Procedural Problems in Virginia Juvenile Delinquency Hearings

Richard Crouch
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With the exception of certain felony cases transferable to courts of record at the State’s option, all charges involving juveniles in Virginia are heard in a special statutory proceeding in the Juvenile and Domestic Relations Court. The proceedings are summary and civil, and the vast majority of cases are carried on without ever coming to a lawyer’s attention. The occasional attorney who does become involved, however, should know where both he and his client stand in this anomalous process where often the statute itself is of little help. Nor are the reports especially useful: In a field where procedure so often escapes the surveillance of adversary legal counsel, the dearth of case law is understandable.

The officially civil character of the proceeding must be borne in mind; especially since, understandable enough, “in the rush to classify a delinquency case as a ‘civil’ case, . . . some troublesome problems have been brushed aside.” The fact that this alone provides a simple formula for potential abuse should not blind us to the substantial good that the innovation may accomplish. But some areas of uncertainty remain, as they must whenever authorities are given full criminal-court powers to affect liberty and property by a process which is designated as other than criminal.

3 VA. CODE ANN. § 16.1-179 forbids the use of words crime or conviction in referring to JDR court action. Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d (1946) denominates the proceeding as definitely a civil, and non-criminal one.
4 Judge Hugh Reid, Jr. of Arlington County JDR Court estimates number of hearings in which attorneys participate at 10 per cent of the total.
**Due Process of Law**

Most of the problems cluster around "due process," an ancient but nonetheless elusive concept. Following a brief general discussion of Due Process as Virginia Constitutional doctrine and in the delinquency field, some potentially troublesome sections of the Virginia statute should be examined with regard to Due Process, essential fairness, and practical reliability. Those points which have been the subject of national disagreement or of appellate litigation in Virginia, and others which dictate especial caution on the part of counsel or litigant are noted. Likewise noteworthy are unique concepts of statutory justice and attitudes of which parties and counsel should remain aware. There are aspects of this law which would seem to make a certain degree of familiarization advisable for practically anyone who is a parent. The over-all purpose here, however, is that the attorney may have some idea of what to expect in litigation of this sort, and some basis for advise to clients involved.

Nationally, where the question has reached litigation, appellate court opinions upon the role of due process in juvenile justice have been divergent. Some courts have found constitutional orthodoxy a simple obligation, compelled by elementary logic; others have found the concept of juvenile rights nothing short of absurd. Many hold that (1) the minor's only right is to custody and restraint, and (2) the parents' right to supply it was forfeited by allowing the child to come within the jurisdiction of the court. So far as the specific criminal-trail rights are concerned, the unqualified negative implied in *Pee v. United States* would seem to be a majority.

In the opinions of the JDR courts themselves, the one word best applicable to due process in this connection is

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6 "There is no unanimity of opinion among the various courts as to whether or not constitutional guarantees are applicable to juvenile offenders." *In Re Poff*, 135 F.S. 224 (U.S.D.C., D.C., 1955).

7 *Wisconsin Industrial School v. Clark County*, 103 Wis. 651 at 654, 79 N.W. 422 at 427 (1899).

irrelevant. If it were at all probable that no one is ever deprived of life, liberty or property under these statutes, then perhaps quite a good case might be made for "irrelevancy."

Whether or not due process is held to be applicable here, it is obvious that the court's powers over life, liberty and property in a juvenile proceeding can be substantial. The court is empowered under § 16.1-158 to dictate "the custody, support, control or disposition of a child." It may transfer a child's case for conduct as an adult criminal trial. Likewise it may simply apply within the juvenile court itself all the adult penalties. It can order summary or regular insanity commitment, or whatever care it may choose. This includes compulsory medical or psychiatric treatment for child or adult at a parent's own expense, and unlimited "watchful care, custody, discipline, supervision, guardianship and control" by the court for the remainder of the child's minority. The court will also assume an all-pervasive dominion over family life and all its intimacies by a decree of probation.9

Virginia's idea of civil due process is embodied in Constitution § 11. So far as "all authorities agree," this includes notice and a hearing before an impartial tribunal "before any decree can be passed affecting the rights to liberty or property."

Likewise held absolute are the right against self-incrimination and the right to know the cause and nature of one's accusation.10

Life, Liberty and Property

It should become apparent that there are a great many once-fondly regarded rights (Their status vel non as constitutional liberties under § 11 is another matter.) which are compromised, or more accurately, stultified, under

these provisions. Whatever civil or property right a parent may be said to have in the custody of one's own children would be included here.\textsuperscript{12} Insofar as any right exists not to be subject to the degradation of involuntary physical and mental examination and clinical treatment, that too would be included. That liberty which Justice Brandeis characterizes as "the most comprehensive of all rights and the right most valued by civilized men"—i.e., a certain modicum of domestic privacy, or "the right to be let alone,"\textsuperscript{13} suffers most conspicuously here. Moreover, it would be sociologically unrealistic to assume that no stigma or social detriment attaches to a child or family as a result of its experience with juvenile court "therapy."

