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Albert K. Cohen
University of Connecticut

AN EVALUATION OF GAULT BY A SOCIOLOGIST

ALBERT K. COHEN†

I am interested in the contributions of social science and, more generally, the contributions of systematic observation and detached analysis, to judicial decisions. The *In re Gault*[1] case would appear, on first reading, to be an impressive testimony to the significance of such contributions. Clearly the Supreme Court, in Justice Fortas' learned opinion, insists on questioning the presumptions of fact that inhere in the official rhetoric of the juvenile court and on examining what actually goes on in the juvenile courts and the actual consequences of established procedures. To this end the opinion marshals governmental statistics, the works of sociologists, and the findings of research studies by task forces, commissions, and legal scholars. Nor can there be any doubt that the Court's assumptions, documented by these materials, about the reality behind the rhetoric are essential to their argument. In sum, it would appear that, after some sixty-five years of the existence of the juvenile court, scientific knowledge about the facts of juvenile delinquency, justice, and corrections finally became, around 1967, so definitive and cogent that it virtually compelled the Court to re-examine the principles of juvenile justice and to conclude that established and traditional procedures were not compatible with due process of law.

Nevertheless, a rereading of the opinion suggests that much the same opinion could have been written at least fifteen years ago with documentation somewhat less voluminous but hardly less cogent, so far as the appeal to empirical reality is concerned. If this is true, then the decision cannot be understood as the response of the Court to a portrait of reality that only recently emerged from the data of governmental statistics and scholarly research. The correct inferences would be, rather, that what has changed in the last few years are the values and interests to which the Court is responsive, that the decision gives effect to these changes, and that the research data and scientific opinion are invoked because they take on, in the light of these changes, a new relevance and meaning. But the really interesting question, from a sociologist's point of view, is how to explain the change in the Court's scale of priorities among values and interests. This change, in turn, would explain the rich banquet of data, impressions, and opinions at which the Court invites us to sit.

I shall attempt to show that the connection between the materials

†Professor of Sociology and Anthropology, Univ. of Connecticut.

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

cited and the conclusions drawn by the Court is not logically inevitable. One is then led to ask *what* the nature of the connection is. It seems probable that the scientific and scholarly literature, the legislation of California and New York and the decisions of lower courts (all cited in this opinion), and the Supreme Court's decisions in the *Kent v. United State*[2] and *Gault* cases are phases of a single grand social movement, and that the earlier phases of this movement served, in their cumulative effect, to convey to the Court that a new perspective had been sufficiently well assimilated into legal thinking and had acquired enough legal respectability that the time was ripe for the Court to place upon it its imprimatur. But this still does not explain why the movement developed as it did at the time it did.

In very brief summary, the *Gault* opinion argues that, notwithstanding the language of the statutes and the official rhetoric, the restrictions and deprivations imposed by the juvenile courts are *in effect* punitive; that juvenile offenders may, for the same offenses, be treated far more harshly than adults; that juveniles suffer such deprivations, often amounting to miscarriages of justice, without the procedural safeguards against judicial error, indifference, arbitrariness and malice afforded by the Constitution to adult defendants; that the juvenile courts, however benevolent and therapeutic their aims, are not in general well equipped to realize them; that the statistical evidence on juvenile delinquency and recidivism does not indicate that the special procedures of the juvenile court are, in fact, effective; and that, therefore, the uncertain accomplishments of the juvenile courts do not justify the tangible and demonstrable injustices that their procedures permit.

All of these assertions could have been made—indeed, were made—with equal plausibility at least fifteen years ago. Furthermore, most of them do not and did not require powerful research, massive statistics, or refined scholarship to establish their plausibility. To realize that deprivation of liberty in reformatory institutions or even the restrictions of probation are experienced as punitive requires no scholarship or subtlety of perception. That juveniles may languish in jail for years for offenses for which adults could not be prosecuted or for which they could suffer only fines or short-term jail sentences has never been a secret. That juvenile courts exercise their enormous discretion sometimes with punctilious concern for the substance, if not the form, of due process, but often carelessly and arbitrarily has been repeatedly noted by critics of the juvenile courts for decades. That juvenile court judges are typically not trained in the behavioral sciences presumably essential to their rehabilita-

2. 383 U.S. 541 (1966).

tive task and often untrained in the law itself was not less true or less difficult to ascertain fifteen or twenty years ago than it is today. That the probation and professional services available to the juvenile courts are generally grossly inadequate has been the constant plaint of the juvenile courts themselves and the basis of their appeal for more generous appropriations. Statistics of juvenile recidivism have told much the same story over the many years.[3] Rates of juvenile delinquency, as reported in the juvenile court statistics of the United States Children's Bureau, have been increasing steadily since 1948.[4]

