

Juvenile Justice and the Rehabilitative Ideal: A Response to Mr. Stapleton

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by Stephen Wizner

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In the typical juvenile delinquency case, a child is arrested by a policeman for the alleged commission of a criminal act; taken to a police station where he is interrogated by the arresting officer and others who attempt to extract a confession from him; brought before a judge; accused of committing a crime; prosecuted, and, if found guilty, sentenced to prison or probation. Labeling such a process "civil" rather than "criminal," and asserting that its purpose is the rehabilitation rather than the punishment, deterrence and incapacitation of offenders, does not alter the reality of what happens to the child. A "finding" is a verdict, "involved" means guilty, an "act which if done by an adult would be a crime" is a crime, a "disposition" is a sentence, and a "training school" is a prison.

*In re Gault*¹ was a constitutional decision based on the Supreme Court's candid recognition of these realities of juvenile court proceedings. It was not, as Mr. Stapleton implies, a "sociological" decision, nor was it based on any empirical studies. Early in the majority opinion, Mr. Justice Fortas set the tone for what was to follow: ". . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."² The Court cited with approval a statement of a former Chief Justice of the New Jersey Supreme Court that children are entitled to Constitutional protection:

“ ‘In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. . . . [Due process guarantees] must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel.’ ”³

And again:

“Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”⁴

Citing its earlier decision in *Kent v. United States*⁵ that waiver of jurisdiction over a juvenile by a juvenile court to an adult criminal court “must measure up to the essentials of due process and fair treatment,”⁶ the Court stated:

“We reiterate this view, here in connection with a juvenile court adjudication of ‘delinquency,’ as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.”⁷

And recently, in *In re Winship*,⁸ the Court reaffirmed the constitutional basis of its holding in *Gault*:

“[T]he Due Process Clause does require application during the adjudicatory hearing of ‘the essentials of due process and fair treatment.’ ”⁹

Thus, the Court did not impose due process requirements on juvenile court proceedings because it found that juvenile crime and recidivism rates demonstrated a failure of the juvenile court system, that a juvenile delinquency record is stigmatizing, that juveniles perceive informal procedures as unfair and that institutionalization is inherently punitive. Rather, the Court imposed such requirements because it recognized the indisputable form of these proceedings—children may be deprived of their liberty if they are found “guilty.” Since this is the case, both in practice and in theory, and since children are human beings and not chattel or laboratory animals, they are entitled to the protections and safeguards conferred upon individuals by the Constitution against government actions which may deprive them of their liberty. “Under our Constitution, the condition of being a boy does not justify a kangaroo court.”¹⁰

The Court's consideration of social science data served two purposes. First, it was a response to those who opposed the extension of due process rights to juveniles with the argument that the unique, humane and benevolent characteristics of the juvenile court system would thereby be undermined. And second, it was undeniably an attempt to use findings of the behavioral sciences as "window dressing" for the decision. The Court emphasized that:

"... the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion."¹¹

And,

"There is no reason why the application of due process requirements should interfere with [provisions classifying juvenile offenders as 'delinquents' rather than 'criminals' and with preventing an adjudication of delinquency from operating as a civil disability.]"¹²

"[T]here is no reason why, consistently with due process, a state cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles."¹³

"While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite. . . ."¹⁴

The important point is that even if the Court's conclusions, drawn from the social science data and literature which it cited, were unfounded or erroneous, the decision in *Gault* would stand. And it would stand regardless of whether the Court were to follow the reasoning of Justice Fortas, or of Justices Black¹⁵ and Harlan¹⁶ in their concurring opinions. For in all three approaches, the recognition of the essential character of juvenile delinquency proceedings is the crucial element: a child may be subjected to the deprivation of his liberty if it is established that he has committed certain acts.

