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BOOK REVIEW

IN DEFENSE OF YOUTH. By W. Vaughn Stapleton and Lee E. Teitelbaum. New York, New York: Russell Sage Foundation. 1972. xv+243 pages. \$10.00.

DANIEL KATKIN* AND FREDERICK HUSSEY†

INTRODUCTION

A student in a class of Professor Monrad Paulsen's once provoked an angry tirade by saying that a lower court decision had been "overruled," when the accurate term would have been "reversed." "For God's sake, young man," Paulsen bellowed, "be precise with language. Words are meant to express ideas with precision, and if you're not going to use them to do that, you might as well be . . . (here turning red in the face, and seeming momentarily to be at a loss for words) . . . a sociologist." To all who heard, it seemed a perfectly reasonable (although very funny) proposition. Of course, all those who heard were law students.

Lawyers tend to view sociology as a "soft," maybe even fuzzy science. Law, on the other hand, is viewed as precise. In reality, however, sociology need not be vague, and law is not all that precise.

The notion that law is an exact science may be traced to the positivist philosophy of Austin, Gray, and Holmes: The law is what courts declare it to be; everything else—even legislation—is merely a source of the law.¹ A counselor who would know what the probable consequences of his client's acts are, or what the nature of his client's rights is, need merely study the cases and place his trust in the doctrine of *stare decisis*.

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1. See J. AUSTIN, *LECTURES ON JURISPRUDENCE* (1875); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1963); O. W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920). Note that Holmes defines the law as "prophecies of what the courts will do in fact." This formulation has the distinct advantage of recognizing that there may be a gap between what the courts declare and what they actually do. *Id.* at 173.

Heretics or fuzzy-minded behavioral scientists might maintain that this is a somewhat grandiose view of judicial power. In support of that position they might point out that despite the Supreme Court's expansion of the rights of criminal suspects, more than seventy percent of all inmates in federal prisons never even had trials because of the operation of plea-bargaining;² or that almost twenty years have passed since the Supreme Court held that the Constitution requires the integration of public schools. Such arguments, however, would likely be dismissed by hardnosed lawyers as confusing issues of enforcement with issues of law. But a philosophy of law which focuses on the decisions of courts without consideration of whether anyone pays attention to those decisions, is sterile indeed.³

If lawyers are to be effective they must be familiar not only with documents, but also with the realities those documents purport to regulate. Furthermore, if law is to be effective in its attempt to regulate human behavior, it must be derived from an accurate conception of reality, rather than from fictions or wishful thinking. Lawyers must find the courage to study the ambiguity and uncertainty that exists outside the confines of their comfortable libraries. They must undertake—at least from time to time—to think like sociologists.

In Defense of Youth is an important book because it demonstrates that fruitful collaboration between lawyers and sociologists is possible. The interest and readability of the book are enhanced by the fact that its field research took place in juvenile court—a fascinating forum about which lawyers tend to know too little—and by the conclusion towards which the study moves: that the presence of counsel may not be sufficient to guarantee due process of law for juveniles.

The book may be conceptualized as having three parts: an introductory section on the history and philosophy of the juvenile court movement; a description of the research design and its implementation; and a search for explanations of the findings.

The History and Philosophy of the Juvenile Court Movement

The first chapter of the book is absolutely first-rate. It traces the history of the juvenile court movement to its intellectual source: the

2. See Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970). In a recent year in New York more than 70 percent of youthful offenders were sentenced after pleading guilty. *Id.*

3. For an excellent critical discussion of legal positivism see L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

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notion that human behavior is determined, and that "[t]he explanation of crime . . . may be found in the motivational and behavioral systems of [individual] criminals."⁴

Because the juvenile court reformers believed that human behavior is understandable, and that intervention to change it is possible, they sought to establish a court based on the rehabilitative ideal. Children were the appropriate special objects of this court for two reasons: first, childhood carries with it a reduced level of responsibility, which makes punishment particularly inappropriate; and second, the state has an affirmative duty to help socialize children.