The matter of removal from parental custody cannot be excluded from any discussion of life, liberty and property interests. Some courts have found the logic compelling that if, or even because, the juvenile has no rights, then the parent does. Seen thus

\ldots a parent or guardian of such child, is a party to the proceedings under the statute to have the child declared neglected, dependent or delinquent, in the sense that he or she has the right to appear and give testimony, to be represented by counsel, to call witnesses and to cross-examine witnesses.\textsuperscript{15}

Other courts have so held because "the proceeding as a whole is one which deals with important rights, the natural right of parents to rear and educate their own child in the parental home and the natural right of the child to be so reared."\textsuperscript{16} In this context it should be worth noting

\textsuperscript{12} Shioutakon v. Dist. of Columbia, 236 F.2d 666 (9th App. D.C. 371, 1956), 60 A.L.R.2d 689, cites "the court's power to deprive the child of liberty and the parents of custody."

\textsuperscript{13} Brandeis, J., (dissenting) Olmstead v. U.S., 277 U.S. 438 at 478, 72 L.Ed. 944 at 956 (1927). It should be noted that Brandeis here was speaking of the right as constitutional: "They conferred—as against the government—the right to be let alone... ."


\textsuperscript{15} In Re Aronson, 263 Wis. 604, 58 N.W.2d 553 (1953), 60 A.L.R.2d 693, n. 2.

\textsuperscript{16} In Re Custody of a Minor, 250 F.2d 419 at 420 -(1957).
that power over the citizen's child is in fact a great potential power over the citizen.

So considered, the juvenile court process is worthy of a measure of prudent respect and of more particularized consideration. There follows a section-by-section examination of those procedural formulae whereby any substantive rights accruing are to be secured.

The Character of the Adjudication

The most problematical of the Standard Act provisions in Virginia's statute are also those sections which are most fundamental to the act itself. These are § 16.1-158 and 178, the "jurisdictional" sections concerning the powers of the court and the occasions for their exercise. It is under these laws that the court takes dominion over a family, adult or child. The object was to obviate the criminal connotations and social stigma attaching to the finding of "delinquency," and to remove tradition-sanctioned procedural impedimenta based thereon. The device employed is the equation, or merger, of the concepts of jurisdiction, culpability, and liability to "disposition." In other words, it is by "coming within the purview of this Law" that a minor is rendered liable to the dispositional processes of the juvenile court. He is then liable in the same sense that an adult found guilty and convicted forfeits his freedom and becomes subject to punishment. A few of the numerous ways in which a minor "comes within the purview" are:

(1) being in any of the older statutory categories ("dependent, delinquent or neglected"),

(2) having "habits or practices injurious to his welfare",

(3) being in need of medical "or any other care necessary to his well being,"

(4) or, under § 16.1-158 (l) (j), being alleged to be such as should be under the jurisdiction of the court.

\(^{17} \text{VA CODE ANN. } \S 63-257 \text{ (1950) } \text{[Repealed].}\)
This last mentioned subsection of § 16.1-158 is particularly worth noting. Under this clause it is obviously the fact of *allegation* that is central to the finding of jurisdiction. As Judge Mack would have it,

The problem for the determination of the court is not, Has this boy or girl committed a specific wrong, but 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. ... \(^\text{18}\)

Given such an allegation, there is of course no need for any fact-finding procedure for objective assessment of the allegation's truth or falsity. In fact, except in cases of transfer to a court of record, there is no semblance of any provision for one.\(^\text{19}\) It was observed, in fact, by a Virginia writer urging adoption of the merger provision\(^\text{20}\) that:

...this device has been criticised because “a court without categories may engage in deciding that a child before it might benefit from the court facilities without concerning itself with a clear legal test of jurisdiction and proof. \(^\text{21}\)

However, just such an approach is often the subject, not of criticism, but of judicial pride—as is the case with Judge Mack's statement above.

Despite the criminal law's voluminous provisions for the protection of a possibly innocent defendant, the plight of the mistakenly or falsely accused juvenile is an intentionally omitted case. This presumption-of-non-innocence approach, it seems, can be rationalized only upon one of several blanket assumptions:

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\(^\text{19}\) And here it is an inquiry into the child's entire personal and family situation, but is required to include the “circumstances” giving rise to the charge. Va. Code Ann. §§ 16.1-164, 214 (1950) (Replacement Volume 1960).


(1) the old-world rationale that any accusation, even a false one, is in itself indicative of such social trouble, unworthiness, or maladjustment that intervention and "disposition" are justified—i.e., that we can categorically equate non-innocence with misfortune or unpopularity;

(2) that absolutely no one would make an ill-founded allegation;

(3) that no socially prejudicial or unenviable result could possible proceed from probation, commitment, hospitalization, or any of the other sanctions at the disposal of the modern juvenile court.  

The body of opinion which calls itself the Juvenile Court Movement prides itself upon being not legal but "sociological." True sociological realism, however, would forbid reliance upon the unscientific presumption that no one is going to bear false witness against his neighbor, particularly when protected by the anonymity which hearsay and ex parte procedure afford. The ultimate wisdom of the decision to embody such sociological naivete in our statutory law—particularly as the law is such a powerful one—has not remained unquestioned. Some propositions have been ad-

22 "In many instances it is apparent that a child is regarded as a delinquent merely because he has been brought before the juvenile court. Such a psychological approach appears dangerous, especially when the alleged acts of delinquency would be a crime if committed by an adult." Annot.: 43 A.L.R.2d 1130.

