South Carolina Law Review

Volume 22 | Issue 3 Article 7

1970

Constitutional Law: An Infant's Right to Trial by Jury

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COMMENTS

CONSTITUTIONAL LAW—AN INFANT'S RIGHT TO A TRIAL BY JURY*

'The right of trial by jury shall remain inviolate' are the words of the Bill of Rights, and no act of the Legislature can deny this right to any citizen, young or old, minor or adult, if he is to be tried for a crime against the commonwealth.[1]

I. Introduction

"[T]he Bill of Rights applies to every individual within the territorial jurisdiction of the United States, irrespective of age."[2] The Supreme Court of the United States is in agreement, stating in *In re Gault*[3] that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[4] Starting with the proposition that these constitutional guarantees extend to everyone regardless of age, the startling fact arises that in only a few instances have these rights attached in juvenile proceedings. It was not until the *Gault* decision, where the first expansive treatment of the constitutional requirement of due process in juvenile proceedings was undertaken, that the juvenile received the benefit of any of the basic constitutional guarantees that would have been received by an adult who was being tried for the same offense. The *Gault* Court held that juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to at least minimum standards of due process and fair treatment. To meet this requirement, a juvenile court in such proceedings must provide a juvenile or his parents or guardian:

1. written notice of the specific charge or allegation sufficiently in advance of the hearing to permit preparation;

* DeBacker v. Brainard, 90 S. Ct. 163 (1969).

1. *Ex parte* Sharpe, 15 Idaho 126,—, 96 P. 563, 564-65 (1908), *citing* Commonwealth v. Fisher, 213 Pa. 48,—, 62 A. 198, 200 (1905). This strong argument was made by the petitioner in seeking the release of his daughter from the Industrial Training School. The court rejected the plea, holding that the delinquency determination of a child was not a trial, and therefore there was no right to a trial by jury.
2. Trimble v. Stone, 187 F. Supp. 483, 486 (D.D.C. 1960).
3. 387 U.S. 1 (1967).
4. *Id.* at 13.

2. representation by counsel, and if the child or his parents are financially unable to afford counsel, counsel must be appointed to represent the child;
3. the privilege against self-incrimination; and
4. the right of confrontation and cross-examination in accordance with constitutional requirements.[5]

Although *Gault* went far in integrating due process requirements into the juvenile scheme, no determination was made as to whether the right to a trial by jury attached thereto.[6] The Court did, however, have a later opportunity to consider the problem of whether a juvenile is entitled to a jury trial. This opportunity arose in the form of *DeBacker v. Brainard*,[7] a decision on appeal from the Nebraska Supreme Court.

In *DeBacker*, the appellant, a minor 17 years of age, was found to be delinquent by the juvenile court sitting without a jury and was committed to a training school for boys. A petition for habeas corpus was dismissed by the district court. On appeal to the Nebraska Supreme Court, a majority of four of the seven judges were of the opinion that the state's juvenile court act was unconstitutional in that it denied juveniles the right to a trial by jury. This did not result in the declaration that the juvenile's right to a jury trial had been violated, for the Nebraska Constitution required the concurrence of five judges to hold a legislative act unconstitutional. The court was therefore forced into affirming the dismissal.[8] On appeal the United States Supreme Court, in a *per curiam* opinion, stated that at the time the case was heard at the juvenile court level, the right to a trial by jury had not been incorporated into the fourteenth amendment and was not, therefore, applicable to the states.[9]

5. *Id.* at 1.

6. The right to trial by jury as herein contained merely refers to the right guaranteed by the Constitution in amendment six, which would apply to an adult being charged with the same offense for which the juvenile is being tried, and in no way proposes to expand such right in any other way. The sixth amendment right to trial by jury was incorporated into the fourteenth amendment, and therefore made applicable to the states, by Duncan v. Louisiana, 391 U.S. 145 (1968). S.C. CONST. art. 1, § 18 provides in part:

> §18. *Trial by jury; witnesses; defence.* In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .

For the constitutional rights afforded to aliens, *see generally* Oppenheimer, *The Constitutional Rights of Aliens*, 1 BILL OF RIGHTS REV. 100 (1941).

7. 83 Neb. 461, 161 N.W.2d 508 (1968); *appeal dismissed*, 90 S. Ct. 163 (1969).

8. *Id.*

9. The right to trial by jury was incorporated into the fourteenth amendment on May 20, 1968, by Duncan v. Louisiana, 391 U.S. 145 (1968). *DeBacker* was heard Mar. 28, 1968, less than two months before *Duncan*.

Since the Supreme Court has not passed on the requirement of a trial by jury in juvenile proceedings, states will continue to differ in their approach to this matter. This comment will contrast the two prevailing concepts now existing, will show the position taken by South Carolina, and will attempt to formulate an approach acceptable in view of current constitutional development.

II. Parens Patriae: A Father in Time of Need

Before 1900, the delinquent was viewed simply as a young criminal. He was afforded no special treatment and, if convicted of the offense with which he was charged, he would receive the same sentence as would an adult. The turning point in dealing with juveniles came in 1899 when Illinois adopted the first juvenile court act.[10] Pennsylvania soon followed in these footsteps by enacting similar legislation.[11] Juvenile court acts subsequently spread throughout the United States.[12]

These juvenile court acts represented a turning point in the treatment of wayward youngsters. No longer were they treated as young criminals; rather, they were regarded as wayward youths who, because of their age, might be more easily rehabilitated than might adult offenders.

> Invoking the doctrine of *parens patriae* the state sought to rehabilitate rather than punish the youthful offender. Thus, the structure of the juvenile court was pragmatically oriented toward securing the child's "best interest." Procedural formalities which prevailed in the criminal courts—where the state's position was basically antithetical to the interest of the suspected criminal—were thought inappropriate in the new institution, which was intended to cure, rather than to restrain and deter. Instead, the juvenile court procedures were fashioned so as to accord the judge the greatest possible opportunity to exercise a quasi-parental influence over the impressionable child.[13]

The adoption of the *parens patriae* doctrine by the juvenile

10. Family Court Act Laws, §§ 1-26 [1899] Ill. Laws (repealed 1966).
11. Act of May 21, 1901, Pub. L. No. 279; replaced by Act of April 23, 1903, Pub. L. No. 274.
12. *See* National Council of Juvenile Court Judges, Directory and Manual 1 (1964).
13. Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281 (1967).

courts in the several states, while praised by sociologists, led, however, to an undesirable result; in juvenile proceedings, juveniles were denied their constitutional rights. These denials were justified on the theory that, when a juvenile was "imprisoned" by a juvenile court, he was not being deprived of his liberty but was merely being taken into custody for his own good.[14] This theory can best be illustrated by the following statement from *In re Holmes*:[15]

> The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal, but protective, — aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as *parens patriae*.[16]

In adopting this *parens patriae* theory, the early reformers were appalled by adult procedure and penalties and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. Seeing the hazards that could result from such procedures, these reformers were convinced that society's duty to the child could not be accomplished by traditional concepts of justice alone. Instead of merely determining whether the child was guilty or innocent, courts should direct their attention to: "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[17] The child, as the reformers saw it, must be made "to feel that he is the object of [the state's] care and solicitude,"[18] not that he is under arrest or on trial. Because of these ideas the concept of criminal law in juvenile proceedings was rejected and in its place a "clinical approach" adopted. This new approach, sociological in nature, was designed to correct the adverse influences that were being exerted over the child and to turn him around, thus preventing him from continuing on his wayward journey.

14. Commonwealth v. Johnson, 211 Pa. Super 62, 234 A.2d 9 (1967).
15. 379 Pa. 599, 109 A.2d 523 (1955), *cert. denied*, 348 U.S. 973 (1955).
16. *Id.* at 603, 109 A.2d at 525.
17. Mack, *The Juvenile Court*, 23 HARV. L. REV 104, 119-20 (1909).
18. *Id.* at 120.

