LIBERTY
UNIVERSITY

Scholars Crossing

Faculty Publications and Presentations

Helms School of Government

8-3-1980

Due Process and the Juvenile System: The Effects of In Re Gault

Steven Alan Samson
Liberty University, ssamson@liberty.edu

Follow this and additional works at: https://digitalcommons.liberty.edu/gov_fac_pubs

Part of the Other Social and Behavioral Sciences Commons, Political Science Commons, and the Public Affairs, Public Policy and Public Administration Commons

Recommended Citation
Samson, Steven Alan, "Due Process and the Juvenile System: The Effects of In Re Gault" (1980). *Faculty Publications and Presentations*. 286.
https://digitalcommons.liberty.edu/gov_fac_pubs/286

This Article is brought to you for free and open access by the Helms School of Government at Scholars Crossing. It has been accepted for inclusion in Faculty Publications and Presentations by an authorized administrator of Scholars Crossing. For more information, please contact scholarlycommunications@liberty.edu.

DUE PROCESS AND THE JUVENILE SYSTEM: THE EFFECTS OF *IN RE GAULT*

Steven A. Samson

American Civil Liberties

August 3, 1980

> Most of the children who come before the court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views. What they need, more than anything else, is kindly assistance; and the aim of the court... is to have the child and the parents feel, not so much the power, as the friendly interest of the state....[1]

The juvenile court system was born in Cook County, Illinois, in 1899, at the crest of a wave of immigration from the less economically developed, less culturally familiar areas of southern and eastern Europe. Since the Civil War, the United States had been undergoing a cultural revolution that transformed the political, social, and economic institutions of earlier white, Anglo-Saxon Protestant immigrants to adapt to growing cultural pluralism. These more recent immigrant groups showed less willingness to assimilate and were generally less tolerated by their predecessors. The social reform movement of that era was a curious blend of upper-middle class nativism, political activism, and liberal religion. Cultural pluralism, in practice, meant conflicting perceptions of proper social behavior. Resistance to change by the gentry of the late nineteenth century was given positive expression in the efforts of social reformers to uplift their "weaker brethren" and teach them American ways. Out of the practical, and yet idealistic, efforts of ministers and other professionals to save the children of immigrants from poverty, ignorance, and crime, grew the public education movement, child labor laws,

---

[1] Julian W. Mack, "The Juvenile Court," 23 Harvard Law Review 2 (December, 1909): 116-17.

reformatories, and juvenile courts.

In recent years, some liberal social critics have seen the efforts of "child savers" to divert children from the criminal justice system in a somewhat negative light. One critic, Anthony Platt, believes that the severity of that system and its impact on youthful sensitivities has been exaggerated. Children were rarely incarcerated with hardened criminals. In fact, they were generally found to lack the essential capacity to commit a crime. Citing fourteen leading cases in American courts from 1806-1882, Platt noted that only three children were actually convicted and sentenced: two slaves were executed for murder and one eight year old boy was sentenced to three years in prison for stealing a bear skin from a private house.[2]

Prison reform, however, was indicative of a gradual trend toward liberalization of attitudes toward poverty and crime. By the turn of the century, psychological theories of behavior were in vogue. Physicians, for example, promoted a "medical model" of motivation that was transforming criminal jurisprudence through the insanity defense of the M'Naughten rule and through the efforts of the younger Oliver Wendell Holmes to place law on a scientific footing. Traditional assumptions about personal responsibility were called into question. The rise of scientific professionalism in law, medicine, and the

---

[2] Anthony M. Platt, The Child Savers: The Invention of Delinquency (Chicago: The University of Chicago Press, 1969), pp. 183-202. See also Steven L. Schlossman, Love and the American Delinquent: The Theory and Practice of 'Progressive' Juvenile Justice, 1825-1920 (Chicago: University of Chicago Press, 1977) on the corrections phase.

new fields of criminology and social work, restructured the treatment of criminal behavior and its underlying causes. One product of these changes was a new status, "delinquency," which meant, on the one hand, that crimes committed by juveniles were redefined so they could be tried in a civil proceeding and, on the other hand, that a new set of status offenses was invented in order to identify delinquent behavior. The ancient concept of parens patriae was used to justify an assertion by juvenile judges of firm, paternalistic control and intervention into the home, to the point of removing the child to a more favorable environment--i. e., a reformatory--if deemed necessary. The usual elements of court procedure were removed to emphasize that the court's purpose was therapeutic, not punitive. This placed the judge into the fatherly role of a benefactor, a physician for troubled souls. Platt concluded:

> The blurring of distinctions between 'dependent' and 'delinquent' children and the corresponding elimination of due process for juveniles, served to make a social fact out of the norm of adolescent dependence. 'Every child is dependent,' held the Board of Public Charities. 'Dependence is a child's natural condition.' It was one task of the child savers to punish premature independence in children and restrict youthful autonomy. Proponents of constitutional protections for children were rebuked for impeding the 'systematic and adequate effort for the salvation of all the children who are in need of savior.[3]

The juvenile court system even today reflects the character of its origins as well as the aspirations of its reformers, the experiences of its administrators, and the changing needs of changing times. Since the middle 1960s, the Supreme Court of the United States has played a leading reform role in a series of decisions, beginning with In re Gault (1967), which have held

---

[3] Platt, Child Savers, pp. 135-36.

that the denial of certain procedural due process rights is unconstitutional even in juvenile courts, which claim to be civil rather than criminal courts.

In re Gault[4] came to the Warren Court on appeal of the dismissal of a petition for writ of habeas corpus by the Arizona Supreme Court. The appellants were the parents of Gerald Gault, who had been arrested on June 8, 1964 by the Sheriff of Gila County after allegedly joining a friend in making an obscene phone call. His parents were not notified of the arrest. Gerald's older brother apparently learned that Gerald was in custody when he went to the trailer home of the other boy's family. A hearing was held the following day. The complainant did not appear to testify and no transcript or other recording was kept. Gerald was released without explanation two or three days later, then summoned to appear once again on June 15. Gerald's mother had attended the first hearing; both parents attended this second hearing at which Gerald was committed as a juvenile delinquent to the State Industrial School until the age of 21, unless discharged sooner. Under Arizona law, no appeal was permitted in juvenile cases.

At the habeas corpus hearing the juvenile judge "testified that he had taken into account the fact that Gerald was on probation."[5] Two years earlier, Gerald had been referred to the court on a complaint that he had stolen another boy's baseball glove. No hearing had been held; no accusation had been made.

---

[4] 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967)

[5] 387 U.S. 1, at 8

Then, during February of 1964, Gerald was placed on probation for having been in the company of another boy who had stolen a wallet from a lady's purse. He was still on probation when the obscenity complaint was made. The judge found that the congruence of these circumstances provided sufficient ground for classifying Gerald as a delinquent: "one who, as the judge phrased it, is 'habitually involved in immoral matters.'"[6] A presumption of guilt evidently operated in the court.

After the Superior Court dismissed the writ, the appellants sought review in the Arizona Supreme Court, challenging the constitutionality of the Juvenile Court and claiming that the conduct of the proceedings had denied due process. The Court held that adequate notice was required, but that there was no right of appeal and that hearsay evidence could be admitted if it was reasonable.

> We approach this challenge to the juvenile code aware of our duty to give to the language of all statutes a meaning that will render them constitutional if this can reasonably be done.... Although the constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law...is not expressly implemented in the juvenile code, we have held a statute valid in other situations though we had to imply into the language a necessary element of the problem.[7]

The Court took note of mounting criticisms against juvenile proceedings but stated that the juvenile court acts as a protecting parent rather than a prosecutor. "The delinquent is the child of, rather than the enemy of society and their interests coincide."[8] The Court held that counsel could not be denied to

---

[6] 387 U.S. 1, at 9 (1967)

[7] 407 P.2d 760, at 765 (1965)

[8] 407 P.2d 760, at 765

parents, although they were not expressly informed of this right. If the judge noted a conflict of interest between the child and its parents, he could appoint an attorney for the child on his own discretion.

The U. S. Supreme Court took the case on appeal and considered the constitutionality of the Juvenile Court as well as six specific due process rights. Justice Abe Fortas wrote the majority decision which reversed the Arizona Supreme Court's decision and remanded the case for further proceedings.