23 As to this aspect of the law, Roscoe Pound's observation seems particularly apropos: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily. Even with the most superior personnel, these tribunals call for legal checks." Foreword to SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, by Pauline V. Young (1952).

24 Nevertheless, the promoters of this legislation in their enthusiasm . . . have gone to the borderline of prudence . . . the orthodox rules of evidence have been riddled as with a machinegun. The hearsay reports of probation officers and others can be used without calling them to be examined . . . The party may be subject to a physical and mental examination . . . the child may be compelled to answer to his own crimes, past and present." 5 Wigmore, Evidence, 3d ed. § 1400.
advanced which at least are not so replete with tacit assumptions.

**An Alternative to Merger**

Determination-disposition merger is an attempted remedy which has itself given rise to a host of problems. The most obvious of solutions to this is of course dichotomy—a clear separation of the determinative and dispositional functions. Admittedly, this may be too facile a solution, notwithstanding it has been the accepted method in all other Anglo-American courts for several centuries. The patent simplicity of this answer has not prevented its gaining widespread currency, however. It has done so even in jurisdictions where express appellate-court rejection of due process notions leaves the judge under no legal obligation to countenance them. In Virginia, an example is the avowed policy of Arlington County's JDR Court:

Officially at least, this policy prescribes an initial hearing focused exclusively upon the fact-issue of grounds for "jurisdiction." As recommended by several authorities, the judge preserves objectivity by avoiding all consultation of the social casework report until dispositional jurisdiction is assumed. This of course accords with the procedure for courts of record under § 16.1-161. It reflects, at least in this initial hearing, the legalistic view that "Hearsay, opinion, gossip...and fears of social workers...have no

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25 This proposal is embodied in the American Legal Institute's Model Youth Correction Authority Act. See GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY, (New York: Dodd, Mead & Co., 1954) p. 92. The underlying rationale is set forth at pp. 94-95: "Few persons favor an omnipresent and authoritative judicial agency that would intrude into the family whenever it thought that a child needed guidance. Prevention and rehabilitation...must not become excuses for judicial carelessness concerning whether there is a true basis for official intervention. The justification for intervention should be determined in a clear cut way before there is any effort to plan the details."

26 Ibid.

27 Arlington County, Virginia, Juvenile and Domestic Relations Court, ANNUAL REPORT (1961) 6.

28 Data supplied by Honorable Hugh Reid, Jr., Judge of Arlington J.D.R. Court. U.S. Children's Bureau, Standards for Specialized Courts Dealing with Children (1954), 53, recommends this procedure.
more place in Children's courts than in any other court."\(^{29}\) Actually, observation of this formality causes the court little additional expense or inconvenience. Factual sufficiency, after all, is not a difficult condition to satisfy in view of the comprehensive character of statutory "pur- view."

**Rules of Procedure**

As already stated, the juvenile court process is an anomalous one. A distinctive peculiarity of the delinquency hearing among Virginia court procedures is that under § 16.1-154 of the statute each judge formulates his own procedural rules, "not in violation of law." In this situation the requirement of a period of legal experience (as suggested in the Standard Juvenile Court Act) might be a commendable addition to the statute.\(^{30}\)

**Juvenile Cases as Civil Proceedings**

It should be noted that before the adoption of Virginia's present act, there existed a considerable body of case law, the significance of which § 16.1-158 was meant to eliminate. These precedents indicated that a finding of delinquency is in effect a finding of criminality. The term *delinquency*, it was said, "implies a statutory violation of the penal code,"\(^{31}\) and "is a serious reflection of [the child's] character and habits."\(^{32}\) Hence the term "should not include behavior other than that which indicates criminal tendencies,"\(^{33}\) and should not include mere ordinance violations,

\(^{29}\) People v. Lewis, 260 N.Y. 171 at 178 (1932). Accord: GUIDES FOR JUVENILE COURT JUDGES, *supra*, note 17, p. 61; In Re Mont., 175 Pa. Super. 150, 103 A.2d 460 (1954); In Re Brown, 201 S.W.2d 844 (1947); Harry v. State, 246 Wis. 69, 16 N.W. 390 (1944). Perhaps the most emphatic expression of the viewpoint, however, is offered by Justice Musmano, dissenting, In Re Holmes, 379 Pa. 599, 614; 109 A.2d 523, 530 (1954). He cites this as an "amazing paradox in jurisprudence."

\(^{30}\) A minimum of six years legal experience, Juvenile Court Standards, U.S. Children's Bureau Publication No. 121 (1923), p. 2. See also, GUIDES FOR JUVENILE COURT JUDGES, (New York National Probation and Parole Ass'n., 1957) 124.

\(^{31}\) 36 Va. L. Rev. 113, 128.

\(^{32}\) Jones v. Commonwealth, *supra*, note 8, at 341; 38 S.E.2d at 447.