Stapleton attempts to distinguish juvenile delinquency proceedings from criminal proceedings by arguing that depriving a child of his liberty is not inherently punitive. He cites studies demonstrating that for some children, "institutionalization offers a more favorable prognosis than release to the community." The Court's decision, however, does not rest upon its view of the failure of rehabilitative programs or upon a judgment that children are better off with

their families. Stapleton is no doubt correct that institutionalization is rehabilitative for some children. This assertion is equally true with respect to many children who are never brought before a juvenile court. But it is only after a finding that a child has committed a specified act that the state may invoke rehabilitative programs in his behalf. Surely, Stapleton would not advocate the right of the state to institutionalize all children for whom "institutionalization offers a more favorable prognosis than release to the community," whether or not they have committed acts which have brought them before the juvenile court.

Mr. Stapleton's concerns are not confined to the welfare and rehabilitation of children accused of juvenile delinquency. "[D]oes not the defense attorney," he asks, "have some obligation to the broader issue of public safety and the protection of the social order by helping to apprehend and remove from society those who are a menace to it?" The answer to this question is clear: a defense attorney has no such obligation. Quite the contrary. The *Gault* decision turned on the similarity between juvenile proceedings and adult criminal prosecutions, and the duty of the defense attorney is the same in each: to present—as Mr. Stapleton notes—"every defense that the law of the land permits."¹⁷

The question posed by Mr. Stapleton is, of course, rhetorical. He feels that a defense lawyer does have an obligation to protect the community from his clients, and he claims as authority for his position the oft-cited essay of Dean Allen.¹⁸ A reading of that essay, however, demonstrates that Allen was concerned with the conflicting roles of the juvenile court—protection of the child vs. protection of the community—and not the role of defense counsel. In fact, Allen's position respecting procedural protections for juveniles is the opposite of Stapleton's:

[T]he importance of fair procedures [is] . . . readily perceived when it is noted that in many delinquency proceedings the rehabilitative effort is at best a matter of secondary concern and that the juvenile court is performing a function in many respects similar to that of a court of justice. This surely suggests that the essence, if not the precise content, of the fair procedures should also be respected in the juvenile court.¹⁹

It is true that some children who are in fact "guilty" escape conviction by contesting the charges of juvenile delinquency against them and putting the state to its proof. (It is, of course, equally true that some children who are in fact "not guilty" escape conviction only because they have a lawyer who contests the charges.) It might even be argued that a system in which children are denied the right to legal representation would be preferable, since fewer guilty kids would "get off." The simple answer to these propositions is that the Constitution does not permit us to construct, or experiment with, schemes affecting individual liberty, no matter how noble our intentions, unless they are in accordance with the legal and political principles which it mandates. And if some guilty individuals go free—or in Mr. Stapleton's terms, lose the opportunity for rehabilitative experiences—that is the price we pay for our constitutional system of government.

It should be unnecessary to point out that procedural due process requirements are not mere legal “technicalities” designed to permit the guilty to escape judgment. Mr. Stapleton’s statistics, however, create that impression by focusing upon a small group of children who were admittedly guilty and the majority of whose cases were dismissed—apparently owing to the efforts of defense counsel, although that is not entirely clear.²⁰ But what of those children whose cases were dismissed because they were innocent? And what of those who were convicted even though they were innocent, because the absence of counsel and procedural safeguards resulted in an unreliable fact-finding process? It is simply not enough to say, as Mr. Stapleton does, that “[t]his is a matter that must be left to pure speculation. . . .” Mr. Stapleton, in fact, is subject to his own most damning criticism: the failure to use a control group for a comparison of effects. He doesn’t give us comparable statistics for Gotham, the other city he studied, nor does he give us comparable statistics of a criminal court. In this light, his apparent alarm is unfounded and his conclusions are fruitless.

