Summer 1970

Right to Jury Trial: Indiana's Misapplication of Due Process Standards in Delinquency Hearings

Robert Gullick

Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons, Courts Commons, and the State and Local Government Law Commons

Recommended Citation

Available at: http://www.repository.law.indiana.edu/ilj/vol45/iss4/4
RIGHT TO JURY TRIAL: INDIANA'S MISAPPLICATION OF DUE PROCESS STANDARDS IN DELINQUENCY HEARINGS

In 1967 the Supreme Court handed down the landmark decision of *In re Gault* which granted children constitutional rights in the adjudicatory phase of juvenile proceedings. That decision has generated a number of juvenile appeals. For example, the Indiana Supreme Court in the past year has ruled on five juvenile cases. *In re Pigg* granted juveniles the right to testify in their own behalf; *McClintock v. State* held a juvenile's confession in the absence of counsel and parents to be invalid; *Cummings v. State* expanded the jurisdiction of the juvenile court; *State ex rel. Atkins v. Juvenile Court of Marion County* protected the juvenile court jurisdiction against possible encroachment by criminal

1. 387 U.S. 1 (1967). The discussion herein is restricted to "delinquent" children as defined in IND. ANN. STAT. § 9-3204 (Burns Repl. 1956). The effects which *Gault, Kent* and *Winship* have on the rights of "dependent" and "neglected" children as defined in IND. ANN. STAT. §§ 9-3205 and 9-3206 (Burns Repl. 1956) are outside the scope of this discussion.

2. *Gault* divided juvenile proceedings into three phases, prejudicial, adjudicative, and dispositional and granted juveniles the following safeguards during the adjudicative hearing where commitment to a state institution was possible: (1) notice to both parent and child sufficiently in advance of scheduled court hearings, (2) notice of the alleged misconduct stated with particularity, (3) notification to the parent and child of the right to counsel, or if they are unable to afford one, that one will be appointed, (4) privilege against self-incrimination, (5) the right to confrontation and cross-examination of sworn witnesses. *Id.* at 31-59. For a discussion of the application of *Gault* to the Indiana Juvenile Code, see Note, *Extending Constitutional Rights to Juveniles—Gault in Indiana*, 43 IND. L.J. 661 (1968). Prior to *Gault*, Kent v. United States, 383 U.S. 541 (1966), held that before a juvenile can be waived to criminal court the requirements of due process and fair treatment must be met. The child in a waiver hearing is entitled to a hearing including access by his counsel to the social records and probation or similar reports which presumably are considered by the court and to a statement of reasons for the juvenile court's decision. *Id.* at 557. Technically the case presented no constitutional issues since the Court was interpreting the waiver provision of the District of Columbia Code. See Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. CTS. J. 9 (1968). The Indiana Supreme Court followed and extended *Kent* in *Summers v. State*, 248 Ind. 551, 230 N.E.2d 320 (1967). See, Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 590 (1968) for a detailed examination of waiver proceedings in Indiana and the constitutional overtones of *Kent*.


4. — Ind. —, 253 N.E.2d 233 (1969). *McClintock* signed a confession admitting housebreaking and use of a stolen credit card. In holding the child's confession invalid the court extended the *Gault* right to counsel and protection against self-incrimination to the preadjudicatory stage of the proceeding.


jurisdiction; and Bible v. State\(^7\) held that a juvenile has no constitutional right to trial by jury in a delinquency proceeding.

The Bible decision, in particular, is significant in light of the Supreme Court's movement toward granting juveniles greater constitutional safeguards,\(^8\) recent decisions granting adults the right to jury trial in serious misdemeanor cases,\(^9\) and the Supreme Court's granting certiorari in In re Burrus.\(^10\) In that case forty juveniles who were charged with either "impeding the regular flow of traffic"\(^11\) on a state highway or "disorderly conduct"\(^12\) were denied a right to jury trial on the ground that the North Carolina Supreme Court was aware of no cases holding to the contrary.\(^13\) The court concluded that the juvenile hearing was constitutionally correct because the juvenile judge adhered to the requirements enumerated in Gault. The problem facing the court is whether due process in the adjudicatory hearing includes the right to trial by jury.