\(^{33}\) See, 36 Va. L. Rev. 113 at 130.
pranks or *mala prohibita.*\(^{34}\) Most importantly, the finding required, as does a conviction, some measure of procedural fairness in arriving at it.\(^{35}\) Moreover, (quite aside from any equation of delinquency with crime) the Supreme Court of Appeals had arrived at several definitive holdings as to what evidence would support a delinquency finding.\(^{36}\) Such reasoning led inevitably to the rule, so familiar to adult law, that upon a finding of innocence the court should dismiss.\(^{37}\)

The newer Code's rejection of the criminal connotations which provided the theoretical basis for the above quoted phrases, is explicit: The "jurisdictional" ruling of § 16.1-158 replaces the finding of delinquency; § 16.1-179 in no uncertain terms decrees:

\[\ldots\text{nor shall any child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction.}\]

It may still be asked, however, whether merely purging the law of evil terminology has worked the expected miracles.\(^{38}\) For one thing, the judicial objections to comprehensive vagueness in the old "delinquency" statute were diverse: not all of them went to this one matter of reputational detriment (and here is where the "jurisdictional" panacea was to do so much substantial good). On the contrary, many of these objections focused upon a far more concrete aspect of the finding's practical effect, and one

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\(^{34}\) Jones v. Commonwealth, *supra,* note 3, at 343; 38 S.E.2d at 447. Here, in fact, the court noted that a decree of probation on such grounds was "offensive to our sense of justice and to the intention of the law." 343.


\(^{36}\) See, e.g., Jones v. Commonwealth, *supra,* note 3.


\(^{38}\) For a full exposition of the theory that to deny right to counsel and other procedural safeguards on the basis of this "non-criminal" theory "is to allow legal fictions and semantic manipulations to overcome reason and common sense," see 45 Ky. L.J. 532, cited in 63 A.L.R.2d 697, n. 13.
which is still very much with us. That is, the very real consequence, not of the finding itself upon reputation, but of the sentence rendered thereunder upon liberty and property.\textsuperscript{39} Here, of course, it makes little practical difference that there has been a change of the words designating the finding upon which the sentence was based.

From the standpoint of constitutional awkwardness, this point may be crucial: the objecting justices were inferring criminal law aspects of the old statute from something which remains unchanged under the present one—i.e., its direct effect upon liberty and property in the more traditional sense. Here difficulties appear, for “It is only because the courts have interpreted the juvenile court acts as non-criminal that they have almost unanimously upheld their constitutionality.”\textsuperscript{40}

Indeed, it may even be asked whether semantic exorcism in this area of intended benefit—community stigma—has had so wholesome an effect as to justify itself. Even ignoring the holding \textit{In Re Conteras}\textsuperscript{41} that it is “common knowledge that such an adjudication ‘. . . is a blight upon the character and a serious impediment to the future of a minor,’” one may still be compelled to note that “regardless of attempts to get rid of this idea, a serious stigma attaches to being considered a case for court treatment, that these devices seriously restrict the freedom the child needs for his personal growth.”\textsuperscript{42}

At any rate, it seems that the recent solicitous attention given to terminology has only increased the degree of complacent self-righteousness in our attitude toward the problems of the most defenseless of social interest groups, and has decreased proportionately (for better or for worse) any natural reluctance to commit misbehaving children to the processes of the law.

\textsuperscript{39} See, Jones v. Commonwealth, \textit{supra}, note 3.

\textsuperscript{40} \textsc{Sussman, Frederick B.}, \textsc{Juvenile Delinquency}, Rev.2d ed. (New York, Oceana, 1959) 36.

\textsuperscript{41} \textit{Supra}, note 14.

\textsuperscript{42} Sussman, \textit{supra}, note 40, p. 30, n. 3.
The Requirement of Certainty

From the standpoint of the would-be law abiding child or parent, the broad new definition of juvenile "trouble" (§ 16.1-158) goes a long way toward making trouble something rather impossible to stay out of. In fact, in one survey of college men and women, the average number of common statutory juvenile "offenses" committed during minority was ten per student. It is at least inferable that the doctrine of certainty which has evolved in the interpretation of Virginia's constitutional due process and law of the land clauses, was aimed at statutes such as this one. Concerning adult offenders, at least, the requirement is that:

An act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is condemned or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him.

Even a tacit assurance that the statute would not be literally enforced would not be a satisfactory answer here. To the explicit constitutional objection the only immediately apparent answer would seem to be as follows: That the benign therapy of the modern juvenile court process is so beneficial that no child or parent would want to avoid it.

Any conscientious examination of the certainty problem necessarily brings up a related difficulty. One important basis for the criticism of any law is its long range effect. In this field the effect of psychological impressions is held to be of vital relevance. But a sociological consideration here is the image the law presents to young persons who may become involved. It is doubtful that a child will respect a

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43 PORTERFIELD, YOUTH IN TROUBLE, (1946) 38-45. However, these were the enumerated offenses found in nearly all delinquency statutes. It should be remembered that Virginia's statute contains in addition two "offenses" with which this survey was not concerned; (1) the codified misprision of § 16.1-158(1) (f), and (2) the "purview" provision of § 16.1-158(1) (j), whereby a minor may become involved with the law while pursuing the most scrupulous course of passive innocence.

system of law whereby he is convinced that to be apprehended is itself a crime.\textsuperscript{45} This easy inference leads directly to its natural converse—the cynic philosophy of the criminal classes, that the only crime is to get caught.\textsuperscript{46} The statute as it stands simply does not convey to the child the image of consistent fairness which otherwise characterizes the law. The Law holds itself scrupulously to this dignified standard on other occasions—even when dealing with those who have themselves broken the rules. Yet here it gives way to a rather ignoble image—that of an officious neighbor motivated by prurient, morbid curiosity. This effect is particularly regrettable in regard to preventive and rehabilitative schemes; for these must be based upon a respect for law, and for the society of which the law is a reflection.