Fortas, who was one of the Court's liberals, criticized the virtually unlimited discretion of juvenile court judges. He cited earlier Supreme Court cases involving the waiver of exclusive jurisdiction by juvenile courts and the use of coerced criminal confessions, but these latest questions had not been yet addressed. The earlier cases dealt specifically with attempts to circumvent the letter and spirit of the juvenile court system in which the infancy of the offender was given special consideration. In _Gault_, the Court had to deal with the whole rationale of that system as reflected in the proceedings themselves.

Fortas reviewed the history and theory behind the juvenile court system. Juvenile courts are adaptations of earlier chancery courts. The courts' power to act _in loco parentis_ is taken from chancery practice.

> The right of the state, as _parens patriae_, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.[9]

The child, in effect, had no rights of which to be deprived.

[9] 387 U. S. 1, at 17

Unfortunately, unbridled discretion, however benevolent in intention, is often very arbitrary in practice. This danger was acknowledged in the early literature on juvenile courts. Judge Edward F. Waite of the District Court of Minneapolis held that departures from traditional safeguards in juvenile courts can mean that "all that is necessary to justify a despotism is to make sure it intends to be benevolent."[10]

Fortas saw in the procedural rules which have been developed for guaranteeing fairness

> our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present.... 'Procedure is to law what 'scientific method' is to science.'[11]

Thus Fortas asserted the primacy of one profession's instruments, those of the law, over anothers' instruments, those of the juvenile court system. In effect, the Court was judging the claims of a distinct profession which, nevertheless, operated through the system of courts. Fortas weighed the supposed benefits of a sociological program and found it wanting according to the tools of his own sociological jurisprudence. He cited a study of the recidivism rate of juvenile offenders who were diverted from the regular criminal justice system and urged that the

> figures and the high crime rates among juveniles...could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders.[12]

---

10 Edward F. Waite, "How Far Can Court Procedure Be Socialized Without Impairing Individual Rights," 12 Journal of Criminal Law and Criminology 3 (November, 1921): 341.

11 387 U.S. 1, at 21

12 387 U.S. 1, at 22

He levelled other criticisms at the system including the disclosure of court records at the discretion of judges and the stigmatization of delinquency. The whole purpose of the system, he pointed out, was to wipe the juvenile offender's slate clean. The stigmatization of delinquency and the disclosure of records defeated this purpose. Moreover, Fortas claimed that procedural fairness, orderliness, and impartiality had a therapeutic effect and cited a study that found that

> when the procedural laxness of the '*parens patriae*' attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed.[13]

The conflicting testimony of experts points up a weakness in the epistemological underpinnings of a sociological jurisprudence. Orthodoxies change. Yesterday's leading theories may be today's bad science. But the law cannot be applied in a way that gives due recognition that the scientific conclusions of the day are part of an ongoing process. The law lacks that kind of fluidity, and to the extent that it approximates the fluidity of science it risks losing the authority and finality of law. Here is another kind of laxness that may adversely affect respect for law. Are the advantages of scientific up-to-dateness that considerable, anyway? Commenting on the welter of psychoanalytic theories that had succeeded each other over several generations of practice, the child psychologist, Robert Coles, concluded that

> All in all, what emerged were children to some extent unlike others before them, but nonetheless human.

---

[13] 387 U.S. 1, at 26

'...It is true that the children who grew up under its [referring to psychoanalysis] influence were in some respects different from earlier generations; but they were not freer from anxiety or from conflicts, and therefore not less exposed to neurotic and other mental illnesses.'[14]

Coles cited no one less than Anna Freud to this effect. The difficulty with the majority decision is that Justice Fortas easily could have chosen to attack the juvenile system on strictly constitutional grounds, as some of his colleagues did. Instead, he chose to pad his opinion with comments and justifications which risk quickly being overruled at the bar of science. With some justification, Fortas labelled the juvenile court as "a kangaroo court," but he wrote a decision that is vulnerable to a similarly contemptuous dismissal. Justice Harlan, who concurred in part and dissented in part, criticized the majority opinion for its vagueness:

I must first acknowledge that I am unable to determine with any certainty by what standards the Court decides that Arizona's juvenile courts do not satisfy the obligations of due process.[15]

The majority was willing to preserve many of the concessions that juvenile courts made to the youth of the offenders, including the emphasis on rehabilitation and the avoidance of classifying the juveniles as criminals. These unique benefits should not be sacrificed, Fortas said. But he saw incarceration in an "industrial school" as the equivalent to prison, no matter what euphemism was used to describe it. Rather than serving as a kind of protective custody, such incarceration exposed the offender to all of the perils of prison life. Yet the majority opinion

---

[14] Robert Coles, The Mind's Fate: Ways of Seeing Psychiatry and Psychoanalysis (Boston: Little, Brown, and Company, 1975), 37-38.