**The Courts' Approaches in Defining Juvenile Due Process**

Whether a court adopts or rejects a juvenile's demand for a "procedural right"\(^14\) may depend upon the court's definition of due process in the juvenile system. Justice Fortas, speaking for the majority in Gault declared, "... [J]uvenile proceedings to determine 'delinquency,'

8. In re Winship, 397 U.S. 358 requires a reasonable doubt standard to adjudicate a child a delinquent. See also Kent v. United States and In re Gault, supra note 2.
9. Duncan v. Louisiana, 391 U.S. 145 (1968) granted the right to jury trial to adults charged with a simple battery where the maximum sentence was two years. See text accompanying notes 81-85 infra. Accord, Bloom v. Illinois, 391 U.S. 194 (1968) granting jury trial to a defendant charged with criminal contempt punishable by a two year sentence. These decisions undercut the rationale applied in Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967) which denied the right to jury trial in juvenile court because it had not yet been held to be a fundamental criminal right.
11. Id. at 888.
12. Id.
14. "Procedural right" refers to issues which were left unanswered by In re Gault, supra notes 1 and 2. These include whether the juvenile has a right to jury trial which will be discussed in this note. The term also applies to questions which are not discussed in this note, but will undoubtedly be faced by the Indiana Court in the future such as: (1) whether there is a right to a public hearing, (2) whether there is a right to a transcript upon appeal, (3) whether these rights will be extended to proceedings concerning dependent and neglected children, (4) whether a juvenile has the right to bail, (5) whether the requirements set forth in Gault will be extended to the preadjudicative or dispositional phases of juvenile proceedings.
which may lead to commitment to a state institution, must be regarded as 'criminal' for the purpose of the privilege against self-incrimination.”

Some proponents of granting greater procedural rights to juveniles have argued that if such proceedings are considered criminal for granting the right against self-incrimination, then due process requires the proceedings be deemed criminal in order to apply other criminal procedural safeguards.

Justice Black in a concurring opinion carried the majority's criminal hearing analogy to the logical extreme and arrived at the “total rights” concept. A juvenile charged with an act which would be a crime if committed by an adult should receive “... the guarantees of all the provisions of the Bill of Rights made applicable to the states by the Fourteenth Amendment.”

The provisions to which Justice Black referred...

15. Supra note 1, at 49-50 (1967). Justice Fortas did not hold that all of the procedural guarantees in criminal proceedings apply to delinquency proceedings. He stated, "We do not mean ... to indicate that the hearing to be held must conform with all of the requirements of a criminal trial. ..." Id. at 30.

One of the major shortcomings of the decision however was its failure to set guidelines which would help future courts determine which, if any, of the other criminal rights not already available in juvenile proceedings should apply. Justice Harlan pointed out that the Court had failed "to provide any discernible standard for the measurement of due process in relation to juvenile proceedings. . . ." Id. at 67.

The Court rejected Justice Harlan's proposed test, which would determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, ... and not which of the proceedings now employed in criminal trials should be transplanted intact to the proceedings in these specialized courts.

Id. at 74. For a more complete discussion of the underlining rationale of Gault see Dorsen and Rezneck, In re Gault and the Future of Juvenile Law, 1 Fam. L.Q. No. 4, 1, 8-13 (1967).

16. See, e.g., Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968) holding that any proceeding which may lead to commitment to an institution should be considered criminal; thus making applicable the sixth amendment right to trial by jury; State v. Cano, 103 Ariz. 37, 426 P.2d 586 (1968) applying Miranda warnings to juveniles; Note, A Due Process Dilemma—Juries for Juveniles, 45 N.D.L. Rev. 251, 278 (1969) concluding that juveniles have a right to jury trials.

Conversely, some courts have read Gault narrowly relying on the doctrine of parens patriae, the necessity of informality at the hearings, and the civil-criminal distinction to reject a child's demand for a procedural right. See In re Johnson, 253 A.2d 462 (D.C. Ct. Ap. 1969) upholding the preponderance of evidence test; accord, State v. Santana, — Tex. —, 444 S.W.2d 614 (1969).