Also relevant from the standpoint of certainty is the lingering jurisdiction of the JDR court in its role as a court of equity. Generally, certainty is a concept so vital to, if not synonymous with, Anglo-American law, that it is accorded as a right even to those who have been convicted. The juvenile coming within the law's "purview", however, shall be for his or her minority subject to such watchful care...and controls as may be conducive to the welfare of the child and the best interests of the State.\textsuperscript{48}

The West Virginia Supreme Court in observing a similar grant of power, felt that it calls for a certain measure of judicial clarification. They observe:

The "continuing jurisdiction" provision of 44-5-2, gives the court no unusual or additional power. It simply gives the trial court the authority to 'reopen' the matter and changes the status of the infant if the parties are ac-

\textsuperscript{45} \textit{Supra}, note 23.

\textsuperscript{46} Or more politely phrased, "This would seem to suggest that whether or not one is officially delinquent depends not on his conduct alone, but to a great extent on the referral practices which obtain in his community." Sussman, \textit{supra}, note 40, 23.


\textsuperscript{48} \textit{Ibid.}
corded due process of law and the evidence warrants such action.\textsuperscript{49}

Even aside from the matter of historical equity jurisdiction, the wisdom of a provision that "all commitments under this law shall be for an indeterminate period"\textsuperscript{50} is open to question on certainty grounds.

\textit{Specially Authorized Informal Procedures}

Section 16.1-164 places certain qualifications upon the private rights which would have survived under other sections. Assuming \textit{arguendo} that a finding of "jurisdiction" (§ 16.1-158) can support a forfeiture of rights by child or parent, it should be noted that forfeiture does not begin here—at least so far as domestic privacy is concerned. Under § 16.1-164, whenever the judge receives reliable information that any child or minor is within the purview of this law or subject to this jurisdiction. . .the court shall require an investigation which may include the physical, mental and social conditions and the personality of the child or minor. . .

The court may then "proceed informally and make such adjustment as is practical without a petition." In this instance a police or probation officer is required to file a petition whenever no one else will. Wherever the bounds of proper informal adjustment may lie, this is judicial discretion at its broadest.

No doubt this provision is a beneficial one, insofar as it may facilitate settlement or dismissal of petty neighborhood and domestic problems without exercise of the court's specific sanctions. Yet so all-pervasive an investigation procedure is itself a substantial exercise of dominion. Normally, only convicted criminals are subjected to it. The truly pre-judicial result obtains when the judge consults the investigative report (which is obtained before notice or hear-

\textsuperscript{49} Matter of Underwood, 144 W.Va. 312 at 327, 107 S.E.2d 608 at 616, 617.

\textsuperscript{50} VA. CODE ANN. § 16.1-180 (1950) (Replacement Volume 1960).
ing) in, or prior to, adjudicating "jurisdiction". This he may do under the present statute, although some judges eschew the procedure, as noted above. This questionable method is expressly endorsed by some authorities. On the other hand, it has been the basis of reversal in several jurisdictions. The National Probation and Parole Association not only counsels against it, but extends its caveat even to the activities of the investigating officer: The Association recommends an immediate suspension of social inquiry upon denial of the charge.

Public-Private Character of the Hearing

Section 16.1-162, as yet unlitigated at the appellate level, deals with circumstances of the hearing. The difficulties inherent in similar provisions have occasioned serious concern in other quarters. The ex-parte form, for example, can be invoked at any time, in the absolute discretion of the judge. Dean Wigmore cites this as the one feature of delinquency statutes which is the most "clearly over the borderline of prudence." He urges:

But that the trial judge should have the power to commit to long detention any person without giving the person any opportunity to hear the substance of the testimony against him, is fundamentally unsound and practically dangerous. That provision should be purged from the statutes, and no judge in practice should allow himself to employ it.

On the other hand, it is contended by many authorities that the child's psychological equilibrium (which is to bene-

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51 In a New York survey, over half the judges answering a questionnaire admitted consulting background reports before the hearing. Correct Use of Background Reports in Juvenile Delinquency Cases, 5 Syracuse L. Rev. 67 (1953).
52 See, Gonas, John S., Therapy in the Juvenile Court, 48 A.B.A. J. 326, 327.
54 GUIDES, supra, note 17, at 50. The Association has renamed itself, and is now the National Council on Crime and Delinquency.
55 5 Wigmore, Evidence, 2d Ed. § 1400.
56 Ibid.
fit by involuntary examination, surveillance, commitment or confinement) would be imperilled by the traumatic rigors of any court proceeding—even an informal one.57

The real unfairness and inconvenience, however, would seem to lie not so much in the ex-parte approach itself, as in the peculiar discrimination against defendant parties: The hearing is not a public trial, yet neither is it exactly a privileged one. The judge may admit not only strangers to whom the family's problems are a matter of scientific curiosity, but anyone with a "proper interest therein." Yet (expressly here) he may exclude child, parent and attorney.58 The sociological wisdom of adding insult to whatever injury may obtain in ex-parte procedure is debatable. Requirements of Notice under § 16.1-172 and § 16.1-173

