of the process and looks to modern evolving juvenile-justice standards for guidance. That is, to counter the ways in which juvenile-court actors increasingly encroach upon the lives and futures of still evolving youthful defendants, the right and role of counsel must be similarly rich, responsive, and evolutionary.

II. *GAULT* VS. *GIDEON* DEFENSE COUNSEL: DIFFERENT CONSTITUTIONALLY

The facts of *In re Gault*[7] are so deeply entrenched in our collective legal recollection that they hardly need repeating. Young Gerald Gault, just fifteen years old, was summarily adjudicated for allegedly making "lewd" telephone calls to his neighbor, Mrs. Cook.[8] Without being served with a written factual basis for the charges, presented with testimony from the complainant, informed of the right to remain silent, or—most importantly for purposes of this Essay—provided with an attorney to defend him at trial, he was found to be delinquent by a local juvenile-court judge and committed to the Arizona State Industrial School until the age of twenty-one.[9]

Before the United States Supreme Court, Gault argued that his rights under the Fourteenth Amendment to the Constitution had been violated.[10] That is, Gault argued that he was denied due process of law because he was found guilty and removed from his home based on allegations of wrongdoing without being provided with notice of the charges, the right to confrontation and against self-incrimination, and the right to counsel.[11] The Court, in a landmark decision that took juvenile courts to task for their extreme informality and misguided paternalism,[12] held that Gault was entitled to far more under the Fourteenth Amendment.[13]

As for what "more" meant, the Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[14] Thus, when addressing testimonial rights and protections, the *Gault* Court expressly relied upon criminal cases that extended the Bill of Rights to the states by way of the Fourteenth Amendment.[15] Just as the right against self-incrimination under the Fifth Amendment was applicable to state criminal proceedings by way of the Fourteenth Amendment,[16] the *Gault* Court held

7. *In re* Gault, 387 U.S. 1 (1967).
8. *Id.* at 4–5.
9. *Id.* at 5–10.
10. *Id.* at 10–14.
11. *See generally id.*
12. *Id.* at 12–31.
13. *Id.* at 30–31.
14. *Id.* at 13.
15. *Id.* at 42–57.
16. *Id.* at 47.

the same rule applied to juveniles—even if juvenile-court proceedings might be technically characterized as civil rather than criminal.[17]

But somewhat surprisingly, in analyzing Gault's other challenges, the Court relied exclusively on the Fourteenth Amendment to extend relief.[18] Perhaps most strikingly, the Court applied this analysis to Gault's right to representation claim; it did not look to the Bill of Rights and the express provisions of the Sixth Amendment, as in criminal cases, to define the right to, and role of, counsel.[19] The Court relied solely upon the more malleable and less clearly established contours of the Due Process Clause to afford accused youthful offenders the protection of the "guiding hand of counsel."[20]

Notably, the Court did not expressly engage in the kind of due process balancing that emerged in later civil due process cases.[21] That test calls on courts to consider: (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest through existing procedures without additional protections; and (3) the government's interest in avoiding the safeguards in question.[22] Rather, in support of its mandate of juvenile-defense counsel, the *Gault* Court cited extensively to best practices recommended by experts who had been studying the issue, including federal executive branch agencies, such as the President's Crime Commission and federal Children's Bureau.[23] The Court also examined ways in which some states—although far less than a majority—had already begun the process of providing attorneys to accused youth.[24]

Thus the Court applied a somewhat similar approach to the one used in the past in criminal cases under the broad banner of due process fairness. In the infamous Scottsboro Boys case, where it first used the term "guiding hand of counsel" to describe what had been denied the youthful defendants facing the death penalty, the Court found a right to court-appointment

17. *Id.* at 49–50.

18. *See generally id.*

19. *Id.* at 34–42.

20. *Id.* at 36.

21. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); Mathews v. Eldridge, 424 U.S. 319 (1976); *see also* Turner v. Rogers, 131 S. Ct. 2507 (2011).

22. *Mathews*, 424 U.S. at 335.

23. *In re Gault*, 387 U.S. at 38–41; THE CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CHILDREN'S BUREAU LEGACY: ENSURING THE RIGHT TO CHILDHOOD 1952 (2012) (describing the Children's Bureau's issuance of juvenile justice standards in 1967, which were relied on by the Supreme Court in *Gault*); *see also* Benjamin E. Friedman, Note, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In Re Gault, 58 UCLA L. REV. DISCOURSE 165, 184 (2011) (discussing the impact of the President's Crime Commission recommendations on the *Gault* decision).

24. *In re Gault*, 387 U.S. at 37–38 (noting that in 1967, one-third of states already allowed for retained counsel, notice of the right to counsel, or appointment of counsel).

representation implicit in the Fourteenth Amendment.[25] But *Powell* was seen by many as being contextually specific, with the Court noting the special vulnerability of the defendants there—all were young, Black, uneducated, contending with a hostile forum, and facing grave consequences.[26] And *Powell* was also decided well before the 1963 case of *Gideon v. Wainwright*.

In *Gideon*, the Court cast aside its prior holding in *Betts v. Brady* that Bill of Rights protections did not extend to the states.[27] Instead, under *Gideon*, indigent accused persons in state court proceedings were granted the right to a free attorney under the Sixth Amendment.[28] Its pronouncement was broad and bold, declaring that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[29] Borrowing language from the Scottsboro Boys decision, the *Gideon* Court spoke about the defendant's need for the "guiding hand of counsel at every step in the proceedings against him," including to ascertain whether the indictment was properly filed, evaluate the evidence before trial, and engage in other pretrial strategizing.[30] This expansive and absolute proclamation was embraced by civil libertarians as launching a sea change in state criminal courts.

Yet at the time *Gault* was decided almost no one commented on its reliance on the Fourteenth Amendment rather than embracing *Gideon*'s Sixth Amendment framework. In fact, this point had not even been argued by Gault's counsel in his briefs to the Court.[31] Gault's attorney cited *Gideon* to support his claim that Gault should have been provided with representation under the Fourteenth Amendment.[32] But he did not cite to or rely on the Sixth Amendment as a basis for the right to counsel or as a

25. Powell v. Alabama, 287 U.S. 45, 69 (1932).

26. *See, e.g.*, Eugene Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 GEO. J. INT'L L. 919, 936 (2009) (highlighting the Court's apparently limiting statement that a right of counsel was needed in "a case such as this" (internal quotation marks omitted)); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2034 (2000) (describing the Scottsboro Boys case as "capital-specific"); *see also* Tom Watkins and Marlena Baldacci, *Posthumous Pardons in 1931 Scottsboro Boys Rape Cases*, CNN, (Nov. 21, 2013, 8:15 PM), http://www.cnn.com/2013/11/21/justice/alabama-scottsboro-pardons/.

27. Betts v. Brady, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

28. *Gideon*, 372 U.S. at 344.

29. *Id.*

30. *Id.* at 344–45 (quoting *Powell*, 287 U.S. at 68–69) (internal quotation marks omitted).

31. *See generally* Brief for Appellants, *In re* Gault, 387 U.S. 1 (1967) (No. 116), 1966 WL 100787.

32. *Id.* at 34–39.

means of interpreting it.[33] Nevertheless, *Gideon* and *Gault* were both seen as part of larger civil rights movement undertaken by the Warren Court.[34]

Indeed, some called the *Gault* decision "revolutionary."[35] Others claimed it required an entirely "new philosophy; a pragmatic realization that an infant is a citizen in his own right and entitled to the full benefit and protection of the Constitution."[36] But as practices and processes began to take shape on the ground, most came to see *Gault* as a pyrrhic victory. The deep reforms that many thought were presaged simply did not come to pass.

III. DECADES OF *GAULT* DISILLUSIONMENT AND DREAMS OF *GIDEON* DELIVERANCE

Criminologist Anthony Platt was one of the first commentators to identify *Gault*'s limited impact. Two years after it was handed down, Platt, along with collaborator Ruth Friedman, acknowledged that, in the decision's wake, several states had passed laws that provided for appointment of counsel in juvenile courts.[37] But they questioned whether *Gault*'s right to counsel had much meaning, particularly given the culture of the courts and continuing confusion about the role of the juvenile-defense attorney.[38]

In 1969, Platt repeated and expanded these criticisms as part of his historic book, *The Child Savers: The Invention of Delinquency*.[39] He noted how "strong ideological and organizational pressure from legislatures, judges, and legal commentators" still worked to "repress adversary tactics in juvenile

33. *See id.* In fact, the Sixth Amendment is nowhere referenced in the brief's Table of Authorities. *Id.* at vii.

34. *See, e.g.*, Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 897–98 (2013) (describing the implications of *Gideon* and *Gault*, together, as creating pressures around delivery of indigent defense representation); Linda S. Mullenix, *God, Metaprocedure, and Metarealism at Yale*, 87 MICH. L. REV. 1139, 1145 (1989) (describing how legal academia changes in reaction to *Gault* and *Gideon* as part of the due process revolution) (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988)); Robert E. Shepherd, Jr, *Still Seeking the Promise of* Gault*: Juveniles and the Right to Counsel*, 18 CRIM. JUST., Summer 2003, at 24–25 (framing *Gault* as part of the Warren Court's extended due process revolution).