18. 387 U.S. 1, 61 (1967). Justice Black gave two theories for this conclusion. First since Gault was charged with a crime under state law and faced a six year confinement, he should be entitled to all of the guarantees of criminal defendants under the Bill of Rights made applicable to states by the fourteenth amendment. Second, if Gault had been an adult he would have been entitled to all of the guarantees of the Bill of Rights and to deny him any of these rights solely because he was a juvenile violates the equal protection clause of the fourteenth amendment. Id. at 61. See also, De Backer v. Brainard, 396 U.S. 28 (1969) (Douglas, J., dissenting).
would entitle a juvenile to the same procedural rights as an adult charged with a crime.

In the Supreme Court's most recent juvenile decision, *In re Winship*, the Court continued the expansion of the concept of due process as applied to juveniles by requiring proof beyond a reasonable doubt that the child committed an act which, if committed by an adult, would be a crime. In that case the juvenile judge had applied the New York statutory standard of preponderance of evidence to find that a twelve year old boy had stolen money from a woman's pocketbook. At a later dispositional hearing the child was committed to a training school for a period of not less than eighteen months and not longer than six years. Justice Brennan rejected the "total rights" approach and interpreted *Gault* to mean that "... the Fourteenth Amendment does not require that the hearing ... conform with all the requirements of a criminal trial. ..." However, the Court specifically rejected the contention that a criminal right could be denied by distinguishing the proceeding as "civil" or on the related ground that the purpose of the juvenile system is to rehabilitate rather than punish the child. The Court then set out a three step approach. First, the Court explicitly held that the reasonable doubt standard is required by the due process clause in criminal fact-finding hearings. Next, the Court determined that the same considerations which led to the adoption of this right in the criminal fact-finding hearing apply as well to protect a child in the adjudicatory hearing. Finally, the Court considered whether the adoption of this criminal right would have any deleterious effects upon the juvenile system.

The Indiana Supreme Court leaned toward the "total rights" approach in *In re Pigg*. There a fifteen year old juvenile, charged with habitual truancy, wanted to testify in order to establish as a defense that she was chronically ill. The juvenile judge refused to allow her to take the stand, stating "I don't particularly care to hear from Diane." Speaking for the majority Chief Judge DeBruler relied upon a criminal statute which gave an adult defendant the right "... to testify in his own

21. See note 19 supra, at 4254.
22. *Id.* at 359.
23. *Id.* at 365. One of Bible's justifications supporting informal hearings was that it would aid the court's function of rehabilitating the child. See text following note 72 infra. This statement in *Winship* rejects this justification as a reason for denying a child a procedural right.
25. *Id.* at 267.
He then interpreted *Gault* to require that "... where the hearing may result in commitment to a state institution the juvenile has *most* of the rights of a criminal defendant." The presence of the word "most" limits the "total rights" concept as stated by Justice Black, but the analysis is the same: This is a right which is granted a criminal defendant. The juvenile is charged with an act which, if proven, could result in commitment to a state institution which constitutes a loss of liberty comparable to that of a convicted criminal. Therefore, due process requires the granting of this right.

A short concurring opinion conceded the desirability of the result but argued that the right to testify at a juvenile hearing does not arise from a criminal statute. Instead "... the doctrine of parens patriae requires that the judge conduct ... an informal hearing ... in a manner which is fair and calculated to give the child the best possible impression as to the fairness of the court." Thus, the concurring opinion tempered "fairness" with the concept of "parens patriae," which suggests that a court should consider not only whether fairness requires the application of a right but also whether the proposed application of a right is compatible with the basic aims and philosophy of the juvenile court system. The apparent restriction of the "total rights" concept by the word "most," in the majority opinion goes no farther and fails to indicate the consideration which would persuade the court to deny juveniles these rights. The court, there-

---


27. *Supra* note 20, at 267 [emphasis added].

28. *Supra* note 20, at 268. This argument is the same as that set out by Justice Harlan, *supra* note 15, which was rejected by the majority in *Gault*.


The basic aim of the Juvenile Court Acts was individualized treatment based upon the child's needs rather than the seriousness of the act he committed, in other words, rehabilitation not retaliation. In the juvenile system the state was to act as parens patriae. The child was not to be accused of a crime, but would be given care and treatment if a need for it was demonstrated in order to save him from a downward career. The adjudication of delinquency was not to carry the stigma of a criminal conviction, and fingerprints, photographs and other records were not to be available for inspection. The juvenile judge was to have a staff of experts and medical facilities available. Probation was envisioned to be sufficient treatment in all but the most serious cases. Where institutionalization was required, it was supposed that the child would receive the rehabilitation and training he needed.

