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Constitutional Law--Due Process--Juvenile Court Hearings

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would benefit. Such a uniform system could incorporate adequate safeguards to assure the admitting court of the applicant's qualifications. The applicant would be required to associate himself with local counsel, and thus the state's interest in protecting its citizens from practitioners unfamiliar with local law would not be disregarded. Attorneys would know the requirements for admission and could easily prepare to meet them. Similarly, the elimination of procedural uncertainties would preclude the possibility of a client's being prejudiced because of delay and would promote the rapid administration of federal justice.

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CONSTITUTIONAL LAW — DUE PROCESS — JUVENILE COURT HEARINGS

In re Winburn, 145 N.W.2d 178 (Wis. 1966).

Juvenile courts across the country are today in a state of revolution. The doctrine of *parens patriae*,[1] which for years has insulated juvenile courts from the standards of due process,[2] is being reevaluated.[3] It has been questioned whether the theory of a "mutual compact,"[4] whereby the child accused of a crime gives up his constitutional rights in exchange for protection by the state from the stigma of a criminal proceeding and for the promise of rehabilitation rather than punishment,[5] deprives the child of the benefits of both systems.[6]

The reasons for this assault upon the insulation of juvenile proceedings from constitutional protections are clear. The law today emphasizes individual rights. Due process is not a static concept — its expansion requires protection of vital rights at every stage in criminal and civil proceedings.[7] If one area of law is to be insulated from due process requirements, there must be an adequate justifica-

clerk of courts for this district. The affiant shall further specify the nature of the particular transaction or cause for which he has been retained and shall specify a local counsel admitted to practice before this court with whom the affiant shall associate himself in the transaction for which he has been retained and upon whom process may be served. A copy of the affidavit shall forthwith be served upon the local counsel and the return shall indicate that said counsel swore or affirmed that he has good cause to believe that the allegations of the affidavit are true. Upon compliance with this rule the nonresident counsel shall be deemed a member of the bar of this court for all activities related to the transaction specified in the affidavit.

tion presented. Thus, juvenile procedure is today under attack because its *parens patriae* justification is no longer adequate. The promise of protection and rehabilitation is not being fulfilled.[8] In light of this realization, state and federal courts are extending constitutional safeguards to juveniles. To what degree and in what manner of application, however, are still speculative questions to which a recent decision offers some interesting and significant answers.

In *In re Winburn*[9] a minor was charged in juvenile court under a delinquency petition with violation of the Wisconsin first-degree murder statute, the fact that he had committed the act being undisputed. A court-ordered psychiatric examination resulted in the de-

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[1] Under this theory the special interest of the state in protecting and rehabilitating its children is considered so controlling, and so well effectuated, that most constitutional safeguards are considered unnecessary. Elson, *Juvenile Courts & Due Process*, in JUSTICE FOR THE CHILD 95 (Rosenheim ed. 1962). Thus, constitutional guarantees respecting defendants in criminal cases "do not apply [in juvenile proceedings]." 43 C.J.S. *Infants* § 99, at 240 (1945).

[2] See Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

[3] See, *e.g.*, Kent v. United States, 383 U.S. 541 (1966); Gallegos v. Colorado, 370 U.S. 49 (1962); Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961); *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955).

[4] Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in JUSTICE FOR THE CHILD 22, 25 (Rosenheim ed. 1962).

[5] *Ibid.*

[6] Kent v. United States, 383 U.S. 541, 546 (1966).

[7] See, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).

[8] See *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (Dist. Ct. App. 1952), wherein it is stated:

> [W]hile the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings.
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> It is common knowlege that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile court record. And further, as in this case, the minor is taken from his family, deprived of his liberty and confined in a state institution. True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult. *Id.* at 789-90, 241 P.2d at 633.

See also Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961).