35. *See* Murray M. Milton, *Post-*Gault: *A New Prospectus for the Juvenile Court,* 16 N.Y. L.F. 57, 59 (1970).

36. Milton, *supra* note 35, at 59; *see also* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1970) ("The eventual result [of *Gault*] will very likely be drastic changes in the design and function of juvenile courts."); Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 750 n. 36 (1973) (noting enthusiastic support of *Gault*).

37. Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1162–63 (1968).

38. *Id.* at 1176–84.

39. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 169 (1969) (in his chapter about the fate of the Progressive Era child-saving movement, Platt noted that "[a]lthough the public defender enjoys the contest of a trial, advocacy is nevertheless a limited commodity" in the juvenile courts he studied).

court."[40] And more than a decade after these first assessments, Platt warned that American juvenile courts had yet to evolve. Rather, they presented a "picture of increasing detention, widespread violations of due process, institutionalized racism and sexism, administrative chaos, and deteriorating social services."[41]

In the years that followed, others joined Platt's critiques.[42] Many derided the Court's failure to more fully embrace criminal-court protections for juveniles, including the Sixth Amendment framework for court-appointed counsel. One powerful wave of commentary at the end of the 1980s and beginning of the 1990s included the voices of Janet Ainsworth, Katherine Federle, Barry Feld, and Martin Guggenheim.[43] In light of *Gault*'s apparent failings, each called for abolition of the juvenile court system and referral of juvenile matters to the adult-criminal courts.[44] These calls were so persuasive that the American Bar Association considered this possibility at

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40. *Id.* at 165.

41. Tony Platt, *Lowering Expectations*, 88 YALE L.J. 1752, 1754 (1979) (reviewing ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978)). Practitioners in the courts agreed with Platt's observations; writing twenty years later, Irene Merker Rosenberg described her experience as a New York City juvenile defense attorney in the late 1960s and early 1970s in this way:

> The judges were by and large uncaring and ignorant of both the rudiments of due process and the basic principles of child development and psychology; the probation department had an overwhelming caseload; and the state facilities in which the minors were detained and to which they were committed were walking Eighth Amendment violations.

Irene Merker Rosenberg, Essay, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165.

42. *See, e.g.*, Irving R. Kaufman, Book Review, 90 HARV. L. REV. 1052, 1052 (1977) (reviewing PURSUING JUSTICE FOR THE CHILD (Margaret K. Rosenheim ed., 1976)) ("Of course, it is now beyond question that the juvenile justice system has worked badly."); *see also* Morales v. Turman, 326 F. Supp. 677 (E.D. Tex. 1971) (describing post-*Gault* conditions in Texas where youth were routinely denied counsel in juvenile court prosecutions and placed in substandard juvenile facilities away from home).

43. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989); *see also* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 723 (1991) ("Despite its transformation from a welfare agency to a criminal court, the juvenile court remains essentially unreformed."); Rosenberg, *supra* note 41, 174 n.66 (describing this second-wave post-*Gault* movement, including Martin Guggenheim's initial support for dismantling juvenile courts and then change of heart, and her own disagreement with this camp).

44. Interestingly, there was also a critical counter movement that bemoaned *Gault* for giving youth too much protection and infusing *Gault* juvenile proceedings with too much formal process. In light of this, its adherents also called for the court to be dismantled. *See* Michael Kennedy Burke, *This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027 (1995).

an annual meeting in 1992.[45] But in the end, obviously, juvenile-court jurisdiction was retained.

Nevertheless, over the last few years, lamentations and proposals for reform have been revived.[46] Advocates and academics have brought new energy and insights to the juvenile right-to-counsel conversation. Modern reformers offer these critiques both in light of the history of our juvenile courts and contemporary conditions encountered there.[47] While not necessarily calling for an end to such institutions, this third wave of post-*Gault* reformers has also pushed for infusing juvenile-court proceedings with greater right-to-counsel protections than presently exist. And nearly all root their positions in Sixth Amendment norms.

For example, Barbara Fedders has criticized the Supreme Court for not going far enough in *Gault* when it provided young people with a right to counsel under the Fourteenth Amendment.[48] Fedders argues that *Gault*'s failure to extend its holding beyond the trial process essentially granted watered down representational rights to juveniles as compared to adults.[49] "The scope of the right to counsel for adult criminal defendants," she claims, "is broader" than the scope of juveniles' rights.[50] In particular, she laments the fact that the *Gault* Court did not expressly address the application of Sixth Amendment "critical stage" doctrine, which will be discussed further below.[51]

Marsha Levick and Neha Desai have similarly catalogued the ways in which American youth still do not have "access to timely, zealous, and effective legal representation" in juvenile courts.[52] Calling for the provision of counsel throughout the juvenile-court process—including those stages

45. Rosenberg, *supra* note 41, at 164.

46. Not all modern critics have expressly acknowledged that they are joining a recurring debate that has unfolded in waves over the decades. But this author believes it is helpful for modern reform movements to take stock of similar efforts that have come before. *See* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57 (2009).

47. *See, e.g.*, Lauren Girard Adams et al., *What Difference Can a Quality Lawyer Make for a Child*, 38 LITIGATION 29, 31 (2011) ("In too many jurisdictions, children charged with delinquency offenses are pressured to waive counsel and plead guilty to charges without the benefit of a lawyer's assistance."); 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, 651–52 (1998) (describing how the 1990s ushered in a new era for juvenile courts with more public hearings, less confidentiality protections, greater numbers of youth transferred to adult court, and other "get tough" practices).

48. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Deliquency Representation*, 14 LEWIS & CLARK L. REV. 771, 782–85 (2010).

49. *Id.* at 783–84.

50. *Id.* at 784.

51. *Id.*

52. Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 175 (2007).

not mentioned by the *Gault* decision which related to trial alone—Levick and Desai argue that application of Sixth Amendment teachings would support such an expansive view of effective juvenile representation.[53] Also focusing on "critical stage" doctrine developed in our adult-criminal courts, Levick and Desai examine various parts of juvenile-court proceedings to show how an adult in the same situation would be entitled to representation under the Sixth Amendment.[54]

Finally, just last year, Robin Walker Sterling, a fellow participant in this Symposium, offered her own powerful denunciation of *Gault*.[55] Walker Sterling sees the Court's failure to provide youth with a Sixth Amendment right to counsel—rather than their current right to representation under the Fourteenth Amendment's fundamental fairness framework—as a lost opportunity.[56] Taking this road, she argues, "exacerbated disparate treatment of children of color in the juvenile justice system."[57] Indeed, she asserts that the racial disparity that occurs at various junctures throughout the juvenile process—including citation versus arrest determinations, intake and prosecutorial screening, and dispositional decisions—"can be laid at the feet of the *Gault* decision."[58]

It is hard to disagree with the concerns expressed by modern reformers about the ever-expanding reach of our juvenile courts—institutions which ensnare countless youth of color in this country each year, stigmatize them, demoralize them, impose restrictions on their lives and liberty, and ultimately work to reduce their life chances.[59] But borrowing from observations offered twenty years ago by Irene Rosenberg during the second wave of post-*Gault* lamentations—it appears "underlying the views" of many of today's juvenile-court reformers "at least unconsciously, is a somewhat idealized or romanticized vision of adult courts in which the criminal guarantees of the Bill of Rights are meaningfully enforced."[60]

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53. *Id.* at 183–90.

54. *Id.*

55. Robin Walker Sterling, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607, 608 (2013).

56. *Id.* at 614–15 ("*Gault*'s reliance on a fundamental fairness analysis based in Fourteenth Amendment due process analysis, instead of on a fundamental rights analysis based in the Bill of Rights, was a critical misstep.").

57. *Id.* at 660.

58. *Id.* at 662–76.

59. *See generally, e.g.*, Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013); Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285 (2008); Mae C. Quinn, *The Fallout from Our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 J. GENDER RACE & JUST. 541 (2012).

60. Rosenberg, *supra* note 41, at 173 (footnote omitted).

In fact, Supreme Court Sixth Amendment doctrine developed post-*Gideon* provides a rather anemic right to counsel as compared to *Gideon*'s rhetoric—one that is even less satisfying as practiced and applied in modern trial-level courts. Thus merely applying Sixth Amendment doctrine to juvenile cases may do more harm than good by artificially cabining the kind of nimble and creative youth advocacy that needs to be delivered in juvenile-court proceedings. And it is possible there is greater space in the Fourteenth Amendment to allow for the development of a right to, and role of, juvenile-defense counsel that is both age-appropriate and holistic in its contours.

IV. BEING CAREFUL ABOUT WHAT WE WISH FOR: *GIDEON*'S LACKLUSTER LEGACY

A. LIMITED AND LIMITING LEGAL DOCTRINES

Sixth Amendment rules that have developed post-*Gideon* hardly provide a robust rights-protecting framework. The right to appointed counsel applies only when a formal case is pending against a defendant and, even then, in limited, purportedly "critical," moments during the prosecution. Accordingly, the constitutional role of counsel has been conceptualized in a restricted way that requires meaningful representation at a few flash points in the process and not in a continual and comprehensive manner. These standards have been repeatedly criticized as being too narrow and formalistic—even for framing the right to, and role of, counsel in adult-criminal courts.

