

**Celebrating *Gault*, and the Constitutional Rights of Children—50 Years Later...**

by Lorraine M. Augostini

On May 15, 1967, the United States Supreme Court proclaimed that children are persons under the Constitution and, therefore, entitled to certain due process protections, and that “the condition of being a boy” does not justify denying children these “fundamental requirements of due process.”<sup>1</sup> By providing children facing a potential loss of liberty in juvenile court with the right to notice, right to counsel, right to confrontation and cross-examination, and the right against self-incrimination, the *Gault* decision represented a critical shift in American jurisprudence regarding the treatment of juveniles in the system of justice.

As Amelia Lewis sat in her law office in Youngstown, Arizona, on a hot August day in 1964, the telephone rang.<sup>2</sup> “I have a man here who needs a lawyer for his son,” said a colleague. “He wants me to tell you that he’s got money to pay.”<sup>3</sup>

An hour later, the man and his wife walked into Lewis’s office. After handing Lewis \$100 in crumpled dollar bills, the man and his wife proceeded to tell her the unbelievable story of their 15-year-old son, Jerry, who had been committed to the state industrial school for boys, until the age of 21, for something adolescent boys had been accused of doing for time immemorial: making a mildly lewd telephone call.<sup>4</sup>

The events described by the Gaults led to one of the most significant Supreme Court cases of the last half-century, *In Re Gault*,<sup>5</sup> which changed the landscape of juvenile justice and “cement[ed] in American law the idea that children have constitutional rights.”<sup>6</sup> May 15 marked the 50<sup>th</sup> anniversary of this seminal decision.

When the Gaults shared their story that long-ago day, Lewis was outraged.<sup>7</sup> She immediately began researching ways to reopen young Jerry’s case. In doing so, she discovered that Arizona, like many other states at that time, did not confer the right of appeal on juveniles.<sup>8</sup>

Thinking creatively, Lewis decided to challenge the legality of Jerry’s confinement by filing a petition for *habeas corpus*, the “great writ of liberty.”<sup>9</sup> Though Lewis could not secure the boy’s immediate release, the *habeas corpus* proceeding afforded her a hearing, during which she could develop a record.<sup>10</sup> In juvenile courts at that time, proceedings were not recorded or otherwise preserved; therefore, the opportunity to recreate the trial record was critical if Lewis hoped to achieve appellate review in Arizona or ultimately take her client’s case to the U.S. Supreme Court.<sup>11</sup>

The superior court gave short shrift to Lewis’s arguments on behalf of Jerry Gault. Lewis then filed an appeal with the Arizona Supreme Court.<sup>12</sup> There, she challenged the court’s decision, the denial of *habeas corpus* and the very “constitutionality of Arizona’s juvenile court law.”<sup>13</sup> The state’s high court rejected Lewis’s arguments, just as the lower court did previously.<sup>14</sup>

Undeterred, Lewis placed a call to her friend and colleague Melvin Wulf, national legal director of the American Civil Liberties Union.<sup>15</sup> Lewis implored Wulf to take the case, arguing that “this obscure case from Arizona raise[s] federal constitutional questions that only the U.S. Supreme Court [can] decide.”<sup>16</sup>

She was right.

Lewis did not argue *Gault* before the U.S. Supreme Court. Characteristically modest, she considered it an act of malpractice not to engage a constitutional law professor to make the

argument.<sup>17</sup> But Justice Abe Fortas, who wrote the majority opinion in *Gault*,<sup>18</sup> later told Lewis's son, Peter, "She needn't have done that. We decided that case on her record."<sup>19</sup> And Professor Norman Dorsen, who ultimately argued *Gault* before the Supreme Court, acknowledged that it was Lewis who deserved "primary credit for bringing this case to the Supreme Court and to the eye of the public and profession."<sup>20</sup> As he told Lewis after his victory, "Although there may be glory in arguing before the Supreme Court, it was due largely if not entirely to your efforts that the case got that far."<sup>21</sup>

The Supreme Court's 8-1 decision in *Gault*, and its pronouncement that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," established that juveniles are entitled to the same due process protections afforded adults, including notice of the charges, the right to counsel, the right against self-incrimination, the right to confront witnesses, the right to a transcript, and appellate review.<sup>22</sup> As Justice Fortas wrote, "[I]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'" <sup>23</sup> The *Gault* Court recognized that juvenile court, with its informality and "unbridled discretion, however, benevolently motivated," was a "poor substitute for principle and procedure."<sup>24</sup>

Furthermore, the *Gault* Court emphasized that children "require the guiding hand of counsel at every step in the proceedings" against them.<sup>25</sup> In light of the potential short- and long-term consequences children face in juvenile court, the assistance of counsel is essential to help the juvenile "cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." This bedrock principle announced by the Court in *Gault* remains true today.

### **The Continuing Impact of *Gault* on New Jersey Law**

In the wake of *Gault*, New Jersey, like many other states, had to revise its Code of Juvenile Justice. At the same time, in response to the Supreme Court's earlier decision in *Gideon v. Wainwright*,<sup>26</sup> the state established the Office of the Public Defender (OPD). In addition to providing counsel to indigent adults, the OPD was charged with ensuring that juveniles received the effective assistance of counsel in delinquency proceedings.