[15] 387 U.S. 1, at 66

held that only specified due process rights were obligatory for juvenile courts. These were the rights to adequate notice, counsel, confrontation and cross-examination, a transcript of the proceedings, appellate review, and the privilege against self-incrimination. Subsequent decisions have further refined the list. In re Winship extended the right to proof beyond a reasonable doubt in cases where a juvenile is charged with an act that would constitute a crime if committed by an adult.[16] McKeiver v. Pennsylvania, on the other hand, did not extend the right to a jury trial.[17] Taken together, the Gault, Winship, and McKeiver decisions have done anything but clarify the constitutional status of the juvenile system, despite Justice Fortas' earlier rationale for ruling on the issues, saying that "the constitutional and theoretical basis for this peculiar system is--to say the least--debatable."[18] One must conclude that the juvenile court is a strange beast: part civil, part criminal, part judicial whim.

Commenting on Justice Fortas' remarks, Justice Harlan elaborated on the resulting confusion:

> The Court's premise, itself the product of reasoning which is not described, is that the 'constitutional and theoretical basis' of state systems of juvenile and family courts is 'debatable'; it buttresses these doubts by marshaling a body of opinion which suggests that the accomplishments of these courts have often fallen short of expectations. The Court does not indicate at what points or for what purposes such views, held either by it or by other observers, might be pertinent to the present issues. Its failure to provide any discernible standard for the

---

[16] 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970)

[17] 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971)

[18] 387 U.S. 1, at 17

> measurement of due process in relation to juvenile proceedings unfortunately might be understood to mean that the Court is concerned principally with the wisdom of having such courts at all.
>
> If this is the source of the Court's dissatisfaction, I cannot share it.[19]

Harlan and others were concerned about the effect that formalization of court proceedings would have on the overall program. Harlan wanted to defer to legislators on substantive issues, which necessarily extend to procedural questions: "Procedure at once reflects and creates substantive rights...."[20] He was willing, however, that three procedural requirements be extended to juvenile courts: timely notice of the nature an terms of the proceeding, timely notice of the right to counsel, and maintenance of a written record.

Justice Black believed that a probably fatal blow was struck by the Court to much that was unique about the juvenile system. But he concurred with the result on a strict interpretation of the Fifth and Sixth Amendments and simply expressed the wish that Court had waited for a better opportunity for squarely facing the issues.

Justice White concurred with the result in all areas except that of confrontation, self-incrimination, and cross-examination. He doubted that the Miranda warning should be extended to a case that was decided before the Court's Miranda decision. Other than using this forum to express his continued displeasure at "unsound applications of the Fifth Amendment," however, he agreed that the decision must be reversed.

---

[19] 387 U.S. 1, at 67

[20] 387 U.S. 1, at 70

Only Justice Stewart dissented in full. He was afraid that the Court was converting the juvenile system into a criminal prosecution. He noted that the parents knew of their right of counsel, and agreed with White's observation that "no issue of compulsory self-incrimination [was] presented by this case."[21] The Court's decision, he said, was a step backwards into the nineteenth century when children were tried, sentenced, and executed as criminals. He also dissented from the Court's characterization of the juvenile system:

> Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings.[22]

Since the Gault decision, some efforts have been made to assess its impact. The use of attorneys and public defenders, in particular, has been examined by social scientists. One study of a juvenile court's records for a two-year period straddling the Gault decision drew the following conclusions:

> An increase in the presence of counsel and the number of dismissals and a reduction in the number of cases reaching adjudication and disposition indicate a shift toward legal fact-finding. A reduction in the number of juveniles placed on probation and an increase in the use of fines may indicate less emphasis on treatment...[but] may allow more individualized treatment, thereby fulfilling a primary promise of the court.[23]

Another study made in a large midwestern city dealt with the role of the public defender, "whose 345 delinquency cases account for eighty-seven percent of his total caseload during