Nearly a decade after *Gideon* was decided, the Court clarified in *Kirby v. Illinois* that an individual does not have a right to appointed counsel under the Sixth Amendment until the adversary process has started.[61] Over time the Court has provided further guidance about what this means in the criminal-court context. For instance, a decade after *Kirby*, in *United States v. Gouveia*, the Court explained that the "formal criminal proceeding[]" marks the moment when the right to counsel attaches for adult defendants.[62] The following year it expanded on this view in *Moran v. Burbine*, noting that only after the government moves its focus from the investigation to accusation phase does a defendant require the assistance of a lawyer.[63] More recently, in *Rothgery v. Gillespie County*, the Court made clear that appointment of counsel is required for arraignment and bail hearings, even if a prosecutor is not present.[64] But the focus was still on the government's decision to formally prosecute and the institution of the adversarial process.[65]

61. Kirby v. Illinois, 406 U.S. 682, 688–91 (1972) (plurality decision).
62. United States v. Gouveia, 467 U.S. 180, 187 (1984).
63. Moran v. Burbine, 475 U.S. 412, 431–32 (1986).
64. Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).
65. *Id.*

Beyond the moment when the formal prosecution process begins, and during trial, adult-criminal defendants are entitled to representation only during other parts of the criminal process that are considered similarly "critical."[66] The Court has held that such stages include post-indictment interrogations,[67] post-indictment lineups,[68] preliminary hearings,[69] and sentencing proceedings.[70] To determine whether any other stage or phase of the criminal process is critical, trial courts have been directed to ask "whether potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[71] Courts have used this test to find that the right to counsel does not attach at numerous other parts of the criminal process, including certain kinds of motion litigation,[72] pre-sentence probation interviews,[73] and supervised release proceedings.[74]

The Sixth Amendment's right to representation is also limited to those cases in which the right has formally attached. This is because the Court has held that Sixth Amendment protections are charge- and offense-specific.[75] The state has been permitted, therefore, to gather information from a defendant about other matters that are not the subject of the pending case in which representation has been provided.[76] Thus, as many commentators have noted, taken together, these rules have largely worked to restrict the expansive right to, and role of, counsel suggested by the Sixth Amendment's own text and *Gideon*'s rhetoric.[77]

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66. *See, e.g.*, Bell v. Cone, 535 U.S. 685, 695–96 (2002) ("A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage' . . . ." (citing United States v. Cronic, 566 U.S. 648, 659 (1984))).

67. Massiah v. United States, 377 U.S. 201, 206 (1964).

68. United States v. Wade, 388 U.S. 218, 236–37 (1967).

69. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

70. Gardner v. Florida, 430 U.S. 349, 357–62 (1977); Mempa v. Rhay, 389 U.S. 128, 137 (1967).

71. United States v. Wade, 388 U.S. 218, 227 (1967).

72. *See, e.g.*, Van v. Jones, 475 F.3d 292 (6th Cir. 2007) (finding no right to counsel at a hearing where the court consolidated defendant's case with those of other defendants charged with involvement in the same crime); Runnels v. State, 896 P.2d 564 (Okla. Crim. App. 1995) (finding no right to counsel where motion for new trial not essential to preserving issues for appellate review).

73. *See, e.g.*, Stuart v. State, 180 P.3d 506 (Idaho Ct. App. 2007) (finding no right to counsel at a "routine presentence interview" because collecting largely publically available data differs from a psycho-sexual evaluation).

74. *See, e.g.*, United States v. Eskridge, 445 F.3d 930 (7th Cir. 2006) (finding no right to counsel at federal supervised release hearing).

75. McNeil v. Wisconsin, 501 U.S. 171 (1991).

76. *See id.* at 180–81.

77. *See, e.g.*, Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381 (2009); Michael J. Howe, Note, *Tomorrow's* Massiah*: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134 (2004).

For instance, Pamela Metzger, law professor and former public defender, has argued that the right to counsel contemplated by the bright-line "critical stage" analysis is largely out of step with norms of modern criminal-court proceedings.[78] Such a mechanistic test focusing on confrontational and adversarial features of the process overlooks too many parts of contemporary criminal prosecutions—which are far less trial focused than in days past—where a defendant can be prejudiced without the assistance of a trained lawyer.[79]

Others have offered similar critiques of the "charge focused" and "offense specific" doctrines that have emerged post-*Gideon*. Even former federal prosecutors have warned these rules are frequently applied in a rigid manner that fails to account for modern criminal law practices.[80] They overlook delays in formal charging decisions and other more subtle practices that work to keep government conduct off of the Sixth Amendment radar.[81] Allowing the prosecution to hide behind these doctrines, they argue, can work to prevent "fair and unfettered access" to a lawyer.[82]

It is true that in the last few years the Supreme Court has revisited the concept of effective assistance of counsel under the Sixth Amendment, in part acknowledging some of the critiques above. For instance, in 2010, it decided *Padilla v. Kentucky*, which expanded an attorney's professional duty to advise a client of the collateral civil immigration consequences of a guilty plea.[83] Failure to do so now may support an ineffectiveness claim.[84] And this past year in *Missouri v. Frye*[85] and *Lafler v. Cooper*,[86] the Court affirmatively enhanced defense-attorney effective assistance duties in the context of counseling around guilty pleas, even where immigration consequences were not present. This series of cases has caused some to suggest we have entered a new defendant-favoring era under the Sixth Amendment, one that is less

78. *See, e.g.*, Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003) ("The rhetoric of the Sixth Amendment is grand; the reality is grim.").

79. *See id.* at 1689; *see also In re* Carter, 848 A.2d 281, 298–99 (Vt. 2004) (citing to Metzger's work in finding that an interview by probation staff constitutes a time when the Sixth Amendment right to appointed counsel applies, even if it is a "non-adversarial" event).

80. James S. Montana, Jr. & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16 A.B.A. CRIM. JUST. MAG. 4 (2001), *available at* http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_16_2_montanta.html ("Two related principles—that the right only attaches at the commencement of formal judicial proceedings and that the right is "offense specific"—remained intact because the Supreme Court adopted and endorsed a formalistic approach to the Sixth Amendment.").

81. *Id.* at 9–10.

82. *Id.* at 5.

83. Padilla v. Kentucky, 130 S. Ct. 1473, 1486–87 (2010).

84. *Id.* at 1486.

85. Missouri v. Frye, 132 S. Ct. 1399 (2012).

86. Lafler v. Cooper, 132 S. Ct. 1376 (2012).

trial-centered and better rooted in the realities of current criminal-court practices.[87]

But these cases must also be considered in light of other contemporary decisions that work to restrict the right and role of defense counsel under the Sixth Amendment. For instance, in a different but related series of decisions, the Supreme Court recently diluted the defendant's right to counsel by suggesting *Miranda* warnings are enough to protect the defendant's Sixth Amendment right to counsel even after counsel has been appointed.[88] So while the government was previously precluded from using information gathered from a represented defendant about the subject of his pending case,[89] it may be able to do so now so long as the defendant has been reminded of his rights under *Miranda* and appears to waive those rights.[90]

Therefore, the actual doctrinal implications and impact of these new decisions, taken together, has yet to be seen.[91] And as was powerfully recounted by others at this symposium, as it stands now, day-to-day Sixth Amendment realities in our adult-criminal courts remain grim.

B. PROMISE IN PRACTICE: FIFTY YEARS OF FAULTY REPRESENTATION

Gideon, just as much as *Gault*, has traveled a troubled path, disappointing critics, criminal defendants, and communities along the way. The modern adult criminal-court system contributes to the degradation and lived injustice experienced by many indigent accused persons—particularly young men of color—even with Sixth Amendment jurisprudence in place. Thus, the criminal-justice system in this country is nothing to celebrate—or replicate—as we consider how to best protect and represent accused minority youth.[92]

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87. *See, e.g.*, Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1162–63 (2012) (asserting that *Lafler* and *Frye* "reject[ed] a cramped, formulistic view of the right to counsel" and will "have immediate and far-reaching implications").

88. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2090–91 (2009); *see also* Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010).

89. *See* Michigan v. Jackson, 475 U.S. 625, 635 (1986); Brewer v. Williams, 430 U.S. 387, 397–98 (1977).

90. *Montego*, 129 S. Ct. at 2091; *see also* Geoffrey M. Sweeney, Casenote, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforecement to Sidestep the Sixth Amendment*, 55 LOY. L. REV. 619 (2009).

91. *See* Jed Rakoff, Frye *and* Lafler*: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 27 (2012) ("[T]he long-term influence of these cases in subtly discouraging defense counsel from taking aggressive positions on behalf of their clients, or just from taking the time necessary to develop a full defense, may be to harm the defendants themselves.").

92. "In determining whether to abandon the juvenile courts because of the disparity in protection, it is also necessary to make a realistic assessment of the constitutional safeguards available in the criminal courts." Rosenberg, *supra* note 41, at 171.