The second line of argument is particularly important to the development of juvenile court theory. Judge Julian Mack summarized the position as follows:

There is a . . . [fine and noble] legal conception hidden away in our history that . . . [should be] invoked for the purpose of dealing with the youngster that has gone wrong. That is the conception that the State is the higher parent; that it has an obligation, not merely a right but an obligation, toward its children; and that is a specific obligation to step in when the natural parent, either through viciousness or inability, fails so to deal with the child that it no longer goes along the right path that leads to good, sound, adult citizenship.⁵

This "noble" conception, generally referred to as the *parens patriae* doctrine, demanded radical alterations in the traditional processes of criminal law. After all, the relationship between a parent and a child—even an erring child—can not reasonably be regulated by the same rules that apply when the state is prosecuting an alleged felon.

New rules were established which prohibited jury trials, relaxed the usual standard of conviction (proof beyond a reasonable doubt), ignored the fifth amendment right to silence, and actively discouraged the participation of defense attorneys. These procedures were justified by the simple expedient of declaring that juvenile cases are civil rather than criminal in nature, that their purposes are therapeutic rather than punitive, and thus, that there is no need for an adversary model. State appellate courts upheld this view;⁶ and until recently juvenile courts had great latitude to create their own procedures.

4. D. MATZA, *DELINQUENCY AND DRIFT* 3 (1964).

5. Mack, *The Chancery Procedures in the Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 311 (J. Addams ed. 1927).

6. *E.g.*, *State v. Scholl*, 167 Wis. 504, 167 N.W. 830 (1918); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905).

In 1967, however, the Supreme Court held that juvenile court procedures are subject to constitutional limitations, and that hearings "must measure up to the essentials of due process and fair treatment."⁷ More specifically, *In re Gault* held that juveniles are entitled (1) to adequate notice of the charges against them;⁸ (2) to exercise the privilege against self-incrimination;⁹ (3) to cross-examine witnesses against them;¹⁰ and (4) to representation by counsel.¹¹

In *Gault* and in such other decisions as *Escobedo v. Illinois*,¹² and *Miranda v. Arizona*,¹³ the Court has tended to view representation by counsel as having a special importance in the constellation of procedural right. The presence of counsel is viewed as "often indispensable to a practical realization of due process of law . . ."¹⁴

It is certainly plausible to expect that the presence of a skilled defense attorney will assure all other procedural rights. But is that plausible expectation true in fact? That is the central question addressed in *In Defense of Youth*; and the answer is disheartening.

The Research Design and Its Implementation

Perhaps the outstanding characteristic of the present study is its effective utilization of scientific techniques in addressing a sociolegal issue. However, the responsible use of scientific method involves more than the efficient use of technique; in addition to good technique there ought also to be the development of a body of theory from which specific testable hypotheses (statements of the expected outcomes of the experiment) are generated. This section of the review will focus attention both on the desirability of using scientific technique and on the admirable extent to which that was done in this study. The consequences of the failure to develop theory will also be considered.

To assess the potential influence of defense counsel in juvenile court cases, Stapleton and Teitelbaum might have considered merely comparing the records of cases in which youngsters were represented with the records of cases in which lawyers were not present. Such a

7. *In re Gault*, 387 U.S. 1, 30 (1967), quoting *Kent v. United States*, 383 U.S. 541, 562 (1966).

8. 387 U.S. 1, 33 (1967).

9. *Id.* at 55.

10. *Id.* at 57.

11. *Id.* at 41.

12. 378 U.S. 478 (1964).

13. 384 U.S. 436 (1966).

14. *In re Gault*, 387 U.S. 1, 40 (1967), quoting N.Y. FAMILY CT. ACT § 241.

procedure, however, would have yielded inherently unconvincing conclusions. A finding that represented youngsters were adjudicated delinquent less often than unrepresented youngsters, for example, might mean that only youngsters with "good" cases obtained legal assistance, and not that the presence of an attorney made a difference. Conversely, a finding that unrepresented youngsters were adjudicated delinquent less often might mean that only youngsters with "weak" cases obtained legal assistance, and not that lawyer presence had somehow proven harmful. There would be no certain way of knowing how to interpret the findings.

Experimental technique seeks to limit in advance the number of causal explanations for the results obtained. To do this it was necessary for Stapleton and Teitelbaum to do more than review the records of old cases. They actually provided legal assistance in current cases in two cities to *randomly* selected youngsters.