---

[21] 387 U.S. 1, at 81

[22] 387 U.S. 1, at 78

[23] Charles E. Reasons, "Gault: Procedural Change and Substantive Effect," 16 Crime and Delinquency 2 (April, 1970): 171.

the year." With such a heavy caseload, the public defender cannot hope to do justice to the merits of each case but his efforts have a decided effect:

> Comparing defendants with and without the services of the public defender suggests that the public defender's clients stand a better chance of having their case dismissed or receiving probation.[24]

The effect of the Gault decision, and that of several other Warren era cases, has been to add to escalating court costs without providing specific guidelines for adjusting to these innovations. The thrust of the 1960s' civil rights movement had the positive value of compelling courts and other institutions to pay greater attention to the rights of individuals. Its impact on social rights and obligations, however, has been more problematic. Individual rights have both private and public value. Violations harm both individuals and society. On the other hand, social life assumes knowledge of its rules and the ability to live according to them. If everyone lacked the capacity to live lawfully, society would be impossible. As it is, people only imperfectly abide by the rules. This being the case, a tension persists between the requirements of society and fairness to the uniqueness of individuals that does not lend itself to procedural uniformity. So courts assign priorities, as do legislatures. On the whole, the balance has tilted so much toward guaranteeing procedural fairness according to a certain conception of professionalism that the result is economically insupportable. For instance, the last Oregon legislative session

---

[24] Anthony Platt, Howard Schechter, and Phyllis Tiffany, "In Defense of Youth: A Case Study of the Public Defender in Juvenile Court," in The Children of Ishmael: Critical Perspectives on Juvenile Justice, ed. Barry Krisberg and James Austin (Palo Alto: Mayfield Publishing Company, 1978), p. 351.

revised the fee schedule for attorneys handling indigent cases. As a result, Multnomah County had to shift $900,000 within its budget to cover the expected cost increase. In a condition of scarce resources, judicial determinations about procedural fairness can give rise to a new profession, like that of the public defender, and further strain government finances. A sizable portion of the increase will cover the attorney fees of indigent families of youthful offenders.

This is an area that is in need of innovative thinking. The original creation of the juvenile system reflected the perception of reformers that the problems of juvenile lawbreaking could not be dealt with by the criminal courts. The Supreme Court in its Gault decision introduced some procedural changes to salvage what it regarded as a defective but necessary vehicle for dealing with contemporary lawbreaking. But it undermined the informality in which lay the key to the system's operation and supposed therapeutic effect. Perhaps the solution, in part, is to transfer some of the functions of juvenile courts to other agencies and attempt to subdue escalating costs through new means of handling complaints. The whole concept of the reformatory, like that of the penitentiary, has perhaps outlived its original rationale and its harmful effects demand a thoughtful, if imperfect, remedy. Similar problems beset public education, the military, and other institutions that have traditionally regulated young people. The times and our expectations are changing. The initiative must not just be left with the courts.

BIBLIOGRAPHY

Coles, Robert. The Mind's Fate: Ways of Seeing Psychiatry and Psychoanalysis. Boston: Little, Brown and Company, 1975.

Mack, Julian W. "The Juvenile Court." 23 Harvard Law Review 2 (December, 1909): 104-22.

Platt, Anthony M. The Child Savers: The Invention of Delinquency. Chicago: University of Chicago Press, 1969.

Platt, Anthony, Howard Schechter, and Phyllis Tiffany. "In Defense of Youth: A Case Study of the Public Defender in Juvenile Court." in The Children of Ishmael: Critical Perspectives on Juvenile Justice. eds. Barry Krisberg and James Austin. Palo Alto: Mayfield Publishing Company, 1978. 347-68.

Reasons, Charles E. "Gault: Procedural Change and Substantive Effect." 16 Crime and Delinquency 2 (April, 1970): 163-71.

Schlossman, Steven L. Love and the American Delinquent: The Theory and Practice of 'Progressive' Juvenile Justice, 1825-1920. Chicago: The University of Chicago Press, 1977.

Waite, Edward F. "How Far Can Court Procedure Be Socialized Without Impairing Individual Rights." 12 Journal of Criminal Law and Criminology 3 (November, 1921): 339-47.