No lawyer will contest Stapleton’s assertion that the presence of defense counsel in juvenile cases will result in a higher rate of dismissals and lenient dispositions and that a proportion of those children who get off will in fact be guilty. But the lawyer’s function and duty is to defend a client who is threatened with the loss of liberty; the *Canons of Ethics* requires that a lawyer represent his client vigorously and to the best of his ability. If a juvenile client does not desire the benefits of incarceration in a reform school, it is his lawyer’s obligation to prevent that result if possible. A lawyer who fails to do that because *he* feels that his client might benefit from a court-imposed treatment program is behaving unethically and is deserving of censure. The lawyer’s client is the *child*, not the community or the system or the public interest. The lawyer’s role is to try to achieve the result which his client wishes, and not to play father, judge, probation officer or social worker.²¹ That is the least he can do to give the accused juvenile parity with the criminal defendant.

Stapleton is wrong in asserting that *Gault* creates a “role strain” for defense counsel in juvenile cases by requiring an attorney with a guilty client to be both lawyer and judge. The Supreme Court did not articulate a “less than classically adversarial role” for defense lawyers in juvenile cases. Of course, nothing in the *Gault* decision precludes defense counsel from suggesting and participating in informal dispositions in lieu of adjudication of delinquency, if his client agrees and particularly if an adjudication of delinquency is likely to occur despite the lawyer’s best efforts.²² But this kind of activity is nearly identical to plea-bargaining and securing “youthful offender” treatment and sentencing on the part of counsel in a criminal case. Moreover, the Court *did* envision that after an adjudication of delinquency, a child’s lawyer might play a role in the selection and implementation of an appropriate dispositional plan. And an effective lawyer will perform these roles as a matter of course.

In short, Mr. Stapleton is correct in observing that reforms in the juvenile courts were necessary both before *Gault* and today. It is doubtful, however, that the approach of the social sciences was or should have been important in the *Gault* decision, or should be instrumental in reform today. As Allen has emphasized,

“The Court . . . is not simply a laboratory or a clinic and the tendency to conceive of it in these terms, largely to the exclusion of other functions it is called upon to perform, contributes neither to a sound understanding of the institution nor to its proper use in serving the public interest.”²³

1. 387 U.S. 1 (1967).

2. *Id.* at 13.

3. *Id.* at 19, n. 25.

4. *Id.* at 20.

5. 383 U.S. 541 (1966).

6. *Id.* at 562.

7. 387 U.S. 1 at 30-1.

8. 397 U.S. 358 (1970).

9. *Id.* at 359.

10. 387 U.S. 1 at 28.

11. *Id.* at 22.

12. *Id.* at 24.

13. *Id.* at 25.

14. *Id.* at 27.

15. *Id.* at 61 *et seq.*

16. *Id.* at 74 *et seq.*

17. American Bar Association, *Canons of Professional Ethics*, Canon 5. As of January 1970, the *Canons of Professional Ethics* was replaced by the new *Code of Professional Responsibility*. Mr. Stapleton doubts whether the old Canon 5 applies to juvenile cases—apparently because it is entitled “The Defense and Prosecution of Those Accused of Crime.” But the new Canon 7 § 20 makes it clear the criminal defense lawyer and the juvenile defense lawyer have the same duty. It employs similar language to that of the old Canon 5, and it comes under the heading “Duty of the Lawyer to the Adversary System of Justice.”

18. F. Allen, *The Juvenile Court and the Limits of Juvenile Justice*, in F. Allen, *The Borderland of Criminal Justice* 43 (1964).

19. *Id.* at 55-6.

20. Of the 13 such cases which were dismissed, the state chose not to prosecute in three, the complaining witness failed to appear in four, and the state was unable to prove its case in six.

21. See J. Weiss, *Defense of a Juvenile Court Case*, in *Criminal Defense Techniques* 6-01 at 6-05 – 6-06 (R. Cipes, ed., 1969).

22. Of course, counsel should advise his client to make the necessary admissions only if they will not be brought to the attention of the judge in the event that the informal disposition fails and the child is subsequently brought to trial.

23. F. Allen, *supra* at 61.