Had the youngsters who were offered their assistance been selected any way other than randomly, it would not have been possible to assert with certainty that the method of selection did not influence the findings at least as much as the independent variable (lawyer representation).¹⁵ Because the group to be represented was selected randomly from the population of cases, the laws of probability support the conclusion that any observed differences can be attributed to the legal intervention.

It is important to note that large scale social research projects rarely make such effective use of the principle of randomization as was made in this study. The design was cleverly constructed and thoughtfully implemented. Had the results clearly indicated that the represented youngsters in both cities fared better than the youngsters in the control groups, it would be definitely known that representation makes a significant difference. Indeed, even the opposite finding

15.

The principle of randomization may be stated thus: Since in random procedures, every member of a population has an equal chance of being selected, members with certain distinguishing characteristics—male and female, Republican and Democrat, extrovert and introvert, high and low intelligence, and so on and on—will, if selected, probably be counterbalanced in the long run by the selection of other members with the "opposite" quantity or quality of the characteristics.

F. KERLINGER, *FOUNDATIONS OF BEHAVIORAL RESEARCH* 56-57 (1964). It will be noted that the samples in the present study were random but not wholly representative of all juvenile court cases. For example, all the cases were male and indigent, none was accused of homicide. However, the samples were comprised of randomly selected individuals within those constraints.

(that unrepresented youngsters in both cities fared better) would lead to the clear conclusion that lawyer participation makes a difference. What, however, can be made of the actual finding: that represented youngsters fared better in one city, but worse in the other?

In the last chapters of the book the authors do an excellent job of developing plausible causal explanations of their surprising finding. The point must be made, however, that those explanations have only the status of theory; and that had the study been truer to the scientific ideal which emphasizes the development of theory and hypotheses at the beginning of an investigation, the final conclusions might have been more meaningful.

An unlikely hypothetical may be helpful to illustrate this criticism. Suppose as you walk home one day, you pass a parked Rolls Royce whose playboy owner is trying unsuccessfully to start it. In exasperation he turns to you and says: "If you can start this damn thing in one try, its yours." You probably would not just jump in and turn the key. Rather, you'd start by thinking about the possible causes of the problem, and would begin a systematic gathering of information. You might check the gas tank, or the battery cables, or the generator belt, or anything else you could think of. On the basis of all of these preliminary observations you would develop a theory of the problem, which, if correct, would have significant payoff. Your behavior would be consistent with the scientific ideal which requires theorizing before experimentation.

It is at a parallel stage in the planning of this research project that the most significant weakness can be identified. Stapleton and Teitelbaum had at hand all of the information necessary to develop comprehensive theory. They failed, however, to make effective use of all of that information.

The main finding of the study—that represented youngsters fared better in one city than the other—suggests that differences in the operational procedures of the courts and the attitudes of the judges in the two cities were the primary determinants of case outcome. In short, the conclusions indicate that there is not one juvenile court system, but rather that there are several and that the differences between them may be of great consequence. Had that been hypothesized at the beginning (and there is sufficient information from other court related research—as their excellent first chapter indicates—to have made such an hypothesis plausible), then the totality of the effort might have

been guided along significantly different lines.¹⁶ It is at least probable that the experimental controls would have been directed differently.

Because theory from which hypotheses could be generated was not developed at the outset, the data had to be explained by ex post facto reasoning. An explanation of findings developed after the collection of data is less convincing than a conclusion based upon the cautious testing of previously constructed hypotheses,¹⁷ because such hypotheses serve to guide the entire research effort. Had the scientific ideal been more closely adhered to it is quite likely that the findings would have been similar; the certainty with which they could be asserted, however, would be greater.

Before proceeding to a review of the book's plausible explanation of findings, a brief caveat about external validity is in order.¹⁸ External validity refers to the extent to which generalizations can be drawn from this study.