To achieve the desired results, the adversary procedure was rejected and in its place the state acted as *parens patriae*.[19]

In the event that the courts deemed it necessary to deprive the child of his liberty, this deprivation was rationalized on the ground that, since a child could be made to respond to his parents and teachers, he had no right to liberty.[20] If the parental authority that was needed by the child was ineffectively administered, the state could intervene and, if it was deemed necessary, confine the child.

In defense of the *parens patriae* approach, the argument is frequently made that juvenile proceedings are not true adversary proceedings, but rather are *sui generis* and require a flexible approach.[21] "The safeguards which surround . . . [the juvenile] do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act."[22] This position found support in *W. v. Family Court*,[23] where the court recognized the distinct need for a separate type of hearing or trial for minors. The court observed that the juvenile court system "has had the singular misfortune of being impaled on the sharp points of a few hard constitutional cases"[24] such as *In re Gault*[25] and *Kent v. United States*.[26] In requiring that constitutional safeguards be met, much flexibility and the sound discretion of the judge are lost. The rationale of this position is that the judge will be forced to sacrifice his knowledge and experience in the disposition of juvenile cases to the jury, which will not possess the same expertise and fatherly insight as would the judge.

South Carolina utilizes the *parens patriae* concept. Section

19. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 S. CT. REV. 167, 173-74. There seems to have been little early constitutional objection to the special procedures of juvenile courts. *But see* Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights*, 12 J. CRIM. L. & CRIMINOLOGY 339 (1922):

> The Court which must direct its procedure even apparently to do something *to* a child because of what he has done, is parted from the court which is avowedly concerned only with doing something *for* a child because of what he *is* and *needs*, by a gulf too wide to be bridged by any humanity which the judge may introduce into his hearings, or by the habitual use of corrective rather than punitive methods after conviction.

20. *Id.* at 340. *In re* Gault, 387 U.S. 1, 17 (1967).
21. State v. Santana, 444 S.W.2d 614 (Tex. 1969).
22. *Id.* at 619.
23. 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).
24. *Id.* at 418, 247 N.E.2d at 256.
25. 387 U.S. 1 (1967).
26. 383 U.S. 541 (1966).

15-1095.1 of the Code of Laws of South Carolina of 1962 prescribes the approach to be taken by the courts within the state when dealing with a juvenile.[27]

> This chapter shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible as secure units of law-abiding members; and that each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance and control that will conduce to his welfare and the best interests of the State, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him.[28]

The *parens patriae* concept is further incorporated by Section 15-1095.19 of the Code of Laws of South Carolina of 1962. Section 15-1095.19 provides: "All cases of children shall be dealt with as separate hearings by the court and without a jury."[29]

This, apparently, is the system followed in the majority of jurisdictions.[30]

III. Due Process: A Cure for the Ailing Father?

If the state affords a wayward child the necessary amount of paternal treatment, the question arises, "Why do we have a need for the constitutional due process requirements?" Perhaps this can best be answered by a statement by Justice Fortas in *Kent*:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[31]

In arguing the need for the right to a trial by jury and the other constitutional safeguards, the *Kent* Court indicated the shortcomings of the *parens patriae* approach:

27. S.C. Code Ann. § 15-1095.2(c) (Supp. 1969) provides:
'Child' means a person less than seventeen years of age, where the child is dealt with as a juvenile delinquent . . . .
28. S.C. Code Ann. § 15-1095.1 (Supp. 1969).
29. *Id.* at § 15-1095.19.
30. Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 71 (1966).
31. 383 U.S. 541, 556 (1966), *citing* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7.