In *Gideon*, the Supreme Court made clear that individual states needed to financially support indigent defense services.[93] Pointing out that "vast sums of money" were being spent "to establish machinery to try defendants accused of crime," including to hire prosecutors, the Court warned that defense lawyers need to be seen as similar "necessities, not luxuries."[94] Even as it expanded the Sixth Amendment right to counsel to misdemeanor cases in *Argersinger v. Hamlin*, the Court rejected the idea that claims of limited resources could be used to hinder delivery of defense services.[95] But fifty years later, states are still sidestepping *Gideon*'s mandate. Many defender programs are all but crumbling under the weight of ever increasing caseloads while watching their budgets diminish.

The *New York Times* reported on requests by the Missouri's public-defender system to turn away cases. The state's high court ruled in favor of the defender system, acknowledging offices did not have enough lawyers or money to handle all of the cases being assigned.[96] The Missouri Supreme Court suggested public defenders and judges should work together to ration representation resources.[97] But, of course, as noted forty years ago in *Argersinger*, purportedly minor matters—including juvenile prosecutions—can have major consequences.[98] In addition, when they began turning away cases consistent with the Court's order, Missouri public defenders suffered tremendous backlash.[99] The Governor withheld $1.4 million from the system—money that was already promised under a budget signed into law.[100]

Other defender systems are contending with similarly impossible burdens and political battles.[101] In the South, the Knox County Community Law Office in Tennessee, led by nationally respected director Mark

93. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

94. *Id.*

95. Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972).

96. Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES (Sept. 9, 2010), http://www.nytimes.com/2010/09/10/us/10defenders.html?pagewanted=all.

97. *See* State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 887 (Mo. 2009) (en banc).

98. *Argersinger*, 407 U.S. at 40.

99. Editorial Board, *Editorial: Piling On the Missouri Public Defender System*, ST. LOUIS POST-DISPATCH (Nov. 1, 2013, 6:00 AM), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-piling-on-the-missouri-public-defender-system/article_1abd346f-4301-566a-9ecf-aecca130bf61.html.

100. Mike Lear, *Public Defenders Warn of Hiring Freeze, Furloughs*, MISSOURINET (Oct. 24, 2013), http://www.missourinet.com/2013/10/24/public-defenders-warn-of-hiring-freeze-furloughs/. Public defender administrators confirmed a hiring freeze as of November 1, 2013, declaring, "It's a very serious situation. It's not good for our employees, it's not good for our clients and it won't be good for victims and local county jails that will have folks waiting in jail longer." *Id.*

101. In some states, the battle has involved simply creating a public defender system in the first instance, as in Michigan. *See* Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform*, ACLU (July 1, 2013, 4:55 PM), https://www.aclu.org/blog/criminal-law-reform/victory-michigan-turns-corner-public-defense-reform.

Stephens, brought a lawsuit in the hopes of addressing its expanding caseloads.[102] Rather than getting the relief sought, government officials are now focused on Knoxville defenders as being overpaid, because they spend $369 per case—more than the state average of $291.[103] Georgia,[104] Louisiana,[105] and Florida[106] are facing similar challenges as they represent more indigent defendants each year than professional standards allow.

Northern states are struggling too. Pennsylvania's Luzerne County Public Defender's Office sued government officials to try to access sufficient funds to handle its crushing caseload,[107] as have offices in New York.[108] Even the Federal Public Defender System has been forced to operate under impossible conditions. American Bar Association President James R. Silkenat has publically berated Congress for what it has done to federal defender funding, calling its actions an "embarrassment" in the face of our country's commitment to the "rule of law."[109] And New York's Chief Federal Defender, David Patton, has conceded that his staff is "outgunned" by the prosecution, where he has thirty-eight lawyers to defend against three-hundred Assistant United States Attorneys in his region.[110]

In some places, as part of the effort to reduce defender caseloads, piecemeal solutions of no-jail misdemeanor dockets and "problem-solving" courts are being offered as alternatives to adversarial criminal-court proceedings. In many such venues, defense attorneys are dispensed with as unnecessary. But, unfortunately, these "innovations" often result in the same kind of sanctions and liberty deprivations as traditional courts—albeit on a slower schedule—all without the benefit of legal counsel or counseling.

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102. Jamie Satterfield, *Cost for Concern: Knox County Spends Most in State on Indigent Legal Services*, KNOXNEWS.COM (Aug. 21, 2011, 4:00 AM), http://www.knoxnews.com/news/2011/aug/21/cost-for-concern/.

103. *Id.*

104. Emily Green, *State Slapped with Lawsuit over Indigent Defense*, S. CENTER FOR HUM. RTS. (Dec. 15, 2009), http://www.schr.org/action/resources/state_slapped_with_lawsuit_over_indigent_defense.

105. John Simerman, *Public Defender Sues New Orleans Traffic Court over Unpaid Fees*, TIMES-PICAYUNE (July 31, 2012, 10:30 PM), http://www.nola.com/crime/index.ssf/2012/07/public_defender_sues_new_orlea.html.

106. Jim Saunders, *Miami-Dade Public Defender Allowed to Pull out of Cases Because of Workload*, MIAMI HERALD (May 23, 2013), http://www.miamiherald.com/2013/05/23/3412933/miami-dade-public-defender-allowed.html.

107. John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, HUFFINGTON POST (June 16, 2012, 11:18 AM), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html.

108. Alysia Santo, *Still No Resolution in Public Defender Suit*, TIMES UNION (Sept. 25, 2013, 6:50 AM), www.timesunion.com/local/article/Still-no-resolution-in-public-defender-suit-4840560.php.

109. *ABA President Rails against Budget Cuts to Federal Public Defender Program*, A.B.A (Aug. 23, 2013, 12:27 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba_president_rails.html (internal quotation marks omitted).

110. *Id.*

For instance, the National Association of Criminal Defense Lawyers recently undertook The Misdemeanor Project to evaluate practices within low-level criminal courts across the country.[111] The Project focused on venues where *Argersinger* is still being interpreted—despite the Supreme Court's decision in *Alabama v. Shelton*[112]—to apply only when the defendant is sentenced to imprisonment. They found that while many defendants were not sent to jail on the spot, they left court with the threat of incarceration hanging over their head with suspended and other complex sentence agreements.[113] Yet they entered guilty pleas and received such deferred sentences without the assistance of appointed counsel.[114] And, of course, many of these defendants were left with significant collateral consequences from their convictions—consequences no lawyer ever told them about.[115]

Even in cases where fines are imposed on unrepresented poor persons, it is often just a matter of time before they are incarcerated for lack of payment in a manner that is reminiscent of debtors prisons of days past.[116] Similarly, in the thousands of "problem-solving" courts that have cropped up across the country incarceration is all too frequently delayed—not avoided.[117] These courts are popular because of their purportedly non-adversarial approaches.[118] Yet, participants may be jailed and otherwise deprived of their liberty at "review" hearings without an attorney to advocate for them.[119] It should come as no surprise, therefore, that in many states

111. *See* ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), *available at* http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf; *see also* Maureen Dimino, *Misdemeanor Courts are in Need of Repair*, 33 CHAMPION 36, June. 2009 (recounting her work as a NACDL court observer for the Misdemeanor Project).

112. Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that an indigent defendant should be provided with counsel even if a jail sentence will be suspended or probated).

113. BORUCHOWITZ, BRINK & DIMINO, *supra* note 112.

114. *Id.*; *see also* Dimino, *supra* note 111.

115. Dimino, *supra* note 111; *see also* Keith Rushing, *Virginia's System of Waiving Jail Time and Legal Counsel for Minor Offenses Boosts Deportations*, RTS. WORKING GROUP (Jan. 31, 2013, 11:08 AM), http://www.rightsworkinggroup.org/content/virginia%E2%80%99s-system-waiving-jail-time-and-legal-counsel-minor-offenses-boosts-deportations.

116. *See* Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companiesprofit.html; Alain Sherter, *As Economy Flails, Debtors' Prisons Thrive*, CBSNEWS.COM (April 5, 2013, 12:39 PM), http://www.cbsnews.com/news/as-economy-flails-debtors-prisons-thrive; Op-Ed., *Return of Debtors' Prisons*, N.Y. TIMES (July 13, 2012), http://www.nytimes.com/2012/07/ 14/opinion/return-of-debtors-prisons.html("[J]udges routinely jail people to make them pay fines even when they have no money to pay.").

117. *See, e.g.*, Quinn, *supra* note 46, at 66–67.

118. *Id.* at 59–62.

119. *Id.* at 65–67; *see also* Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L & SOC. CHANGE 37, 64 (2000).

where public defenders are least supported, like Missouri, "problem-solving" courts are supported most. [120]

Not only does the current system ensure that some of the country's most vulnerable citizens remain forever under the weight of poverty,[121] but most of those poor are young Black males.[122] As has been well documented by Michelle Alexander,[123] Paul Butler,[124] Bryan Stevenson,[125] and others in recent years, contemporary criminal courts maintain a de facto caste system that has historically disenfranchised and dehumanized persons of color.[126]

We need to look no further than the sidewalks that surround our criminal courts as they open for business each day to bear witness to the shaming and stigma that we heap onto thousands of young African-American men—many for the most trivial of alleged wrongdoings.[127] These

120. *See* Marshall Griffin, *Mary Russell to Become Chief Justice of Mo. Supreme Court Next Week*, ST. LOUIS PUB. RADIO (June 26, 2013, 6:38 PM), http://news.stlpublicradio.org/post/mary-russell-become-chief-justice-mo-supreme-court-next-week (noting the expansion of specialty courts as one of the top priorities for Missouri's court system); *Drug Court Facts*, MO. ASS'N OF DRUG CT. PROF., http://www.modrugcourts.org/showpage.php?page=5 (last visited May 20, 2014) (claiming Missouri drug courts "are a proven cost-effective method for diverting non-violent offenders from incarceration in prisons"); Missouri Sentencing Advisory Commission, WEBPAGE - PUBLIC INFORMATION, http://www.courts.mo.gov/page.jsp?id=250 (describing seven different kinds of problem-solving courts where "[t]he treatment team may"—or may not—include a defense attorney).