I do not dispute the facts and I am willing to accept the Court's conclusions, but these conclusions do not follow as irresistably as might appear from these facts. It could be argued—and of course it has been—that the juvenile court philosophy, like Christianity, has never really been tried and that, if we supported the courts more generously, the results would have been more rewarding. It could be argued that delinquency and recidivism rates are determined by massive and obscure social forces and that the juvenile courts can, at the most, make a marginal—which does not mean an unimportant—contribution to their diminution. Furthermore, from such statistics one can draw no clear inferences because, in the absence of research controls very difficult to institute, one cannot say that the rates would have been higher or lower had the courts operated under procedures more congenial to the philosophy of *Gault*. It could be argued, as Justice Harlan did in his separate opinion in the *Gault* case,[5] that the majority's critique of the juvenile courts was essentially sound and justified the requirements of timely notice, right to counsel, and a written record, but that to insist on the privilege against self-incrimination and the right to confrontation of witnesses *at this time* is to impose upon the courts a fixed mold and to inhibit the states in sorely needed experimentation with new forms that might be appropriate to the original purposes of the juvenile courts without jeopardizing the rights of the child. Specifically, Justice Harlan suggests that the various classifications

3. For a convenient summary of the earlier studies, H. SHULMAN, JUVENILE DELINQUENCY IN AMERICAN SOCIETY 81-84 (1961).

4. The authorities that the Court invokes (apart from case citations) are, with a few exceptions, taken from the large and accelerating literature of the last ten years. The Court makes no reference, however, to the work of the late Paul Tappan, a legally trained sociologist whose writings constitute one of the most exhaustive, informed, and closely reasoned analyses in keeping with the spirit of the *Gault* decision. They appeared mostly between 1946 and 1952 and most of the literature since then amounts to restatements and amplifications of the case as stated by Tappan. *See* COMPARATIVE SURVEY ON JUVENILE DELINQUENCY, NORTH AMERICA, pt. 1, ch. 3 (1952); P. TAPPAN, JUVENILE DELINQUENCY, ch. 9 (1949); P. TAPPAN, DELINQUENT GIRLS IN COURT (1947); Tappan, *Treatment Without Trial*, 24 SOCIAL FORCES 306-11 (1946). Of these references the chapter in JUVENILE DELINQUENCY is perhaps the most compendious.

5. 387 U.S. 1, 65 (1967) (separate opinion).

of juvenile court proceedings are arbitrary or ambiguous and that we should not discourage, by prematurely rigid procedural requirements, efforts to devise classifications to which the full panoply of due process guarantees might be appropriate and others to which they might not be relevant or helpful. Justice Harlan could have added that juvenile courts throughout the land have been moving in the direction of *Gault* and that, although we cannot afford to wait for the laggards to catch up with the others in their own good time, Supreme Court intervention on the scale of *Gault* is more drastic than the situation calls for.

On the other hand, the Court failed to make one of the most forceful arguments for its own case—namely, that the failure of the juvenile courts to deliver on their promises goes back to causes that lie deeper than faulty institutional forms, incompetent and unqualified personnel, and meager resources. It goes back to the fact that, despite the material progress of our knowledge about juvenile delinquency, we simply do not know enough to diagnose, predict, and prescribe for a very large proportion of offenders. If all our courts and correctional agencies were staffed by Ph.D.'s in clinical psychology and sociology and provided with unlimited resources, we would still not know in many cases—and some would say in most cases—whether the needs of "treatment" would be better served by letting the offender go free or by incarcerating him for two or three years. We must, of course, do the best we can in the circumstances and above all we must continue to experiment with new forms of treatment and to explore new ways of classifying offenders. In the meanwhile, however, we must take scrupulous pains to establish that the young people have indeed committed the offenses that, under the law, justify the heavy-handed ministrations of the state.[6]

It would be hard to quarrel with the decision in the *Gault* case if one takes his stand unequivocally on the principle that no person, regardless of status or circumstance, shall suffer any deprivation of liberty at the hands of the state except for causes clearly specified in the law and without a full, fair, and realistic opportunity to defend himself against the charges. The social movement I referred to above amounts to a more resolute

6. The sociological authorities most frequently cited in the *Gault* opinion are S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND TREATMENT in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY & YOUTH CRIME 409 (1967). It is interesting that the opinion did not cite these authors to this effect:

> [b]ut do we know enough about delinquency to specify the ways in which even a moderate reduction could be brought about? In terms of verified knowledge, the answer must be an unqualified no. . . . Indeed, as of now, there are no demonstrable and proven methods for reducing the incidence of serious delinquent acts through preventive or rehabilitative procedures. *Id.* at 410.

commitment that this principle must prevail over alternative or competing interests that the law might serve. If one feels strongly enough about this principle, then the arguments against *Gault* reduce to quibbles; the massive invocation of sophisticated, scholarly, and contemporaneous research adds dignity and éclat to the arguments pro, but it is like marshaling a battalion when a platoon would do. A study of the materials that seem to impel the court to its conclusion impels me to the conclusion that, although these materials are useful to the construction of the Court's argument, there must be another set of materials of even greater interest: those that account for the social movement and the new perspective of the Court, in the light of which old facts and arguments acquire a saliency that they did not have before.