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Right to Counsel in Virginia Juvenile Proceedings

COMMENTS

RIGHT TO COUNSEL IN VIRGINIA JUVENILE PROCEEDINGS

The juvenile court, representing the *parens patriae* power of the state, was created in order to remove juveniles from the stigmatizing and punitive atmosphere of adult criminal courts.[1] Divorced from this atmosphere, the juvenile court, by administering individualized justice[2] in an informal, civil-natured proceeding,[3] could measure the juvenile's social maladjustment and subject him to state supervision in such a manner as to correct his delinquent attitude and lead him to a correct life.[4] Many forums, however, have found that the functioning juvenile system inadequately promulgates the enlightened principles which led to its creation.[5] Scholars have attacked the non-criminal label as an

[1] *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109-110 (1909). *See also* Nicholas, *History, Philosophy, and Procedures of the Juvenile Court*, 1 J. FAM. L. 151 (1961). However, a stigmatizing and punitive atmosphere is present in the juvenile system. The founders escaped the brand of criminality only to find the brand of delinquency just as damning. Virginia has attempted to remove these brands. VA. CODE ANN. § 16.1-179 (Cum. Supp. 1968) forbids the use of the words "crime" or "conviction" in referring to a juvenile court action. *See* Jones v. Commonwealth, 185 Va. 335, 342, 38 S.E. 2d 444, 447 (1946). By the enactment of VA. CODE ANN. § 16.1-158 (Cum. Supp. 1968) Virginia also removed any procedural determination of delinquency. A juvenile, under the statute, is adjudged under the court's jurisdiction and is therefore subject to rehabilitative treatment. However, the effectiveness of avoiding stigma by changing labels is questioned. Platt & Friedman. *The Limits of Advocacy : Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1160 (1968).

Indeterminate sentencing and inadequate rehabilitative facilities continue the punitive atmosphere the founders sought to escape. "Court adjudication and disposition of offenders should no longer be viewed solely as a diagnosis and prescription for cure, but frankly recognized as an authoritative court judgment expressing society's claim to protection." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2 (1967) [hereinafter cited as TASK FORCE REPORT]. Indeed, such an approach has been actively adopted in the German Juvenile system. *See* Overland and Newhouse, *Juvenile Criminal Law in the Federal Republic of Germany and in England*, 4 CAL. WEST. L. REV. 35, 36 (1968).

[2] *See* Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719 (1962). For a discussion of the important role of social reports in the administration of individualized justice *see* Teitelbaum, *The Use of Social Reports in Juvenile Court Adjudication*, 7 J. FAM. L. 425 (1967).

[3] Mickens v. Commonwealth, 178 Va. 273, 281, 16 S.E. 2d 641, 644, *cert. denied*, 314 U.S. 690 (1941).

[4] *Id.* at 279, 16 S.E. 2d at 643.

[5] Legislative recognition of juvenile system inadequacies is exemplified by model

insufficient justification for summary proceedings administered with extensive judicial power,[6] and question the constitutional propriety of denying juveniles procedural rights in exchange for unfulfilled promises of rehabilitation.[7]

In *In re Gault*,[8] the Supreme Court of the United States found the disparity between the functioning juvenile system and its avowed principles unacceptable. The failures of the system[9] and the seriousness of an adjudication of delinquency led the Supreme Court to demand greater formalities in juvenile proceedings involving possible commitment to a state institution.[10] This comment will consider the effect of the *Gault* guarantee of counsel upon the administration of juvenile justice in Virginia. Primary focus will be placed on Virginia's statutory attempt to implement the *Gault* guarantee of counsel.[11]

As a result of the *Gault* decision, four basic procedural rights are

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statutory revision in several states. The following statutes are representative: N.Y. FAMILY CT. ACT (McKinney 1963); CAL. WELF. & INST'NS CODE (West Supp. 1967); ILL. ANN. STAT. ch. 37, §§ 701-1 to 708-4 (Smith-Hurd Supp. 1967). Congress has shown its concern in the proposed Juvenile Delinquency Act, S. 1248, 90 Cong., 1st Sess. (1967). Executive interest is illustrated by the PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter cited as NAT'L CRIME COMM'N REPORT]. The most significant judicial consideration of the juvenile system's inadequacies is *In re Gault*, 387 U.S. 1, (1967). This decision is reflective of what Cox finds the most intensive criminal procedure reform in our country's history. A. COX, THE WARREN COURT, at 74 (1968).

6 Welch, *Delinquency Proceedings–Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653, 694 (1966).

7 *E.g.*, Glueck, *Some "Unfinished Business" in the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628-640 (1964). For a list of authorities who advocate constitutional reforms *see* Platt & Friedman, *supra* note 1, at 1160 n. 22.