121. *See* Tracy Velázquez, *"Criminalizing" Poverty*, SPOTLIGHT ON POVERTY & OPPORTUNITY (Oct. 13, 2009), http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=5f13e0fe-a47d-4ce4-a945-187fc331e81d (noting that after poor people are released from incarceration, "they are relegated to poverty once again because of the punitive barriers society has set up to prevent their success").

122. *See* John Tierney, *Prison and the Poverty Trap*, N.Y. TIMES (Feb. 18, 2013), http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html (quoting a Harvard sociologist as declaring prison "has become a routine event for poor African-American men and their families, creating an enduring disadvantage at the very bottom of American society" (internal quotation marks omitted)).

123. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

124. *See generally* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).

125. *See* Eva Rodriguez, *Bryan Stevenson, the Man Behind the Juvenile Justice Cases Decided by the Supreme Court*, WASH. POST (June 25, 2012), http://articles.washingtonpost.com/2012-06-25/lifestyle/35459355_1_juvenile-justice-cases-violent-crime-juvenile-offenders (detailing Stevenson's work toward abolishing mandatory life imprisonment for juveniles, most of whom were "poor and kids of color").

126. *Cf.* Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 887–88 (2013) (describing the "race-and-crime" and "race in criminal justice" narratives arising during the Warren Court period); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 58–61 (2012) (comparing the impact of mass incarceration on various racial populations).

127. Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, July 2013, *available at* http://www.nacdl.org/Champion.aspx?id=29517 ("Racial disparity in the criminal justice system is a problem with which public defenders are intimately familiar. They see it every day in courthouses across the country where people of

images leave all viewers with a definite understanding of who is and who is not deserving of life and liberty in this country. They deliver messages far louder than the promises of *Gideon* that seem like whispers from decades ago. And for these individuals—while on public display and while they carry the long-term consequences of their court involvement—the Sixth Amendment provides little solace.[128]

V. FURTHER MAKING THE CASE FOR SEEING THINGS DIFFERENTLY: COURTS AND KIDS

It is against this backdrop that this Essay questions the call to adopt the same Sixth Amendment protections and practices in our nation's juvenile courts. It is true that *Gault* has yet to fully deliver; many youth still negotiate our juvenile-justice system without counsel, let alone quality representation. More than this, today's juvenile-court prosecutions—no different from those in our criminal courts—disproportionately impact minority youth, working to entangle them in the justice system while reducing their life chances. But adding further doctrinal restrictions and Sixth Amendment formalism around juvenile representation would not improve the situation nor result in greater support and empowerment of such youth. Turning to another broken system for solutions seems like no new way forward at all.

Instead, this Essay offers a different possible approach that focuses on the important differences between contemporary juvenile and criminal courts—and contemporary understandings of juveniles and adult defendants. Thus, rather than fight for kids to be treated like adults under *Gideon*, it may be time to try to breathe greater life into *Gault* to better inform the right to, and role of, defense counsel for youth. In doing so we might be able to finally establish a meaningful constitutional due process theory of juvenile representation—one that not only accounts for the entirety of the juvenile justice process with all of its "peculiar" features but also holds the system accountable.[129]

A. DISPOSITIONAL AND OTHER DIFFERENCES IN THE COURTS

In *Gault* the Court described two cornerstone components of American juvenile courts—rehabilitation interventions and protective informal procedures.[130] The Court did not strike down these features, but warned

color from low income communities line the crowded hallways, fill the courtroom benches, and sit at the defense table in staggering and disproportionate numbers.").

128. *See generally* Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2004); Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1 (1997); SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1 (2013).

129. *In re* Gault, 387 U.S. 1, 17 (1967).

130. *See id.* at 16–19.

that they can serve as double-edge swords if not managed appropriately.[131] Its decision to guarantee counsel in juvenile matters was intended not only to help youth defend against accusations, but to assist them to negotiate juvenile court's amorphous proceedings and ensure their regularity.[132] So while the Court limited its express findings to the adjudication hearing—leaving to another day the "pre-judicial stages" and "post-adjudicative . . . process"[133]—it was quite clear that meaningful defense representation was intended to serve as a check on the good intentions and broad discretion present in juvenile-court practices.[134]

If the juvenile process was "peculiar" and difficult for a child to fully comprehend in the 1960s, it has become labyrinthine today.[135] Many agree that juvenile-court proceedings are far more complex and complicated than adult-criminal-court matters.[136] The process may include intake proceedings where juveniles are interviewed by state actors, pre-prosecution efforts to refer children to treatment programs, detention hearings, complex guilty plea offers, dispositions that can result in long-term direct and indirect consequences, and certification proceedings that result in a child facing adult prosecution and a sentence of life behind bars.[137] Thus, juvenile-court features and practices are incredibly idiosyncratic and require deeply specialized knowledge to understand and meaningfully negotiate.[138]

Beyond this, the life cycle of a juvenile case is generally quite different from that of a criminal case. Given their often discretionary and indeterminate nature, the end of a case may be impossible to predict.[139] Youth may be required to return to juvenile court for multiple review

131. *Id.* at 15–21.

132. *Id.* at 36 ("The juvenile needs the assistance of counsel to . . . insist upon regularity of the proceedings . . . .") (footnote omitted).

133. *Id.* at 13; *cf.* Fedders, *supra* note 48, at 783 (lamenting the *Gault* Court's failure to address the right to juvenile-defense counsel beyond the trial context, but acknowledging that pre- and post-trial representation was "not at issue in the factual context of *Gault*").

134. *In re Gault*, 387 U.S. at 36.

135. *See* Mark Ells et al., *Unraveling the Labyrinth: A Proposed Revision of the Nebraska Juvenile Code*, 82 NEB. L. REV. 1126, 1130 (2004) (recounting how the Nebraska Supreme Court referred to one piece of juvenile court litigation as "labyrinthine") (quoting Wheeler v. D.D. (*In re* Interest of L.D.), 398 N.W.2d 91, 100 (Neb. 1986)).

136. *See, e.g.*, Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111 (2006).

137. *See* Sue Burrell, *Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations*, 16 U.C. DAVIS J. JUV. L. & POL'Y 314, 360–61 tbl. 3 (2012); *see also* Levick & Desai, *supra* note 52, at 184–91 (examining juvenile procedure in light of the Sixth Amendment).

138. *See generally* Burrell, *supra* note 137.

139. *See* Jeffrey K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399, 434–35 (1992) (describing how the indeterminancy in juvenile court dispositions leaves the court with great discretion to decide what kind of intervention to order and when to end the case); *see also* Levick & Desai, *supra* note 52, at 181 ("[J]uvenile court dispositions . . . are indeterminate . . . .").

hearings to see how they are doing on a rehabilitative path.[140] This is because, unlike adult-criminal courts, juvenile courts take jurisdiction over the *youth* before them: it is not so much a particular charge but the child herself who falls under the court's review. Thus a disposition may be modified or expanded to include any number of additional claims and concerns that arise during the course of the court having jurisdiction.[141] In such proceedings, the "phase" or "stage" of the process may become murky and difficult to define.

More than this, the extent to which social work, mental health, and substance abuse interventions are part of the fabric of the court and its workings also makes juvenile court different from criminal courts.[142] It is true that in the last twenty years more adult-criminal courts have attempted to become "problem-solving" through their use of treatment interventions instead of incarceration. But such practices remain discrete outliers in a system that centers on incarceration.[143] In fact, such "innovative" efforts have been compared to long-standing norms and practices in juvenile court.[144]

Contemporary Sixth Amendment rules do not account for these unusual and complex features of juvenile court. Nor are they—with their formalism and inflexibility—well-suited as standards for establishing the role of counsel in such proceedings. Therefore, assuming we do not dismantle the juvenile-court system in its entirety, which most of today's reformers do not advocate, it is clear that simply importing Sixth Amendment representational rules into today's juvenile proceedings will not adequately serve or protect youth.

B. DEVELOPMENTAL AND OTHER DISTINCTIONS IN DEFENDANTS

Not only are juvenile court proceedings different from those in our criminal courts, but those who stand accused are obviously quite different too. Referring to fifteen-year-old Gerald as a mere "boy" as it contrasted him to "adults" prosecuted in our criminal courts,[145] the *Gault* court was very much concerned with how juveniles' lack of sophistication impacts them in

140. Levick & Desai, *supra* note 52, at 181 ("Some jurisdictions provide for formal judicial review of a youth's progress in placement or on probation . . . .").