The attorneys who participated in the project were not typical of the total population. They were all recent law school graduates of high academic standing, who were willing to take on "social work" as well as traditional legal roles. In addition they all carried well controlled case loads, and while working on the project, all took advanced courses on delinquency, juvenile courts, and related topics. This was desirable not only in terms of the quality of service they offered, but also in terms of the requirements of good research. In order to eliminate dif-

16. The point should be made that the project was funded in 1964, three years before the *Gault* decision, at a time when little research was taking place in juvenile courts; thus hypotheses of the type the absence of which is lamented here, may not have been so apparent as they seem to be in 1973.

17.

The most important difference between experimental research and ex post facto research, then, is *control*. In the experimental case, the investigator at least has manipulative control: he has at least one active variable. If an experiment is a "true" experiment . . . he can also exercise control by randomization. He can assign subjects to groups at random. . . .

In the ex post facto research situation, this control of the independent variables is not possible, and what is perhaps more important, neither is randomization. The ex post facto investigator must take things as they are and not try to disentangle them.

F. KERLINGER, *supra* note 15, at 361.

Strictly speaking, Kerlinger's comments refer only to research strategies, while the present criticisms are directed to techniques in deriving explanations. However, Kerlinger's observations on the shortcomings of ex post facto research are parallel to our comments on the imperfection of explanations developed after all the empirical data has been collected.

18. Stapleton and Teitelbaum are not unaware of the problem concerning external validity; it is discussed in the second chapter of the book (p. 58 *et seq.*).

ferences in the quality of the lawyers as a possible explanation of the findings, it was necessary for the staff attorneys to be of roughly equal quality. Attempting to standardize quality at the high end made sense not only for its own sake, and not only because it is probably comparatively easy, but also because the project was conceptualized as testing the effect of highly skilled legal representation. Had consistently poor or mediocre attorneys been unable to successfully assist their clients it would not have proven that lawyer participation could not possibly be helpful. On the other hand, however, if well-trained recent graduates with all the advantages of controlled case loads and special courses failed to assist their clients, the qualified inferences that could be drawn about the potential effectiveness of more typical counsel would be persuasive.

The problem with using highly trained and specialized lawyers is that it limits the extent to which the conclusions can be generalized to more typical attorneys in more common situations.

The thrust of this criticism is not that the researchers made a mistake in providing consistently high quality counsel—the very nature of the research required them to do that—but rather that the reader must bear in mind that the research took place under conditions atypical of those which usually exist in the real world of professional practice.

The point being made here is not that the findings are erroneous or useless, but only that we cannot be *certain* that they are representative of the totality of lawyer interventions in the juvenile court.

Having spent considerable attention on the techniques and conceptual issues raised by the methodology of the study, it is now appropriate to review the findings and comment on their possible interpretations.

The Search for Explanations

The point has already been made that the findings differed significantly in the two court systems studies.

In the city identified as Zenith, youngsters represented by counsel were significantly more likely than unrepresented youngsters to win acquittals, or at least to have the case continued without a formal declaration of delinquency ever being entered. In the other city—identified as Gotham—there was not a statistically significant difference between the experimental and comparison groups; there was,

however, a slight trend indicating that unrepresented youngsters had a better chance of avoiding an adjudication of delinquency.

While the assistance of a lawyer made a significant difference in Zenith at the adjudicatory stage, it did not make any difference at all in the dispositional stage. Youngsters were 3.7 times more likely to be placed on probation rather than to be institutionalized regardless of whether they were represented. In Gotham, however, lawyer assistance at the dispositional stage seems to have been downright unhelpful. 85.5 percent of the unrepresented youngsters received probation as opposed to 79 percent of the youngsters in the experimental group. Conversely, 21 percent of the represented youngsters were committed to institutions as opposed to only 14.5 percent of the boys in the comparison group. These differences are not statistically significant. That means that it cannot be asserted with reasonable certainty that they are not attributable to chance. They do, however, represent a statistical trend; and that trend is reinforced by a more detailed analysis of the data.

Stapleton and Teitelbaum approached the data with great rigor in an attempt to ferret out possible hidden relationships. Thus, they compared not only the experimental and control groups, but also relevant sub-groups. Experimental group boys who came up before a given judge were compared with control group boys who came up before the same judge. Similar intergroup comparisons were made on the basis of age, race, previous court experience, offense, number of petitions, and home situation.