8 387 U.S. 1 (1967).

9 *E.g.*, TASK FORCE REPORT 7-9.

10 Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUPREME COURT REVIEW 233, 241.

11 VA. CODE ANN. § 16.1-173 (a) (Cum. Supp. 1968) provides that:

> In any case in which a child or minor is within the purview of this law, or subject to the jurisdiction of the court hereunder, except any offense for which the maximum sentence does not include a sentence of confinement or a case involving child custody, the court shall, if such child or minor appear for any hearing without being represented by counsel, appoint an attorney at law to represent him and provide such child or minor legal representation throughout every stage of the proceeding against him.
>
> The order of appointment of counsel shall be filed with and become a part of the record of such proceeding. The attorney, so appointed, shall represent the child or minor at any such hearing and at all stages of the proceeding until relieved or replaced in the manner provided by law.

This comment will not consider the effect of this statute upon custody proceedings or traffic violations where penalties are explicit and punitive in nature.

guaranteed in the adjudicatory stage of a juvenile proceeding when a determination of delinquency is being made, the foreseeable result of which could be commitment to a state institution.[12] Of these safeguards, that of right to counsel is most fundamental for it attempts to insure procedural regularity in the juvenile court.[13] Although lack of counsel in juvenile proceedings is not a denial of due process under the Virginia constitution,[14] the Virginia legislature has guaranteed counsel for juveniles in every procedural stage if confinement may result.[15] This statutory guarantee is an extra-constitutional right under Virginia law, but in so far as it incorporates the *Gault* situation, it expresses a due process guarantee. Denial of counsel outside the *Gault* situation, cannot be collaterally attacked,[16] but timely exception to such a denial would be grounds for appeal.[17] However, appeals are rare in juvenile courts because of the cost involved and the general reluctance to challenge the court's paternal decree.[18]

12 387 U.S. 1, 13 (1967). These rights are notice of the charges, right to counsel, right to confrontation and cross-examination, and privileges against self-incrimination. *Id.* at 10.

13 *E.g.*, Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558 (1968).

14 Cradle v. Peyton, 208 Va. 243, 251, 156 S.E. 2d 874, 880 (1967). The Supreme Court of Appeals found the *parens patriae* concept of non-counsel representation adopted by all states, constitutionally adequate to satisfy the Virginia due process clause. Such a position by the court in light of the *Gault* decision, seems unrealistic and regressively inadequate. States throughout the country have exhibited a marked awareness of the juvenile court system's deficiencies and, like Virginia, through statutory reform have attempted to insure procedural guarantees, such as right to counsel, as a stabilizing and reforming measure. *See* Skoler & Tenney, *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77, 95-96 (1964).

15 It is within the discretion of the juvenile judge under VA. CODE ANN. § 16.1-178 (Cum. Supp. 1968) to confine a juvenile for any offense (i.e., those specified in VA. CODE ANN. § 16.1-158 (1) (f), (g), (h), (i), (j)) that creates jurisdiction in the court to consider the petition. It should be noted that traffic offenses and custody proceedings are excluded from this discussion.

16 For a collateral attack to be available outside the *Gault* situation, there must be a lack of jurisdiction. Cunningham v. Haynes, 204 Va. 851, 855, 134 S.E. 2d 271, 274 (1964). A deficiency that makes a decree void would also be sufficient. Hobson v. Youell, 177 Va. 906, 916, 15 S.E. 2d 76, 80 (1941). Although VA. CODE ANN. § 16.1-173 (Cum. Supp. 1968) is mandatory in tone, it would not effect the power of the court to hear the proceeding. VA. CODE ANN. § 16.1-158 (Cum. Supp. 1968). As representation by counsel is not a constitutionally guaranteed right in Virginia, denial would not void the proceeding. Of course when denial of counsel falls within the scope of the *Gault* decision, it would be a denial of due process and assailable by any means.

17 VA. CODE ANN. § 16.1-214 (Cum. Supp. 1968).

18 TASK FORCE REPORT 40. *See also* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 799 (1966). Appellate review

Gault, in part, uses "commitment to a state institution" as a measuring stick to determine when counsel is required. The Virginia statute incorporates this standard by stipulating that when the maximum sentence may be confinement, counsel is required.[19] Yet this language provides more than a mere guideline to be used by the juvenile court. The literal effect of the statute is to require counsel in every juvenile proceeding because it is always within a Virginia juvenile court's power to confine a juvenile under its jurisdiction, or to commit him to a state institution.[20] Since confinement is a possibility, but rarely a reality[21] in every juvenile proceeding, the total effect of the Virginia statute has been to create an unwarranted extension of *Gault*.