[9] 145 N.W.2d 178 (Wis. 1966).

termination that the minor was insane at the time of the murder, and the court found him not guilty by reason of insanity, dismissing the delinquency petition on its merits, and ordered him committed to an institution for treatment.[10] The state supreme court affirmed this finding,[11] rejecting the state's contention that under the theory of *parens patriae* the criminal defense of insanity is not permissible in a noncriminal juvenile hearing.[12]

The court, construing *Kent v. United States*,[13] first stated that precedent required that a juvenile hearing meet the essentials of due process and fair treatment.[14] Although the theory of juvenile proceedings is good — rehabilitation and treatment in the best interests of the child through individualized justice — retribution in fact plays a role. Because the juvenile is often incarcerated to protect society, juvenile proceedings may "smack of 'crime and punishment.' "[15] Social stigma may attach to a child adjudicated a delinquent, and a minor may be sent to an adult institution. At this point, said the court, the distinction between the juvenile and the criminal process breaks down, and the need for essential due process protections becomes acute.[16]

Because the determination of delinquency cannot occur when a child's act is accidental, the same distinction must be drawn between acts of the sane and the insane to insure maximum fairness to the child. "A petition based on a violation that requires criminal intent cannot result in a finding of delinquency when . . . because of insanity, there was a failure to form the requisite intent."[17] Thus, permitting the defense of insanity goes to the heart of the guilt-determining process. The court added that its decision is fully consonant with both the essentials of due process requirement enunciated in *Kent* and the juvenile court philosophy.[18]

In order to appreciate the impact of *Winburn* upon the growing

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[10] *Id.* at 179-80.

[11] *Id.* at 180.

[12] Brief for Respondent, pp. 12-13, *In re* Winburn, 145 N.W.2d 178 (Wis. 1966).

[13] 383 U.S. 541 (1966).

[14] *In re* Winburn, 145 N.W.2d 178, 182 (Wis. 1966).

[15] *Ibid.*

[16] *Id.* at 183.

[17] *Id.* at 184.

[18] The best interests of both the child and society are served by committing him to a mental institution. Dismissal of the delinquency petition on the merits is a bar to future criminal prosecution should the child later regain his sanity. Thus the protection of *parens patriae* has been afforded to the child, and he has received fundamentally fair treatment within the juvenile process. *Id.* at 185.

extension of constitutional rights to juveniles, it will be helpful to examine the types of cases in which this extension is occurring and the constitutional theories under which the courts are proceeding.

Generally, constitutional rights have been granted to juveniles in juvenile proceedings wherein the minor is charged with a crime[19] and in juvenile hearings held to determine waiver of the minor to a criminal court to be tried there as an adult.[20] The assault upon *parens patriae* is most pertinent in the former instance, for where a child is charged with a crime and is subject to possible criminal sanctions, although they be called juvenile remedies, the claim that he is not entitled to adult constitutional protections merely because the court procedures are different becomes indefensible.[21] "May a child be deprived of his liberty and incarcerated in an institution until he reaches the age of twenty-one merely by changing the name of the offense from unauthorized use of a motor vehicle to juvenile delinquency?"[22] Thus, the courts have found that *parens patriae* is not adequate justification for denying the minor constitutional fairness by changing the name of the offense, where its substance remains the same,[23] or by changing the name of the proceedings from criminal to juvenile, where the sanctions are in fact the same[24] and where the guilt-determining process is identical.[25]

Cases involving waiver of the minor to criminal court have produced the most liberal extension of constitutional rights,[26] but they must be distinguished by the overlapping of jurisdiction between the juvenile and criminal courts. Because the minor may, as a result of waiver, move from a protected noncriminal to an unpro-

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[19] *Accord*, United States v. Glover, 372 F.2d 43 (2d Cir. 1967); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955); *In re* Winburn, 145 N.W.2d 178 (Wis. 1966).

[20] *Accord*, Kent v. United States, 383 U.S. 541 (1966); Black v. United States, 355 F.2d 104 (D.C. Cir. 1965); Watkins v. United States, 343 F.2d 278 (D.C. Cir. 1964); Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961); United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd*, 271 F.2d 487 (D.C. Cir. 1959).

[21] *Accord*, *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955).

[22] *Id.* at 226.