Currently in New Jersey, a juvenile has the right to be represented by counsel at every "critical stage in the proceeding which, in the opinion of the court, may result in the institutional commitment of the juvenile."<sup>27</sup>

*Gault* has resulted in additional changes to the law in New Jersey regarding juveniles. For example, a juvenile is provided with "all defenses available to an adult charged with a crime, offense or violation, and all rights guaranteed to criminal defendants by state and federal Constitutions, except the right to indictment, the right to trial by jury and the right to bail."<sup>28</sup> Additionally, a juvenile may not waive any rights, including the right to counsel, "except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding this decision."<sup>29</sup> A juvenile determined to lack mental capacity may not waive any right.<sup>30</sup>

New Jersey's law surrounding juveniles continues to evolve. Most recently, New Jersey's juvenile laws changed with the passage of S-2003/A-4299, which Governor Chris Christie signed into law in Aug. 2015. The new law provides juveniles committed to the custody of the Juvenile Justice Commission (JJC) with the right to counsel and other enhanced due process protections when facing transfer from a juvenile correctional facility to an adult prison.<sup>31</sup> The law also increases, from 14 to 15, the age at which a juvenile may be 'waived,' or transferred, to

adult court; limits the use of solitary confinement (referred to in the new law as “room restriction”); and creates a presumption that a youth waived to adult court will remain in a juvenile detention facility pending trial and upon conviction may serve his or her sentence at the juvenile correctional facility until the age of 21 and beyond at the discretion of the JJC.<sup>32</sup>

### **The Impact of *Gault* Beyond Delinquency Matters**

Although *Gault* does not technically extend beyond delinquency matters, its spirit has found its way into other practice areas. The first example of the impact of *Gault* in other practice areas involving juveniles relates to the right to counsel in child protection actions. Children do not have a federal constitutional right to counsel in child protection actions brought by the state.<sup>33</sup> Nevertheless, in 1974 Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which requires states to provide children who are the subject of child welfare court proceedings—known in New Jersey as children in court, or CIC, matters—with a guardian *ad litem* who may be an attorney or a court-appointed special advocate.<sup>34</sup> *Gault* recognized the importance of representation when a young person’s liberty interests are at stake. Likewise, the ‘guiding hand of counsel’ is also critically important when a child’s right to family integrity as well as to safety and well-being are at the center of a children in court case.

In both abuse-and-neglect proceedings and state applications to terminate parental rights, children in New Jersey are statutorily entitled to legal representation through the OPD’s Office of Law Guardian.<sup>35</sup> The child’s attorney, referred to as a law guardian, is obligated to preserve the confidentiality of client communications, zealously advance the client’s cause and otherwise adhere to the ethical duties extended to adult clients.<sup>36</sup> In privately initiated family court actions involving custody and visitation, however, the court has discretion whether to appoint an attorney or guardian *ad litem* for the child.<sup>37</sup> If the court appoints an attorney for the child in such an action, Rule 5:8A permits the assessment of counsel fees against one or both parties.

Children removed from their families by state action in New Jersey are entitled to 16 specific rights outlined in the Child Placement Bill of Rights Act.<sup>38</sup> The act was created “to protect the most fundamental rights of children placed outside the home.”<sup>39</sup> The Legislature intended the act to provide these children with “rights independent of their parent or legal guardian,” to establish an “affirmative obligation of the State to recognize and protect the rights of the child placed into surrogate care” and to impose a “requirement for a clear and consistent policy from the State for the promotion of permanent placement over long-term temporary care.”<sup>40</sup> As a result, the U.S. District Court held in *K.J. v. Div. of Youth & Family Servs.*<sup>41</sup> that the act provides children with a private right of action for certain violations under the act.

A critical decision-making point in a CIC proceeding is the “permanency” hearing. Courts must conduct a permanency “planning” hearing within 12 months of a child’s out-of-home placement.<sup>42</sup> At this hearing, to ensure that the child does not languish in foster care indefinitely, the court must review and approve the child welfare agency’s permanent plan for the child. In addition to the right to counsel, children in CIC proceedings are entitled to “[w]ritten notice of the date, time and place of the permanency hearing...” and “...to attend the hearing and submit written information to the court...”<sup>43</sup> As further emphasized in the Child Placement Bill of Rights Act, children have a “right to be represented in the planning and regular review” of their cases.<sup>44</sup> This fundamental notion of due process, that a child has a right to be heard and to participate in a meaningful way in the decision-making process, had its origin in *Gault*.

## Conclusion

The efforts of Amelia Lewis, a solo practitioner in Arizona, to frame Jerry Gault's story in constitutional terms, assemble a compelling record, and persuade an accomplished oral advocate to take the case to the United States Supreme Court were instrumental in changing the law. Lewis understood that she not only needed to help Jerry Gault and his distraught parents, but she also needed to address a broader audience because, as she later explained:

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it seemed to me that if we were trying to teach our children democracy, trying to teach them the three branches of government, trying to teach them that everybody in America got a fair trial,...then we [needed to avoid] treating them [like Jerry Gault]...[and] making [them] not only skeptics, but [even criminals] before they got started.