Extending the Virginia statute beyond the *Gault* standard has produced a result as unacceptable as the failure of the juvenile system to transpose its founding principles into a functioning reality. *Gault* emphasizes the procedural necessity of counsel where commitment may result, and qualifies this as applicable only in a delinquency-determining adjudicatory stage. Virginia has incorporated these qualifications in its statute, but by correlating the right to counsel with the ever present threat of confinement, counsel's presence is necessary in every stage of every proceeding. Where confinement is a possibility, this expansion of *Gault* is laudably prospective. But, where confinement is not a practical alternative, counsel's presence is not essential to insure the juvenile's due process rights. Although this end has been indirectly achieved by effective use of waiver of counsel forms,[22] prompt statutory revision by the Virginia Legislature would more effectively restore judicial discretion in non-confinement proceedings.[23]

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can effectively reduce arbitrary and inconsistent official action. Handler, *The Juvenile Court and the Adversary System: Problem of Function and Form*, 1965 WIS. L. REV. 7, 44-45.

19 VA. CODE ANN. § 16.1-173 (a) (Cum. Supp. 1968) quoted, *supra* note 11.

20 Jurisdiction in traffic violation and custody proceedings will not be considered in this comment. Disregarding these two proceedings, the juvenile judge, vested with the power conferred by VA. CODE ANN. § 16.1-178 (Cum. Supp. 1968), can as a rehabilitative alternative, confine any juvenile before him.

21 *See* Lemert, *The Juvenile Court—Quest and Realities*, TASK FORCE REPORT 91, 96.

22 Paulsen, *Juvenile Court and The Legacy of '67*, 43 IND. L.J. 527, 534-535 n. 35 (1968).

23 In any statutory revision it would be important to specify what will constitute confinement. Certainly the juvenile's rights are restricted while he is on probation or in a foster home for undetermined periods. Perhaps the line should be drawn at pre-adjudicative disposition and adjudicative disposition that results in a warning or probation. *See* Skoler, *supra* note 13, at 563 n. 27.

Where confinement is in fact a possibility, counsel's presence is recognized as a procedural mechanism of control.[24] The Supreme Court of the United States recognized a juvenile's constitutional right to

> . . . the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceeding and to ascertain whether he has a defense and to prepare and submit it.[25]

It will be left for the juvenile judge to make this conceptually adverse advocate an effective officer of the court, as well as a guardian of the juvenile's rights and welfare.

A recent study of Chicago counsel service for juveniles[26] illustrates the frustration and lack of understanding among attorneys as to their dual role in juvenile proceedings. The typical counselor was found to be a small-fee lawyer who most often is pressured by the welfare system into ignoring his adversary functions in order to reduce friction.[27] Such a counselor discovers that seldom is a case won on its merits, and if a case is won on a technicality, he feels obligated to reprimand the youth against further acts of misconduct.[28]

Active participation by attorneys in juvenile proceedings may create inconveniences. Compliance with the *Gault* decision and Virginia statutory counsel requirements will be expensive. But, this cost factor might induce a more conscientious effort by juvenile authorities to dispose of less severe offenses at the pre-adjudicative stage.[29] An advocate's presence will place the judge in the awkward position of being both judge and prosecutor. A full utilization of adversary representation may necessitate an attorney for the state to insure proper presentation of the case and free the judge from advocate responsibilities.[30] Educational programs must be instituted to develop a bar aware of the juvenile court philosophy, and its dual role as an assisting and reforming arm of the court.[31]

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24 *E.g.*, Welch, *supra* note 6, at 667-683; NAT'L CRIME COMM'N REPORT 86-87.

25 387 U.S. 1, 36 (1967).

26 Platt & Friedman, *supra* note 1.

27 *Id.* at 1168.

28 *Id.* at 1182.

29 TASK FORCE REPORT 9-22.

30 Skoler, *supra* note 13, at 577.

31 Legal training could be provided in a number of ways. Continuing legal education programs could educate the existing bar. Internship programs have been instituted in

Procedural domestication will not dissipate the juvenile court's ability to exercise the *parens patriae* power of the state. Indeed, procedural informality has been found to instill in juvenile offenders a sense of injustice over the seemingly challengeless authority vested in judges and welfare officials.[32] Effective implementation of the *Gault* guarantees by the juvenile judiciary can complement and reform the administration of individualized justice. The Virginia counsel statute, despite its weaknesses, initiates the struggle to achieve this reformation.

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law schools. *See* Furlong, *The Juvenile Court and The Lawyer*, 3 J. FAM. L. 1, 33-44 (1963).

[32] NAT'L CRIME COMM'N REPORT 85.