The notice provisions of the statute follow a familiar pattern: They begin with seeming requirements of formality, but end in a convenient exception which is capable of rather broad interpretation.59 Notice is one of the four definite constitutional due process guarantees,60 and the notice requirements for juvenile proceedings have indeed occasioned litigation in Virginia. But the holding that literal non-compliance, when it did occur, was fatal to jurisdiction, arose under the older statutes.61 This compliance requirement under the new Code may be satisfied by a judicial certification that “no useful purpose would be served” by

57 See generally Gonas, supra, note 52. In Re Santilles, 47 N.M. 140, at 160, 138 P.2d 503 at 516 (1943).

58 VA. CODE ANN. § 16.1-195 (1950) (Replacement Volume 1960). It must not be assumed that the “proper interest” is interpreted in practice as “a legal interest” for the latter phrase was struck in favor of the present provision by a 1958 Amendment.Apparently, “a proper interest” would be such an interest as that of the “representatives of various Arlington women’s clubs” “invited to sit in” on juvenile hearings in that county. (Annual Report, supra, note 28 at 14).


61 Ex Parte Mallory, supra, note 35.
the parent's presence. Thus § 16.1-172 does not create so strong a right in the parent as one might otherwise suppose.

In the same sense, it should be understood that the procedural formula (petition-investigation-disposition) of § 16.1-166 is by no means mandatory. The court may itself initiate proceedings without petition under § 16.1-164, and filing may be done by a probation officer after investigation. Therefore, no undue reliance should be placed upon the former section in trying to ascertain what the court has done, is doing, or will do in any particular case.

Section 16.1-167 is another statutory exception to the notice requirement. It excludes from § 16.1-172's protection children present in the court, regardless of the occasion for their presence. This may not exactly square with the constitutional notice requirements of § 11. Moreover, § 8's protection against self-incrimination extends to "witnesses in any investigation", civil or criminal. While the possibilities of abuse in such a situation may not be immediately apparent, they are graphically presented in the West Virginia case of State v. Ferrell. This is not a matter of express statutory endorsement in that state. Nevertheless it is not entirely irrelevant that the West Virginia court looked upon such procedure as something of an outrage, and a violation of federal 14th Amendment requirements.

**Application of Adult Penalties**

There is express authorization under §§ 16.1-161, 175 and 176 for trial of older minors as adults in courts of

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62 VA CODE ANN. § 16.1-172 (1950) (Replacement Volume 1960). To be so certifiable the uselessness of parental attendance must be the result of any of several conditions set forth in § 16.1-166. But these conditions are the appearance of "such conditions or surroundings that his welfare requires or there is other good reason" that custody be taken without regard to procedural formalities.


64 140 W.Va. 202, 83 S.E.2d 648. Here teen-ager called as witness in trial of a rapist denied having been a rape victim, was then questioned about her own sex life, admitted having relations on one remote occasion with a serviceman whose name she would not disclose, was thereupon sentenced summarily to reform school. Parents' petition for jury trial and for custody denied. Reversed by Supreme Court.
record, and decisions under these sections tend to be more scrupulously mindful of due process. Nevertheless, the juvenile court may administer almost the full range of adult penalties pursuant to its own civil and summary proceedings, whenever it deems JDR Act measures not effectively remedial. Commendable as disciplinary flexibility in itself may be, it seems to introduce a disconcerning element of unfairness. It is upon the child’s immunity from the harshness of adult justice that his forfeiture of procedural safeguards is rationalized. The law is deprived of its essential foundation of implied *quid pro quo* when that immunity is itself removed. The position of some Federal courts has been that the imposition of adult penalties will *per se* convert the proceeding into a criminal one, and that full customary due process is then required.

A recent interpretation of the “effectively remedial” clause construes here the necessity of a finding of “incorrigibility”, supported by evidence, even though this word does not appear in the statute. This restrictive clarification is commendable. But the incorrigibility finding itself need not be reached by the orderly procedure which is dictated by the severity of the sanctions which can be imposed. Therefore, it would seem that a disturbing inequity remains, possibly to occasion future trouble.

*Appeal Under § 16.1-214*

Understandably this is a rare occurrence in a field so infrequently invaded by legal counsel. Even so, the knowl-

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67 U.S. v. Hegstrom, 178 F.S. 17, at 20-21 (U.S.D.C. Conn., 1959), holding further that: “To hold otherwise would be to permit confinement for crime without a right to trial. This would be violating the constitutional right to due process under the Fifth Amendment and the guarantee of fair trial of the Sixth Amendment.” See also, In Re Poff, *supra*, note 6.