[23] *Ibid.*

[24] See *id.* at 227; *In re* Winburn, 145 N.W.2d 178, 183 (Wis. 1966).

[25] See *In re* Poff, 135 F. Supp. 224, 225 (D.D.C. 1955); Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L.J. 76 (1966), pointing out that due to the different weight given evidence in criminal and juvenile proceedings, the minor may be sentenced on proof that would fail to sustain a conviction in criminal court. *Id.* at 108.

[26] See, *e.g.*, Kent v. United States, 383 U.S. 541 (1966); Black v. United States, 355 F.2d 104 (D.C. Cir. 1965); Watkins v. United States, 343 F.2d 278 (D.C. Cir. 1964); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).

tected criminal status, the question becomes that of determining the point at which the juvenile becomes subject to the "regular procedures" of the criminal process.[27] At this "critically important" point,[28] constitutional rights attach.[29] Thus, not only must the juvenile be notified of his right to counsel prior to the waiver hearing[30] but also he must be represented by counsel at the hearing.[31]

Kent v. United States[32] carried this due process requirement a step further and held that the "essentials of due process and fair treatment" require procedural regularity in the waiver hearing to the extent that a full investigation must be held in which the juvenile court rules on all of counsel's motions, for example, a motion for a psychiatric examination or a motion to see the minor's juvenile record.[33] Failure to do so was held tantamount to a denial of counsel and, hence, denial of due process.[34] Thus, in waiver cases, where juvenile and criminal jurisdiction and procedure may overlap, the minor will receive the full protection of criminal guarantees.

With these distinctions in mind, *Winburn*,[35] in applying the standard presented in *Kent*[36] to its own fact situation, has carried certain criminal guarantees into the insulated delinquency hearing where there is no overlapping of juvenile and criminal jurisdiction such as exists in the waiver situation. Because *Kent* rested not upon a specific interpretation of the juvenile court statute with reference to waiver,[37] but upon objective requirements of constitutional due process, its broad language was interpreted in *Winburn* as applica-

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27 *Accord*, Pee v. United States, 274 F.2d 556, 561 (D.C. Cir. 1959).

28 *Accord*, Black v. United States, 355 F.2d 104, 105 (D.C. Cir. 1965).

29 Thus, hearsay, admissible in juvenile hearings, State v. Shardell, 107 Ohio App. 338, 153 N.E.2d 510 (1958), is inadmissible when the minor is tried in criminal court. A confession made before a juvenile court cannot be used in a subsequent criminal prosecution, Gallegos v. Colorado, 370 U.S. 49 (1962) (confession obtained by coercion), nor may any other admission made by the minor prior to waiver be used. Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961). *But see* Harrison v. United States, 359 F.2d 214 (D.C. Cir. 1965) (written confession excluded, but oral confession admissible in subsequent criminal prosecution).

30 *Accord*, Black v. United States, 355 F.2d 104, 107 (D.C. Cir. 1965).

31 Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956), holding that counsel was necessary to make the statutory right to be heard fully meaningful. If the minor is indigent, the court must provide counsel. *Id.* at 669, 670.

32 383 U.S. 541 (1966).

33 *Id.* at 546-61.

34 *Id.* at 561.

35 *In re* Winburn, 145 N.W.2d 178 (Wis. 1966).

36 Kent v. United States, 383 U.S. 541 (1966).

37 Compare Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).

ble to *any* juvenile hearing.[38] This demonstrates that, as the concept of due process in juvenile court expands, the type of fact situation in which minors are afforded constitutional protections also expands.[39]

Various theories have been utilized in the extension of constitutional rights to juveniles, but at the heart of each lies a basic dissatisfaction with the performance of the theory of *parens patriae.* That a juvenile is entitled to fundamental fairness was interpreted in *Pee v. United States*[40] to mean the right to fair treatment, not the right to the "direct application of the clauses of the Constitution which in terms apply to criminal cases."[41] This approach to fundamental fairness as a substantive element inherent in the *parens patriae* doctrine has been affirmed by those who would urge that, while principles of fundamental fairness should control in determining what is due process for the child, it must be done within the statutory scheme and that for this reason juvenile proceedings must be insulated from adult procedure.[42] To expand constitutional rights under this theory, it has been held that the legislative intent in creating a juvenile court system was to *enlarge* the safeguards which juveniles as citizens have, not to bar their application.[43]