> While there can be no doubt of the original laudible purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.[32]

The chief reasons given for the failure of the *parens patriae* theory to achieve the desired results are:

1. budgets were not sufficient to draw experienced personnel into the field;

2. the personnel in the field were drawn away by better salaries;

3. the judge alone could not untangle the web of subconscious influences that possessed the troubled youngster;

4. correctional institutions were essentially miniature prisons; and

5. the secrecy of the proceedings led to some overreaching and arbitrary actions.[33]

Kent and *Gault* are illustrative of the lack of protection afforded an infant in juvenile court. In *Kent*, the District of Columbia Juvenile Court waived its exclusive jurisdiction and authorized the juvenile to be criminally prosecuted in the District Court for the District of Columbia, where he was found guilty. On certiorari, the United States Supreme Court reversed and remanded to the district court on the issue of waiver. The Court stated that the order was invalid because of the juvenile court's failure to grant a hearing, to give counsel access to the records requested, and to state reasons for its order waiving jurisdiction.

In *Gault*, the lack of protection was even more pronounced. A fifteen year old boy was committed to the Arizona State Industrial School for the period of his minority. This harsh sentence of six years, imposed by the state acting as *parens patriae*, would not have been imposed upon an adult committing

32. Kent v. United States, 383 U. S. 541, 555 (1966); *cf.* Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961).
33. DeBacker v. Brainard, 90 S. Ct. 163, 168 (1969) (dissenting opinion).

the same offense. Such adult would have been subjected to a maximum sentence of sixty days.[34]

These cases went far in integrating due process requirements into juvenile actions. While neither decided the issue of the right to a jury trial, some support can be found in *DeBacker v. Brainard*,[35] where two dissenting justices favored such a concept.[36] Justice Black characterizes the right to a trial by jury as one of the fundamental rights of criminal justice.[37] Justice Douglas stated that he "would reach the merits and hold that the Sixth and Fourteenth Amendments require a jury trial as a matter of right where the delinquency charged is an offense which, if the person were an adult, would be a crime triable by jury."[38]

While the Supreme Court has not passed on the question of an infant's right to a trial by jury, several lower courts have. These lower court decisions can usefully be divided into two categories. First, there are those courts that have felt that the right to a trial by jury attached in juvenile proceedings. The courts supporting this view have done so believing that such right was implicit in *Gault*.[39] Second, there are the courts that have denied infants the right to a jury trial. These courts have reasoned that either a trial by jury is not a fundamental right applicable to the states[40] or that such a right is not consistent with the concept of a juvenile court.

One case that supports the first classification, that of allowing a juvenile the right to a trial by jury, is *Nieves v. United*

34. "[J]uvenile proceedings to determine 'delinquency', which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *In re* Gault, 387 U.S. at 49. The *Gault* court made the determination that juvenile proceedings were criminal when determining the applicability of the right against self-incrimination. Justice Black appears to be equally convinced that this classification applies to the right of trial by jury in a juvenile proceeding. DeBacker v. Brainard, 90 S. Ct. 163, 166 (1969) (dissenting opinion).

35. DeBacker v. Brainard, 90 S. Ct. 163 (1969).

36. *Id.* at 166, 167.

37. *Id.* at 166.

38. *Id.* at 167.

39. *In re* Gault, 387 U.S. 1 (1967). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

40. Duncan v. Louisiana, 391 U.S. 145 (1968), laid this idea to rest by incorporating the sixth amendment right to trial by jury into the fourteenth amendment, thus making it applicable to the states.

States.[41] In this case the Federal Juvenile Delinquency Act[42] was declared unconstitutional since it forced a juvenile to choose between sixth amendment rights and a non-jury trial under the juvenile act. The court held that the waiver of a jury trial required by the Federal Juvenile Delinquency Act was unconstitutional because it presented the juvenile offender with an "impermissible choice" between a non-jury hearing with a maximum commitment until his twenty-first birthday and the exercise of his right to a trial by jury with the resulting possibility of a longer sentence.[43]

On the other hand several lower courts have denied the juvenile a right to a trial by jury. *Commonwealth v. Johnson*[44] was one case where the court felt that the addition of a jury would not materially contribute to the fact-finding function of the court and would seriously limit the court's flexibility in meeting the needs of delinquent children. The court noted that juvenile proceedings were designed to cure rather than to restrain and deter, thus giving the judge the greatest possible opportunity to exercise quasi-parental influence over the impressionable child.