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The 50<sup>th</sup> anniversary of *Gault* is an opportunity to reflect not only on the significance of this landmark decision but on the role that advocates like Lewis play in crafting the policies and practices that shape our society. Amelia Lewis saw the legal system as a vehicle for change, and as a means to do what was right for a family and their son. Her advocacy changed the law in many ways, some intended and others in unimagined ways. The ripple effects of the *Gault* decision, begun on that hot August day in Lewis's office, continue to reverberate in the legal system 50 years later, as Lewis's foresight, perseverance and hard work stand as a shining example of the power of an individual to effect significant and lasting change in the justice system.

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## Endnotes

1. *In re Gault*, 387 U.S. 1, 13, 28 (1967).
2. Interview with Amelia D. Lewis, Interview by Jo Ann Damos, 17 Aug. 1989: 1-140, 72; Arizona Bar Foundation, Oral History Project: Arizona Legal History. Found at: [http://www.legallegacy.org/images/PDFs/LEWIS\\_AMELIA\\_D\\_2.PDF](http://www.legallegacy.org/images/PDFs/LEWIS_AMELIA_D_2.PDF); Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women on *In re Gault* (2014); *Scholarly Works*. Paper 984, <http://scholars.law.unlv.edu/facpub/984>.
3. Interview with Amelia D. Lewis, page 72.
4. *Id.*
5. 387 U.S. 1 (1967).
6. Interview with Amelia D. Lewis, page 72; Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, (Univ. Press of Kansas, 2011); page 123.
7. Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women on *In re Gault* (2014), *Scholarly Works*. Paper 984; page 42.
8. Interview with Amelia D. Lewis, at page 73.
9. Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women of *In re Gault*, page 42.
10. *In re Gault*, 387 U.S. at 5-6; 58 (1967); Interview with Amelia D. Lewis, Interview by Jo Ann Damos, 17 Aug. 1989: 1-140, at 76-78; Arizona Bar Foundation, Oral History Project: Arizona Legal History.
11. *In re Gault*, 387 U.S. at 5, 8-10.
12. *Id.* at 9-10.

13. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, (Univ. Press of Kansas, 2011); page 39.
14. *Id.* at 42-43; *In re Gault*, 387 U.S. at 10.
15. Interview of Amelia D. Lewis, page 95-96; Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, page 44.
16. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, page 44-45.
17. Interview with Amelia D. Lewis, page 111.
18. Before his appointment to the U.S. Supreme Court, Justice Abe Fortas was the attorney assigned to represent Clarence E. Gideon, petitioner in *Gideon v. Wainwright*, 372 U.S. 335 (1963).
19. *Id.*
20. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, page 68.
21. *Id.* at 93.
22. *In re Gault*, 387 U.S. at 13, 31-59.
23. *Id.* at 22.
24. *Id.* at 18-20.
25. *Id.* at 36, citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932).
26. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
27. N.J.S.A. 2A:4A-39 (a).
28. N.J.S.A. 2A:4A-40.
29. N.J.S.A. 2A:4A-39-(b)(1).
30. N.J.S.A. 2A:4A-39-(b)(3).
31. N.J.S.A. 52:17B-175.
32. 2015 N.J. ALS 89, 2015 N.J. Laws 89, 2015 N.J. Ch. 89, 2014 N.J. S.N. 2003, 2015 N.J. ALS 89, 2015 N.J. Laws 89, 2015 N.J. Ch. 89, 2014 N.J. S.N. 2003.
33. Duquette, Donald, Haralambi, Ann, Sankaran, Vivek, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 3rd Edition (National Association of Counsel for Children, 2016), page 819-820.
34. 42 U.S.C.S. § 5106a(b)(2)(A)(xiii).
35. N.J.S.A. 9:6-23; N.J.S.A. 30:4C-15.4(b).
36. *In re Maraziti*, 233 N.J. Super. 488 (App. Div. 1989); *In the Matter of M.R.*, 135 N.J. 155 (1994); *Div. of Youth & Fam. Serv. v. Robert M.*, 347 N.J. Super. 44 (App. Div. 2002), *cert. denied* 174 N.J. 39.
37. Fall, Robert A., Romanowski, Curtis J., *New Jersey Family Law: Relationships Involving Children*, (Gann Law Books, 2015); N.J. Court Rules, R. 5:8A, R. 5:8B.
38. N.J.S.A. 9:6B-1 *et seq.*
39. *K.J. v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d. 728; 742 (D.N.J., 2005).
40. *Id.*
41. *K.J. v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d. 728 (D.N.J. 2005).
42. Duquette, Donald, Haralambi, Ann, Sankaran, Vivek, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 3rd Edition (National Association of Counsel for Children, 2016), page 442; N.J.S.A. 30:4C-61.2.
43. N.J.S.A. 30:4C-61.2.

44. N.J.S.A. 9:6B-4 (l).