69 Arlington’s court, for example, making over 1600 juvenile “dispositions” annually, averages two appeals a year, and those are “generally dilatory.” Data supplied by Hon. Hugh Reid, Jr., Judge of Arlington County Juvenile and Domestic Relations Court.
edge of a guaranteed right to appeal is a comfortable thing—for attorney as well as for client.\textsuperscript{70}

While appellate review is certainly not an element of constitutional due process in Virginia,\textsuperscript{71} an ostensible right to appeal is supplied. The succinct language of § 16.1-214 provides for review of "any final order affecting the rights or interests" of the child or parent.\textsuperscript{72} However, several qualifications on the practical significance of this little-used right should be observed. The most obvious, of course, is that the awesome breadth of the juvenile judge's statutory powers leaves little room for any meaningful definition of abuse. As has been observed in the New York City courts:

Actions taken by the juvenile judge are so much a matter of discretion, and in areas where there are so few norms, that in any event they would be immune from appellate review.\textsuperscript{73}

But the truly ironic, if predictable, weakness is revealed by the legislative history of such provisions, to wit: the dominion exercisable over rights and interests without a "final" order, can be substantial. A New York study cites as an example the finding in Re Herko, where a long, or even indefinite, commitment to an insane asylum was held not final. Hence it was not susceptible of appeal.\textsuperscript{74}

\textbf{Guardian Ad Litem and Legal Counsel}

Section 16.1-172 and 173 do at least provide that the child shall not be convicted or "purviewed" without the presence at the hearing of some adult besides the judge. The truly salutary effect of this step is rendered dubious,
however, by a notable exception: the statute allows the substitution of a probation officer as guardian ad litem in the parents' absence. Here the proponents of the "sociological approach" carry their rejection of the adversary traditions of Anglo-American jurisprudence to such an extreme as to at least demonstrate their seriousness in the matter. To assume that a juvenile could not possibly have interests at once adverse to both court and parents is one thing; the facile assumption that the interests of child, court, defendant, parent, arresting and custodial personnel must necessarily be coincident is obviously something else again. Recently the Supreme Court of Appeals has even declared that something else must be meant—that "the statutes do not contemplate that in such cases the local Superintendent of Public Welfare may represent both sides and be both plaintiff and defendant." On several past occasions the Supreme Court of Appeals has held that a "judgment against" an infant in the absence of a guardian ad litem is void, and recently they have recognized "compelling reasons against relaxing that rule." The relevance of such rulings is restricted, however, by a theory which has not been rejected explicitly—i.e., that a finding of "jurisdiction" cannot possibly be a "finding against" the child.

75 VA. CODE ANN. § 16.1-173.
76 This is not to say that the same reasoning has not been carried still further in other jurisdictions, at least as a matter of judicial interpretation. The court in Re Custody of a Minor, supra, note 16, held that no decision regarding right to separate independent counsel was necessary, "since the juvenile court process in effect makes the Director of Social Work who initiates the proceedings, the child's counsel." (Emphasis added.)
79 Lowe v. Grasty, supra, note 71. Cole v. Pennell, 2 Rand. (23 Va.) 174, contains a slightly broader and more careful statement of the rule whereby this precaution in favor of the minor's rights is made mandatory: Here it was held "that an infant cannot be prejudiced by any judicial proceedings, unless he be defended by guardian, a rule without which infants, incapable of protecting themselves, might be utterly ruined, under color of judicial proceedings."
80 VA. CODE ANN. § 16.1-140: "...It is the intention of this law that ... the court shall proceed upon the theory that the welfare of the child is the paramount concern of the state ..." See also, § 16.1-179, which declares that the court's action must not be denominated a criminal conviction, and for a typical statement of a widely held view, see In Re Custody of a Minor, supra, note 16,
There is in the Virginia statute no positive provision for actual legal counsel (i.e., a practicing attorney) or for information as to right thereto. But this is not because of any national uniformity of appellate-court opinion on this point. The vehement conflict over right to counsel has in some states forced a searching reexamination of the whole due process area of this field. In fact, it has raised serious questions reaching the very fundamentals of juvenile court law. Even in a Federal Constitutional context, "diametrically opposed and contrasting theories" of constitutional liberty are as yet unreconciled. One extreme is represented in *Ex Parte McDermott*, a California case, wherein it was held that:

...there being no accusation of the commission of any criminal offense, no legal rights of the ward in this connection could be violated or abridged, and ...there was neither necessity nor occasion for the advice of an attorney in relation thereto.\(^8\)

The qualified application of the anti-counsel theory stated in the less dogmatic language of *People v. Dotson*, has also achieved some currency. Hereunder a juvenile:

...is held to be deprived of due process only when the lack of counsel is found to have actually resulted in unfair treatment.\(^3\)

On the other hand, certain courts have rejected such logic as resulting in "a denial of due process so gross as to make the judgment lack a necessary attribute of judicial determination." This was the holding of *State Department of Public Welfare v. Barlow*, a 1956 Arizona decision.\(^4\) It

holding that "it must be remembered that this is not a criminal proceeding, nor indicative of any kind of procedure against the child."


\(^{83}\) 46 Cal.2d 891, 299 P.2d 875 (1956), 60 A.L.R.2d 700.

\(^{84}\) 80 Ariz. 249, 296 P.2d 298 (1956), 63 A.L.R.2d 692, n. 2.
seems to represent fairly well the views of several similarly unorthodox jurisdictions.\textsuperscript{85}

This is not the ultimate in profound doctrinal deviation, however: the earlier District of Columbia case of \textit{Evans v. Rives} had gone so far as to maintain that the social considerations underlying the Juvenile Court Acts and the informality permitted thereunder “are not and cannot be incompatible with according an accused his constitutional rights, of which counsel is one and . . . cannot be ignored.”\textsuperscript{86} These occasional reconsiderations of juvenile court philosophy seem to have culminated in the neolegalistic heresies of \textit{Conteras} cited above, and \textit{Shioutakon v. D. C.}, where it is declared:

The “right to be heard” when personal liberty is at stake requires the effective assistance of counsel in a juvenile court as much as it does in a criminal court. . . the juvenile must be advised that he has the right to engage counsel or to have counsel . . . in his behalf.\textsuperscript{87}

Of course an interpretation necessitating (after the manner of \textit{Shioutakon}) court-appointed counsel would raise almost insuperable budgetary objections. In the larger Virginia jurisdictions,\textsuperscript{88} after all, the court “jurisdictionalizes” over 1600 minors a year.\textsuperscript{89} Nevertheless the suggestion concerning a requirement for information of right to counsel must give us pause:

The \textit{Shioutakon} case also holds—and perhaps more importantly from Virginia’s viewpoint—that procedural rights (such as they are) afforded by the juvenile court statute

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\begin{itemize}
\item 75 App. D.C. 242; 126 F.2d 633 (1942); 63 A.L.R.2d.
\item \textit{Supra}, note 12. In \textit{Re Poff}, \textit{supra}, note 6 (another District of Columbia ruling, with which \textit{Shioutakon} stands unreconciled at date) makes very unequivocal declarations as to full constitutional rights in minors, yet would restrict the right-to-counsel requirement to situations where the juvenile is accused of what in an adult would be a crime.
\item Arlington’s Judge Reid estimates that the cost of these services on a single busy day might run into four figures.
\item ANNUAL REPORT, \textit{supra}, note 28, at 7, Table IV.
\end{itemize}
are quite meaningless without legal assistance. Persuasive here was the inherent absurdity in expecting a child to fathom the complexities of the statute. This should bring to mind the logic of the Virginia Mallory ruling, and the far more recent Lowe case, holding certain of the statutory rights to be mandatory, and hence to inure to the benefit of any minor or parent who is aware enough to grasp them, as a matter of right.

The categorical assumption that lawyers are neither wanted nor needed in the delinquency matters is not an unassailable one. In the light of the several decisions, and especially in view of the position taken by the National Probation and Parole Association on this matter, this should be obvious. One social agency's investigator in fact has observed:

...I have questioned numerous parents...and have yet to find one who would not want to have legal advice if his child were in conflict with the law and subject to the processes of an institution such as the juvenile court today.

Such findings as this would lend support even to the position of the practitioner who ventures the suggestion that:

...The argument that lawyers are not ordinarily conditioned by adversary proceedings to be helpful in juvenile cases is not a convincing reason against assigning them to a delinquency case.

**Jurisprudential Considerations—Concluding Subjective Postscript**

Delinquency statistics reflect apprehensions. Thus the one thing that the increasing figures definitely can be said to mean is that more young offenders are being caught. Now

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90 **Supra**, note 12.
91 **Ibid**.
92 **Supra**, note 35.
93 **Supra**, note 71.
94 **GUIDES, supra**, note 17.
95 Letter by Bertram M. Beck, Director of the Special Juvenile Delinquency Project of the Children's Bureau, July 31, 1953, quoted in Gellhorn, **supra**, note 26, at 78 (N).
96 Shears, **supra**, note 5, at 723.
what that in turn may mean is a matter of conjecture. The inference that it reflects merely increased efficiency, or perhaps only ubiquitous proliferation, of apprehension and “referral” facilities is surely as logical an inference as any other at this point. Whether or not some other and more remote conclusion lies—such as the popular notion that there is something evil abroad in the land, which is subtly turning our children to crime—is surely no less conjectural.

Certainly there are going to be impressively rising delinquency figures so long as delinquency’s definition is the one which is codified in Virginia at present—the one under which our referral-disposition systems now proceed.

Considerations of freedom and justice are not entirely out of place here; another fundamental object of law, however, is perhaps even more immediately in point. That is the diminution of petty litigation. This concept of the law as a last resort is no new idea: it has been one of the overall guiding principles of Anglo-American law, and historically it has been found to work out rather well. There was something—granted, not everything—to be said for the older legal system where a man had to be sure enough, serious enough, and incensed enough, to go through all the awesome formalities necessary to sue his neighbor at the law. At the very least, he had to be willing then to incur the possible displeasure of those who were the deserving or undeserving victims of his decision.

At present however, all it takes is an anonymous word or phone call to bring the awe-inspiring weight of the law down upon a hapless family’s head and the social services into its bedrooms. And furthermore the anonymous traducer may self-righteously arrogate to himself the comfortable and flattering rationalization that he has exposed his fellow man to processes which are only humanitarian. In sum, the effect of the present law does not stop at a convenient codification of misprision. Its true effect is to lend the swift and terrible sanction of law to vindicative neighborhood pettiness. *De minimis curat lex.*
That such transcendent considerations are not entirely beyond the pale of judicial concern is indicated by an observation of Justice Brandeis:

Triviality destroys at once both robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.\(^9^7\)

As for concerns of right and justice, it is difficult to forbear suggestion that the anxieties voiced by extra-Virginia courts in this area should not be so blithely ignored. It must be remembered that the context is a unique one: In a normal situation, where appeal brings these matters before the high court and the legislature, we could assume from the dearth of appeals alone that our courts were just—but here we cannot.

\(^{97}\) GOLDMAN, SOLOMON, editor. THE WORDS OF JUSTICE BRANDEIS. (New York, 1953) 172.