The most cogent argument for the inapplicability of a jury trial in juvenile proceedings comes from an article written by Professor M. G. Paulsen:

> A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact finding process than before a judge. The jury provides the accused with a weapon against political crimes repressive of civil liberties, a weapon juveniles do not generally need.[45]

Although Paulsen appeared to be a leading exponent of non-

41. 280 F. Supp. 994 (S.D.N.Y. 1968). Although this case can be distinguished on the grounds that it is a federal case and applies the sixth amendment, this distinction should not lead to a different result as *Duncan* incorporated the sixth amendment right to trial by jury into the fourteenth amendment. *See* Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968) and *In re* Rindell, 36 U.S.L.W. 2468 (U.S. Feb. 6, 1968).

42. 18 U.S.C. § 5033 (1964).

43. Nieves v. United States, 280 F. Supp. 994, 1001 (1968).

44. 211 Pa. Super. 62, 234 A.2d 9 (1967). This case can be distinguished in that it was decided before Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. United States, 391 U.S. 194 (1968). *Accord,* Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968); People v. Anonymous, 56 Misc. 2d 725, 289 N.Y.S.2d 782 (1968).

45. Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 559 (1957).

jury proceedings, his position seems to have mellowed to permitting the juvenile to have a trial by jury.

> It is probably true that some of the adult protections that the reformers sought to avoid could be introduced into the juvenile court without completely hampering its operation. The right to a jury trial is preserved in some states and the juvenile courts still function with jury trials, although, in fact, the right is usually waived. A constitutional right to a public trial has rarely been invoked. If a child properly advised by parents and counsel, wishes a public trial, why should he not have it? In my view the reformers, in their desire to distinguish sharply between juvenile and criminal proceedings and in the hope that children would be processed as patients in a clinic or given social education as in a school, put too much emphasis on the need for informal procedure. The child and his parents are under no illusion. They know they are in court, not in school or at a doctor's office.[46]

IV. CONCLUSION

Although the sociological approach to treating wayward youths was praiseworthy, history has indicated its shortcomings. In far too many instances juveniles have been deprived of their constitutional rights merely through the use of semantics. Labelling a child a delinquent instead of a criminal may be thought desirable, but an objective look at the outcome will reveal the same basic stigma being attached to the youth. As Justice Musmanno said in *In re Holmes*: "To say that a graduate of reform school is not to be 'deemed a criminal' is very praiseworthy but this placid bromide commands no authority in the fiercely competitive fields of everyday modern life."[47]

States which do not provide the constitutional right to trial by jury in juvenile proceedings should take a close look to determine whether they are offering the juvenile the "worst of both worlds."[48]

Although it may be felt that the *parens patriae* theory is providing for the best interests of the child, one should not lose

46. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 S. CT. REV. 167, 186.
47. *In re* Holmes, 379 Pa. 599, 611, 109 A.2d 523, 528-29 (1954), *cert. denied*, 348 U.S. 973 (1955).
48. Kent v. United States, 383 U.S. 541, 546 (1966).

sight of the fact that legislative reforms, such as juvenile delinquency acts, must conform to constitutional mandates.

Perhaps a more efficacious juvenile system could be devised by utilizing the better concepts of both the *parens patriae* approach and the due process model. This goal could be accomplished without sacrificing the bifurcated nature of the juvenile hearing. At the adjudication stage, the jury would be allowed to make a determination of delinquency. Once this determination has been made, the jury's function would be served, and the judge would then be required to make some disposition of the child. This system would preserve the desired flexibility and would allow the judge to utilize the experience and insight developed by his association with wayward youngsters.

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