141. *See* Jim Moye, *Don't Tread on Me to Help Me: Does the District of Columbia Family Court Act of 2001 Violate Due Process by Extolling the "One Family, One Judge" Theory?*, 57 SMU L. REV. 1521, 1526 (2004).

142. Burrell, *supra* note 137, at 347–49 (discussing the need for appointed counsel to learn about the specific features of juvenile cases and issues specific to adolescents).

143. *See* Quinn, *supra* note 46.

144. *See* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 955–82 (2006) (discussing the history of juvenile courts and the creation of specialty juvenile courts); Nadav Zamir, *Problem-Solving Litigation for the Elderly: An Eventual Shift with a Cautionary Approach*, 25 J. C. R. & ECON. DEV. 1023, 1040–41 & n.104 (2011).

145. *In re* Gault, 387 U.S. 1, 27–29 (1967).

our courts.[146] Since then, the Court's intuition about the differences between young people and adult defendants has been scientifically proven and more concretely explored by youth advocates and academics.[147]

Over the last decade, findings in neuroscience, biology, and psychology have informed modern understandings of the capacity of young people.[148] We now know youth are less likely to comprehend legal jargon than adults.[149] They are also developmentally less able to resist pressures of others, comprehend consequences, and make future-oriented decisions.[150] These findings have been extensively cited by the Supreme Court in its most recent decisions relating to juveniles, holding that youth are categorically less culpable than adults.[151] The Court has now jurisprudentially embraced these differences in establishing different youth-centered rights and rules under both the Eighth and Fifth Amendments to the United States Constitution.[152]

VI. GOING BACK TO *GAULT*: TOWARDS A MODERN FOURTEENTH AMENDMENT FRAMEWORK

In light of the differences between criminal and juvenile courts—in both the people being represented and the proceedings in which they find themselves—it seems clear the doctrines and standards that have evolved under the Sixth Amendment are not sufficiently robust or nuanced to account for the needs of young people in our juvenile-justice system. Thus, as this Part will suggest, perhaps it is time to return to the Fourteenth Amendment to further mine its depths for a more meaningful framework for the right to, and role of, counsel in juvenile-court proceedings.

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146. *Id.* at 48 (noting that confessions obtained from children and adolescents need to be received with distrust).

147. *See, e.g.*, Jahaan Shaheed, *The "Amorphous Reasonable Attorney" Standard: A Checklist Approach to Ineffective Counsel in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 905, 911 (2011) ("To have the capacity to assist counsel, juveniles must receive information from their attorneys, properly comprehend this information, and understand the implications of the information that their attorneys provide.").

148. *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003).

149. *See* Ells et al., *supra* note 135, at 1130 (noting that youth have difficulty understanding *Miranda* warnings).

150. *See* Marty Beyer, *Immaturity, Culpability, & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27–29 (2000); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–58 (2003); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 810 (2005).

151. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); J.D.B. v. North Carolina, 131 S. Ct. 2394, 2405 (2011); Graham v. Florida, 130 S. Ct. 2011, 2031 (2010); Roper v. Simmons, 543 U.S. 551, 574 (2005).

152. *Miller*, 132 S. Ct. at 2469; *J.D.B.*, 131 S. Ct. at 2405; *Graham*, 130 S. Ct. at 2031; *Roper*, 543 U.S. at 574.

A. *PAST CALLS FOR A COHERENT FAIRNESS FRAMEWORK FOR JUVENILE-DEFENSE COUNSEL*

Over the years a few scholars and youth advocates have, in fact, called for further embrace of the Fourteenth Amendment right to counsel for youth. Their work started us down the road towards challenging the assumption that the right to counsel provided to children under the Fourteenth Amendment—while different—must necessarily be less protective or expansive than the right to counsel provided under the Sixth Amendment.[153]

For instance, in 2003, Emily Buss critiqued commentators who applied *Gault*'s teachings to create a "false dichotomy" of "adult rights or no rights."[154] As a result of this approach, she argued, youth have been provided with a "patchwork" of protections seeking to "split the difference" between these two views.[155] Her work begins to suggest something other than a simplistic, binary view around the right to, and role of, counsel for youth.[156] Thus, she called for "a coherent set of due process rights for children."[157]

Ellen Marrus offered a similar challenge in a series of articles that embraced *Gault*'s due process framework for juvenile representation.[158] She, too, suggested the Due Process Clause might be a better tool for taking account of the special attributes of juvenile-court proceedings and the children impacted by them.[159] As argued here, Marrus explained that juveniles need even more assistance than adult defendants as they make their way through the prosecutorial process.[160] Thus, competent representation should be defined differently for them.

But interestingly, both Buss and Marrus were writing before the Supreme Court's previously discussed doctrinal pronouncements, starting in 2005, which modified constitutional standards to take account of adolescent development theory in cases involving youth. Since that time, others have

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153. *Cf.* Fedders, *supra* note 48, at 775, 817–18 (claiming that "the right to counsel for children in delinquency proceedings is more limited in scope than the comparable adult right," yet also suggesting further embrace of the Fourteenth Amendment to resolve juvenile court ineffective assistance of counsel claims).

154. Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 43 (2003)

155. *Id.*

156. See *id.* at 43–44; *see also* Birckhead, *supra* note 59, at 1468 ("When the expansion of juveniles' rights is based solely on the Sixth Amendment, the most likely model will be an adult criminal court, thereby failing to shift the juvenile justice paradigm.").

157. Buss, *supra* note 154, at 43.

158. Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 298–300 (2003) [hereinafter Marrus, *Best Interests*]; Ellen Marrus, *Effective Assistance of Counsel in the Wonderland of "Kiddie Court"—Why the Queen of Hearts Trumps* Strickland, 39 CRIM. L. BULL. 393 (2003) [hereinafter Marrus, *Wonderland*].

159. *See* Marrus, *Best Interests*, *supra* note 157; Marrus, *Wonderland*, *supra* note 157.

160. *See generally* Marrus, *Best Interests*, *supra* note 158.

called for the application of these scientific findings to different features of the juvenile-justice system—including the right to and role of counsel.[161] But these calls, which seem to apply some hybrid of Sixth Amendment and Fourteenth Amendment doctrines, primarily focus on the specific questions of whether youth should be permitted to waive counsel,[162] and how to evaluate post hoc claims of ineffective assistance.[163] Thus, to date, a comprehensive due process framework for active juvenile-defense representation has not been formulated.

B. BACK TO BASICS: GAULT*'S EMBRACE OF EMERGING VIEWS AND VOICES*

In beginning to build a Fourteenth Amendment framework for the right to, and role of, juvenile-defense counsel, it is important to remember what *Gault* actually did—and did not—do. Contrary to the suggestions of some commentators,[164] it did not decide against a robust right to counsel for youth. It expressly left to another day the question of how early in the process counsel must enter and how long they must remain.[165] The Court also said the juvenile-court trial proceeding itself might be less formal than a more public criminal-court trial, thereby arguably limiting the application of other Bill of Rights protections to juvenile proceedings.[166] But it did not hold that the representation provided to young people should also be limited in its nature or quality.[167]

In fact, as noted earlier, the Court did not expressly apply the stringent Fourteenth Amendment balancing tests that it applied in other decisions that have sought to determine the role and scope of appointed counsel in

161. *See generally, e.g.*, Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529 (2012); *see also* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Signficance of Adolescent Developmental Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV. 125 (2007).

162. *See generally* Pokempner, *supra* note 161; Bishop & Farber, *supra* note 161; Friedman, *supra* note 22.

163. *See generally* Fedders, *supra* note 48; Shaheed, *supra* note 148.

164. *See, e.g.*, Fedders, *supra* note 48, at 783.

165. *See In re* Gault, 387 U.S. 1, 13 ("We do not even consider the entire process relating to juvenile 'delinquents.' . . . We consider only the problems presented to us by this case."); *id.* at 30–31 & n.48.

166. *See id.* at 25–26.

167. *Cf.* Betts v. Brady, 316 U.S. 455, 462 (1942) (referring to the Fourteenth Amendment fundamental fairness as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights"), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963); Yale Kamisar, *How Much Does It Really Matter Whether Courts Work Within the "Clearly Marked" Provisions of the Bill of Rights or with the "Generalities" of the Fourteenth Amendment?*, 18 J. CONTEMP. LEGAL ISSUES 513, 515–17 (2009) (stating that the "specific" provisions of the Bill of Rights are not as clear as judges purport them to be).

civil cases.[168] Rather, it looked more broadly and normatively to proposed best practices of contemporary knowledgeable experts.[169] This included federal executive branch agencies and committees.[170] It also cited to practices of outlying states that had employed greater youth-focused protections than others.[171]

It makes sense, therefore, to expand upon this analysis and examine these data points as we attempt to further develop a Fourteenth Amendment juvenile right-to-counsel doctrine beyond the trial context. Taking such evolving standards into account, new juvenile representational rules will emerge that evaluate what is fundamentally fair to youth in light of their limited capacities, their specific needs, and the nature of proceedings in which they may find themselves in conflict with the state.