In Zenith, boys in the experimental group were adjudicated delinquent less often across all the categories. In Gotham there were no categories in which represented boys received favorable dispositions significantly more often than control group boys. Furthermore, there was one category (youngsters from broken homes) in which the trend towards more favorable dispositions for unrepresented youngsters actually attained statistical significance; and in another category (youths with more than one petition) the results almost attained statistical significance.¹⁹

19. Statistical significance relates to the degree to which chance influences an observed difference or association. If an observation could be caused by the operation of chance alone, then one concludes that the intervention (*i.e.*, lawyers) made no difference. If, however, the difference is so great as to rule out chance as a cause of the difference, then the investigator concludes that the intervention made the difference. Usually, one accepts as statistically significant a conclusion that a result would occur less than five times in one hundred due to chance alone.

It is clear from the text that a considerable amount of hard work and ingenuity went into the search for explanations. The authors did not merely reflect on their more obvious findings, they exhibited a dogged determination to ferret out statistical relationships, and no doubt expended a tremendous amount of energy on repeated analyses. They labored well, and their product reflects it.

Their conclusion, that lawyer effectiveness is determined primarily by the dominant judicial attitudes on a particular bench, is well grounded. Most of the judges in Zenith were new to the juvenile court bench, and were comfortable with the adversary model common to most branches of law. The judges in Gotham had all served for a long time and were all firmly committed to the *parens patriae* approach. These philosophical differences were manifested in the procedures adopted by the courts in those (many) areas not regulated by *Gault*.

Two examples of differences in court procedures may be useful to demonstrate the extent to which judicial attitudes may undermine lawyer effectiveness.

Plea-taking procedures in the two cities differed substantially. In Zenith the plea was treated in much the same way as it is in criminal courts. Pleas of not guilty were regarded as a challenge to the state to prove the elements of its case, rather than as an assertion of factual innocence. The Zenith court viewed the decision about how to plead as an important part of defense strategy, and consistently granted reasonable extensions to permit counsel to investigate the case carefully. In addition, recognizing the strategic functions of the plea, the court never required that it be taken under oath; in Gotham, however, pleas were taken under oath and continuances to allow counsel ample opportunity to investigate the facts of the case were discouraged. Judicial attitudes and behavior operated to deny counsel the time necessary to prepare an adequate adversarial defense.

The patterns of judicial usage of "instant amendments" also differed in the two cities. Such amendments to the original petitions may be made by judges when it appears that the facts revealed in court support a charge of delinquency other than the one actually brought. The possibility of sudden and drastic alteration of the original charge obviously limits the capacity for successful adversarial defense. As might be expected, instant amendments appeared $2\frac{1}{2}$ times more frequently in Gotham than in Zenith; and in 10 percent of the cases in Gotham,

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but less than 2.0 percent of those in Zenith, outcome rested expressly on such amendment.

These examples and many others support the proposition that the effectiveness of lawyers depends not only on their own talents, but also on the attitudes of the judges before whom they practice.

Bitter pill though that may be, it is an important one for the profession to swallow; particularly as it casts doubt upon the belief that the right to counsel is an effective safeguard of civil liberties generally.

CONCLUSION

The broadest issue with which this book deals is the relationship between knowledge in the field of sociology and knowledge in the field of law. This review began with the assertion that lawyers must undertake—at least from time to time—to think like sociologists. If the study of law does not concern itself with the systematic examination of social reality, then lawyers can delude themselves with the belief that landmark decisions, such as the one in *Gault*, actually describe reality, when rather they are attempts to prescribe it.

Perhaps more important, a jurisprudence divorced from sociological inquiry will perpetuate myths and fictions such as the belief that reforms which extend the right to counsel will actually increase the probability of fair hearings.

If the law is to be an instrument of social change, it must be based on a systematic knowledge of society. In this review we have raised issues about the extent to which Stapleton and Teitelbaum actually adhered to the scientific ideal. However, their methodology was certainly good, and their analysis of the data was excellent. One puts down the book with confidence that he understands the reality in which those who defend youth must practice.

Stapleton and Teitelbaum have blazed a trail. It would be well if many more of us began to travel it.