The cases granting right to counsel in a juvenile hearing have used the penumbral rights theory to extend greater due process protection to juveniles, finding counsel necessary to make fully meaningful the right to be heard[44] and the right to a full investigation prior to waiver.[45] However, cases advancing this theory have dealt with waiver, where the primary constitutional rights may be said to arise from potential criminal status and jurisdiction and are thus distinguishable.

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[38] See *In re* Winburn, 145 N.W.2d 178 (Wis. 1966).

[39] See United States v. Glover, 372 F.2d 43 (2d Cir. 1967); *In re* Carlo, 35 U.S.L. WEEK 2322 (N.J. Nov. 21, 1966).

[40] 274 F.2d 556 (D.C. Cir. 1959) (granting criminal protections after waiver).

[41] *Id.* at 559.

[42] Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961). See Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957), where the author asserts that fundamental fairness must be kept within the beneficial context of the *parens patriae* doctrine. Any constitutional rights which would conflict with the desired end of treatment and rehabilitation, such as granting a juvenile the privilege against self-incrimination, would not be desireable. *Id.* at 550, 561.

[43] *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955).

[44] *Accord*, Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).

[45] *Accord*, Kent v. United States, 383 U.S. 541 (1966). See also Black v. United States, 355 F.2d 104 (D.C. Cir. 1965); Watkins v. United States, 343 F.2d 278 (D.C. Cir. 1964) (both discussing the procedural requirements of a full investigation prior to a valid waiver).

The loss-of-liberty theory offers perhaps the best justification for the extension of constitutional rights to juveniles, for it abrogates the *parens patriae* doctrine and serves as a vehicle to carry equal protection of the laws to the minor. "[F]airness and justice certainly recognize that a child has the right *not* to be a ward of the State, *not* to be committed to a reformatory, *not* to be deprived of his liberty, if he is innocent."[46] That loss of liberty may follow *any* fact finding determination in juvenile court[47] is a reality not easily defensible by virtue of a mere difference in the labelling of judicial systems. Therefore, it has been held that where in a juvenile hearing loss of liberty is threatened, the right to counsel exists, regardless of the seriousness of the charge, for "the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."[48] By analogy, it could be said that in reality today there is little distinction between incarceration in a juvenile detention or correction home and incarceration in an adult penal institution.[49] And the social stigma of juvenile delinquency is not negligible.[50]

The revolution in the juvenile court system is well under way. Presently, the United States Supreme Court is faced with deciding whether the federal constitution applies to state juvenile courts.[51] That decision will most probably give federal approval to the criticisms raised and the solutions offered in such cases as *In re Winburn.*[52] In permitting constitutional protections within the juvenile hearing, the court in *Winburn* cast off the tyranny of labels insulating the juvenile court and permitted the true nature of the hearing to determine what due process required for the child. Recognizing that it is not the purpose of the *parens patriae* doctrine which has failed but rather the means adopted in the name of individualized justice for the child,[53] *Winburn* indicates that the best

[46] Holmes' Appeal, 379 Pa. 599, 613, 109 A.2d 523, 529 (1954) (dissenting opinion).

[47] It is still unsettled whether the defense of double jeopardy may bar a criminal trial subsequent to a juvenile hearing in which the minor was found not guilty. See United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd*, 271 F.2d 487 (D.C. Cir. 1959).

[48] Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942).

[49] *Cf.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966) (writ of habeas corpus because of incarceration in mental institution).

[50] See note 8 *supra.*

[51] See Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965), *cert granted*, 87 Sup. Ct. 498 (1966).

[52] 145 N.W.2d 178 (Wis. 1966).

[53] *Accord*, Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in JUSTICE FOR THE CHILD 22 (Rosenheim ed. 1962).