C. CONTEMPORARY EXPERT AND STAKEHOLDER RECOMMENDATIONS

Reminiscent of *Gault*'s 1960s, intense investigations and interventions are taking place across the country today to highlight the shortcomings of juvenile-court practices in light of modern standards of decency. As already noted, leading scholar–practitioners have documented the ways in which young people are often harmed by limited right to representation rules and practices.[172] Their voices underscore the findings of the National Juvenile Defender Center ("NJDC"), one of the nation's most respected juvenile-justice organizations, which has shed light on juvenile-court practices that are out of step with modern norms.[173] NJDC has documented instances across the country where youth are not being provided with counsel.[174] Beyond this, its assessments show that even when they are, the culture of

168. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); *see also* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) ("Neither do we address what due process requires in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'" (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973))); *cf. id.* at 2523 (Thomas, J., dissenting) ("This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.").

169. *See In re Gault*, 387 U.S. at 37–41.

170. *Id.* at 38–39.

171. *Id.* at 37–38, 40–41.

172. *See, e.g.*, Fedders, *supra* note 48, at 795–98; Levick & Desai, *supra* note 52, at 187; Sterling, *supra* note 55, 660–75.

173. *See About Us*, NAT'L JUV. DEFENDER CENTER, http://www.njdc.info/about_us.php (last visited May 20, 2014) ("All children [are entitled to] legal representation that is client-centered, individualized, developmentally and age appropriate, and free of bias . . . .").

174. *See, e.g.*, PATRICIA PURITZ ET AL., GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2001), *available at* http://www.njdc.info/pdf/georgia.pdf; MARY ANN SCALI ET AL., NAT'L JUVENILE DEFENDER CTR., MISSOURI: JUSTICE RATIONED, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS (2013), *available at* http://www.njjn.org/uploads/digital-library/Missouri-Justice-Rationed-Assessment-of-Access-to-Counsel-NJDC-2013.pdf.

juvenile court in many places works to impede the work of juvenile-defense attorneys and undermine a youth's ability to receive meaningful advice and representation before, during, and after trial.[175]

Most recently NJDC studied the state of Missouri, where it discovered that approximately 60% of young people negotiate juvenile-court proceedings without representation, that court staff often discourage attorney representation, and that systemic barriers impede representation when it is provided.[176] In finding that such practices were fundamentally unfair and inconsistent with both the letter and spirit of *Gault*, NJDC offered specific recommendations for improvements in the days ahead—improvements which include an expanded, more holistic juvenile defense system that appoints lawyers as early as possible in the process, represents youth throughout the proceedings, and better accounts for the developmental stage of juveniles.[177]

Over the last five years, the United States Department of Justice ("DOJ") has both helped to fund the expert investigative efforts of NJDC,[178] and undertaken its own studies and investigations of juvenile-court systems across the country.[179] DOJ's work has yielded similar findings and calls for change. For instance, it has recently issued reports relating to the practices in two different jurisdictions—Meridian County, Mississippi and Memphis, Tennessee—which it found to be substandard in light of *Gault*'s fundamental fairness dictates.[180] Many of the deemed violations relate to inadequate representation for youth throughout the juvenile-court process, including in post-disposition probation proceedings.[181] In response to these

175. SCALI ET AL., *supra* note 174, at 52.

176. *Id.* at 34–38.

177. *Id.* at 55–58.

178. *See* Press Release, U.S. Dep't of Justice, Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor (Oct. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-ag-1156.html (describing over $1 million in grants awarded to the National Juvenile Defender Center "in order to improve juvenile indigent defense across the nation").

179. *Rights of Juveniles*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/spl/juveniles.php (describing its mission as including the protection of civil "rights of youth involved in the juvenile justice and detention systems" and announcing recent investigations of juvenile court systems) (last visited May 20, 2014).

180. Press Release, U.S. Dep't of Justice, Department of Justice Releases Investigative Findings on the Juvenile Court of Memphis and Shelby County, Tennessee (Apr. 26, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crt-540.html; Press Release, U.S. Dep't of Justice, Justice Department Releases Investigative Findings Showing Constitutional Rights of Children in Mississippi Being Violated (Aug. 10, 2012), *available at* http://www.justice.gov/opa/pr/2012/August/12-crt-993.html; *see also* Press Release, U.S. Dep't of Justice, Department of Justice Announces Investigation of the St. Louis County Family Court, (Nov. 18, 2013), *available at* http://www.justice.gov/opa/pr/2013/November/13-crt-1232.html.

181. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 48 (2012), *available at* http://www.justice.gov/crt/about/spl/documents/

findings, Memphis has established an entirely new system for the delivery of juvenile-court representation, which is intended to be expansive, developmentally appropriate, and holistic in its approaches.[182]

Thus, not unlike the reports and studies of bar associations, the President's Crime Commission, and federal Children's Bureau which served as the basis for many of the United States Supreme Court's findings in *Gault*,[183] today's juvenile justice think tanks and executive agencies are providing similar expert analyses and determinations that should help frame modern Fourteenth Amendment right-to-counsel norms in juvenile-court prosecutions. In fact, the shared concerns of the nation's leading defenders and prosecutors reflect the fact that we are in an historic moment—not unlike the moment that inspired the due process revolution of the 1960s.

D. MODEL STATE PRACTICES IN MODERN AMERICA

At the time *Gault* announced a juvenile right to defense counsel at trial, many states were already providing such a right. Indeed, the Court looked to these states as it determined how a modern juvenile court should operate. Similarly, today, a number of jurisdictions already appear to provide more expansive representation rights for juveniles than what was expressly set out in *Gault*.[184] These rules, which appear to better reflect developmental differences between youth and adults, and the differences in adult- and juvenile-court proceedings, may further serve to inform a modern Fourteenth Amendment framework relating to juvenile-defense counsel.[185]

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shelbycountyjuv_findingsrpt_4-26-12.pdf ("Against the backdrop of a court culture that frequently discourages an adversarial testing of facts for children and misinterprets the proper role of defense counsel, the Juvenile Defenders in JCMSC are challenged to meet ethical and professional obligations to their clients.").

182. *See* Press Release, Dep't of Justice, Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee (Dec. 18, 2012) *available at* http://www.justice.gov/opa/pr/2012/December/12-crt-1511.html (county agreed to "[e]stablish a dedicated juvenile defender unit in the public defender's office that will be independent of the court and have the structure and resources to provide independent, ethical, and zealous representation for children"); *see also* Lurene Kelley, *Juvenile Defense Reform in Shelby County Draws National Attention*, MEMPHIS LAW. 6, 6–7 (Nov. 2013), *available at* http://content.yudu.com/Library/A2kvoa/November2013/resources/8.htm (under the DOJ agreement, juvenile defenders in Memphis "must be highly specialized attorneys, skilled in dealing with families, knowledgeable in brain development and childhood trauma").

183. *See In re* Gault, 387 U.S. 1, 38–39 (1967) (citing to the work of the President's Crime Commission and Department of Health, Education, and Welfare's Children's Bureau as providing persuasive authority for the Court's determination that representation during a juvenile court trial is a constitutional right).

184. *See* Samuel M. Davis, RIGHTS OF JUVENILES 284–85 (2d ed. 2013) (describing how some jurisdictions have expanded the right to counsel for juveniles beyond what was described in specific factual circumstances presented in *Gault* and *Kent*).

185. *See* Fedders, *supra* note 48, at 782 (explaining that *Gault* failed to fully "consider how immaturity and cognitive underdevelopment would affect youths' ability to exercise their newly granted due-process rights" including the right to counsel).

For instance, several jurisdictions appear to require appointment of juvenile counsel before formal courtroom presentment. For example, both Iowa and Indiana expressly provide that the right to counsel attaches as early as pre-charge custodial interrogations—generally seen as an investigative stage of the prosecutor's work and excluded from the Sixth Amendment.[186] Missouri also provides that a child has the right to counsel during the informal adjustment interview process.[187] Here, too, at least in theory, this provides an acknowledgement that a child should benefit from the guiding hand of counsel even before formal charges are processed to help a child understand the consequences of agreeing to informal probation through diversion, and protect the child's right to silence and against self-incrimination.[188]

As any interrogation would appear to be covered under these more expansive rules, it does not appear that the protection of representation is limited under these rules to a singular allegation as defined by a singular charge under the criminal code. That is, the right that attaches appears to be more fluid and expansive than the Sixth Amendment's "charge-focused" or "offense-specific" analysis, which looks to the moment when a particular case has moved from the investigative stage to the formal prosecution to decide when the right to representation in that particular matter attaches.

While some states now provide for juvenile-defense representation earlier than might be required under the Sixth Amendment, others require such representation for a longer period time than that necessarily contemplated by the Sixth Amendment. For instance, in Kansas once an attorney is appointed, that individual is required to continue to represent the child for "all subsequent court hearings."[189] This appears to contemplate not only trial and dispositional hearings, but later proceedings such as probation review or other post-dispositional matters. In Massachusetts, similar practices recently have been developed, resulting in post-dispositional representation being provided to over 1400 youth since

186. *See, e.g.*, IOWA CODE ANN. § 232.11 (1)(a) (West 2006); Bridges v. State, 299 N.E.2d 616, 617 (Ind. 1973) (interpreting *Gault* as requiring "the assistance of counsel at any interrogation that may take place" in juvenile proceedings).

187. MO. ANN. R. § 113.03(a) (West 1999) ("If the juvenile and the juvenile's custodian appear at the informal adjustment conference without counsel, the juvenile officer shall inform them at the commencement of the conference of the right to counsel under Rule 116.01 and the right of the juvenile to remain silent."). Of course, what is on the books and what is practiced is sometimes quite different, as suggested in NJDC's Assessment of Missouri's Juvenile Courts. *See* SCALI ET AL., *supra* note 174, at 17. But as drafted Missouri's Juvenile Court Rule 113.03 does contemplate an expansive and robust right to representation—even before charges have been formally lodged.

188. *See* MO. ANN. R. § 113.03 (a) (West 1999).

189. KAN. STAT. ANN. § 38-2306 (b) (West 2008) ("An attorney appointed for a juvenile shall continue to represent the juvenile at all subsequent court hearings . . . including appellate proceedings, unless relieved by the court upon a showing of good cause. . . .").

October, 2011.[190] This extended duration of juvenile representation is consistent with best practices as outlined by the National Juvenile Defender Center,[191] Models for Change,[192] and other modern juvenile-justice experts.[193]

Indeed, rather than adopting the kind of "critical stage" analysis that has developed under the Sixth Amendment that myopically hones in on particular phases of the process, some state statutory schemes embrace a less technical and more holistic view of representation once the right attaches for juveniles. Several states considered relatively conservative when it comes to the rights of criminal defendants provide more robust representational rights for accused youth. Florida,[194] Georgia,[195] and Louisiana[196] all provide youth with representation at "all stages" of the juvenile proceeding—without modification relating to the kind or significance of the stage.

E. SOME FURTHER IMPLICATIONS: JUVENILE DEFENSE BEYOND OFFENSE

Taken together, these authorities suggest at least a rough sketch for the way forward as we establish a uniquely juvenile-court-focused Fourteenth Amendment framework for the right to, and role of, defense counsel. Contrary to concerns expressed in the past, such fundamental-fairness representational principles would likely protect vulnerable young people—in juvenile court's unique proceedings—even more than their adult counterparts. By way of example, this can be seen in the case of a youth who has been charged with one crime, appointed counsel, and then becomes a person of interest in conjunction with a second crime—unfortunately a

190. NAT'L JUVENILE DEFENDER CTR., ADDRESSING THE LEGAL NEEDS OF YOUTH AFTER DISPOSITION 2 (2013), *available at* http://njdc.info/pdf/rcp_innovations/Post_Dispo_-_Inno_Brief_2013.pdf.

191. NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS 127 (2012) *available at* www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf.

192. *Strategic Innovations: Efforts to Improve Juvenile Indigent Defense System Policies or Practices*, MODELS FOR CHANGE, http://www.modelsforchange.net/about/Action-networks/Strategic-Innovations.html (last visited June 3, 2014) ("Without competent counsel at every stage of the legal process, including post-disposition, youth may be deprived of fundamental legal protections, and needlessly suffer any number of serious and lifelong consequences attendant to juvenile adjudications.").

193. *See, e.g.*, Sandra Simkins, Marty Beyer & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 28 WASH. U. J.L. & POL'Y 241 (2012).

194. FLA. STAT. ANN. § 8.165(a) (West 2008 & Supp. 2014) (counsel to be provided "at each stage of the proceeding"); *see also* State v. T.G., 800 So. 2d 204, 210 (Fla. 2001) (reiterating right to counsel and each stage and enhanced protections against waiver of juvenile-defense counsel as compared to criminal defense counsel).

195. GA. CODE ANN. § 15-11-6 (b) (West 2007) (right to counsel applies to "all stages of any proceedings alleging delinquency").

196. LA. CHILD. CODE ANN. Art. 809(a) (2004 & Supp. 2014) ("At every stage of proceedings under this Title, the accused child shall be entitled to the assistance of counsel at state expense.").

scenario that presents itself with some frequency in both juvenile and criminal courts.

Under standard Sixth Amendment principles a child would not necessarily have a right to appointed counsel in conjunction with the investigation of a second crime.[197] Therefore, if adult-criminal court rules apply, law enforcement might be permitted to interrogate that youth and take other actions in pursuit of charging them in the second case—all without conferring with the juvenile-defense attorney who was appointed in conjunction with the first charge.

But as discussed, modern evolving standards demand special concern for children as a class based upon the determination that they are less developed than adults. Moreover, our courts seek to treat young people as individuals, in light of all of their behaviors and needs, when determining the best rehabilitative course. Thus, under such a framework—one supported by the calls of leading experts for a more meaningful, holistic, and age-appropriate representation for youth—the second crime should not be carved out as a separate matter for representation purposes.[198] Instead, in effectively representing the whole child, juvenile-defense counsel should be seen as the attorney of record for the subsequent matter so as to preclude police interrogation and otherwise defend the child's interests during the processing of that case. Accordingly, counsel's appointment should be thought of as child-specific, rather than charge-specific under the Fourteenth Amendment.[199]

Since the scope of representation would be assessed in light of the needs of a reasonable child in a modern society, there might be further implications for the role of juvenile-defense counsel under the Due Process Clause. For example, while adult defendants are presumed capable of identifying and raising constitutional claims relating to the system in which they find themselves, the same cannot be said for youth. Thus, to effectively serve as juvenile-defense counsel under the Fourteenth Amendment, such attorneys might also be expected to engage in systemic litigation whenever necessary to protect their clients as a class. Raising detention center

197. McNeil v. Wisconsin, 501 U.S. 171, 177–80 (1991) (holding a defendant's invocation of his Sixth Amendment right to counsel in on proceeding does not constitute a Fifth Amendment invocation for all other crimes); *see also, e.g.*, State v. Wilson, 826 S.W.2d 79 (Mo. Ct. App. 1992) (finding there was no Sixth Amendment violation when police questioned a youth, who was awaiting appointment of an attorney for his criminal, because his juvenile defense attorney had been an attorney for "a different matter"—the adult certification).

198. Thus, not only would the *McNeil* rule be abrogated for court-involved youth, but *Montejo* would be similarly inapplicable for juveniles. *See supra* note 90, 200 and accompanying text.

199. *Cf.* Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381 (2009) (suggesting an attorney-client centered Sixth Amendment right in the context of adult criminal proceedings, rather than an offense-specific right).

conditions[200] and disproportionate minority contact concerns[201] could easily be seen as essential to preserving fundamental fairness for young people in conflict with the law—while clearly beyond the scope of Sixth Amendment counsel.[202] In this way, juvenile-defense counsel would also be charged with holding the system accountable.

VII. CONCLUSION

On this fiftieth anniversary of *Gideon v. Wainwright*, it is time to rethink the future of the right to, and role of, counsel in this country—taking full account of *Gideon*'s unfilled promises and failings. This Essay has specifically called for revisiting and re-envisioning the right, and role of, juvenile counsel. It suggests that we might return to *In re Gault* and the Fourteenth Amendment to establish a more meaningful and robust conception of effective juvenile-court representation, rather than repeatedly looking to *Gideon* and Sixth Amendment doctrine for guidance as has been suggested for decades by commentators.

When leading juvenile-defender groups—and the nation's top prosecutor—both agree that juveniles are not sufficiently represented in our courts, we have clearly arrived at another historic moment. These views, as was the case during the due process revolution of the 1960's, should inform contemporary fundamental-fairness analyses. Armed with recent findings about adolescent development and competence, and in light of the unique nature of such proceedings as they have evolved over time, we should reconsider lawyer competence within juvenile prosecutions to ensure greater justice for court-involved youth. To meaningfully counter the ways in which juvenile court actors increasingly encroach upon the lives and futures of still-evolving youthful defendants—most of whom are youth of color—the right and role of juvenile-defense counsel under the Fourteenth Amendment must be similarly rich, responsive, and evolutionary.

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200. *See, e.g.*, CTR. FOR CHILDREN'S LAW & POLICY, FACT SHEET: INDEPENDENT MONITORING SYSTEMS FOR JUVENILE FACILITIES (2012), *available at* http://www.cclp.org/documents/Conditions/Fact%20Sheet%20%20Independent%20Monitoring%20Systems%20for%20Juvenile%20Facilities.pdf (recommending independent monitors for juvenile detention centers to prevent neglect and abuse, and highlighting the Public Defender Service for the District of Columbia as a model program serving in such a role for its clients); Sandra Simkins, Marty Beyer & Lisa M. Geis, *supra* note 192 (urging defenders to represent youth throughout disposition so that conditions of confinement issues can be discovered and addressed).

201. *See, e.g.*, Henning, *supra* note 59; Moriarty, *supra* note 59; *see also* OFFICE OF THE JUVENILE DEFENDER, ADDRESSING DISPROPORTIONATE MINORITY CONTACT (DMC) IN JUVENILE DELINQUENCY COURT (2011), *available at* http://www.ncids.org/JuvenileDefender/Guides/AddressingMinorityContact.pdf (instructing North Carolina juvenile defenders to engage in zealous advocacy around the issue of disproportionate minority representation).

202. I seek to further explore this component of an expanded role for juvenile-defense counsel, including proposing special next friend standing rules, in a work in progress currently entitled: *(Im)mobilizing Youth*.