A juvenile case would be non-adversary in nature and more informal than a criminal prosecution. The juvenile judge was given wide discretion so that he could establish a meaningful relationship with the child in order to motivate the child to get to the roots of his own problems and thus facilitate rehabilitation.
RIGHT TO JURY TRIAL

by, made possible its consideration in future cases of the compatibility of a proposed right with the unique features of the juvenile system. 39

Other recent Indiana decisions support the retention of the juvenile court as a system unique and distinguished from the criminal system due to the benefits accruing to the child. In State ex rel. Atkins v. Juvenile Court of Marion County, 31 the county prosecutor attempted to by-pass the juvenile court. A mass indictment was sought and obtained against twenty-three high school students charging them with disorderly conduct. The criminal court immediately transferred the indictments to the juvenile court 32 and one week later the prosecutor filed a petition for waiver back to criminal court. 33 The Supreme Court granted the relators a writ of prohibition to prevent the juvenile court from acting upon the waiver petition. The court ruled that transfer of cases to the juvenile court was to be allowed only when the prosecutor or the grand jury had mistakenly believed that the defendant was over eighteen years of age. Here they both knew the children were under eighteen when the acts were committed; thus, the juveniles were within the exclusive jurisdiction of the juvenile court. 34 Therefore, the indictment was a nullity. Nonetheless, the grand jury proceeded to indict juveniles who were not within the criminal court's jurisdiction. 35

If a criminal court were allowed to obtain jurisdiction over juveniles in this manner, the whole "... spirit and purpose of the juvenile act is violated..." 36 because these children would be subject to the discretion of the prosecuting attorney and police. Under such a procedure, the police could control what court had jurisdiction by sending youths to either the prosecutor or the juvenile court, since the one who got his hands on the

30. See text accompanying note 52 infra.
32. IND. ANN. STAT. § 9-3213 (Burns Supp. 1967) provides that if a complaint is filed in another court and it is determined that the child is under eighteen that court is to transfer the case to the juvenile court with the exception of traffic offenders over sixteen and children charged with a crime, which if, committed by an adult would be a capital offense.
33. IND. ANN. STAT. § 9-3214 (Burns Supp. 1967) provides that a juvenile judge may waive jurisdiction to adult court of a child fifteen or over who is charged with an offense which would be a crime if committed by an adult. Thus through the manipulation of §§ 9-3213 and 9-3214 the prosecutor sought to initiate a criminal proceeding against pre-eighteen year old youths.
34. IND. ANN. STAT. 9-3104 (Burns Supp. 1967) gives juvenile courts exclusive jurisdiction over delinquent children. Section 9-3204 (Burns Repl. 1956) defines "delinquent child" in part as any boy under the full age of eighteen [18] years and any girl under the full age of eighteen [18] who: (1) commits an act which, if committed by an adult, would be a crime not punishable by death or life imprisonment.
35. IND. ANN. STAT. § 9-824 (Burns Repl. 1956) limits the power of a grand jury to subject matter which comes within the jurisdiction of the criminal court.
36. Supra note 31, at 55.
Youth first would have jurisdiction. Thus, the juvenile court screening mechanism\textsuperscript{37} which provides for a probation officer to investigate a juvenile offender's record and background to determine whether to file a petition with the court would be circumvented.

By rejecting the prosecutor's action the court was more concerned with rehabilitating children in need of help than subjecting a child to punishment for violating a criminal statute. In addition, allowing the juvenile court to have jurisdiction over the children protected them from having their arrest made public and from being retained in jail with adult defendants.\textsuperscript{38} The decision, therefore, affirms the rehabilitative functions of the juvenile system.\textsuperscript{39}

In another recent Indiana case, \textit{Cummings v. State},\textsuperscript{40} the court affirmed its faith in the juvenile system by expanding its jurisdiction to include children who were previously excluded. A sixteen year old defendant was convicted of inflicting physical injury while committing robbery, an act punishable by life imprisonment if committed by an adult. Under the definition section\textsuperscript{41} of the Indiana Juvenile Code a child who commits a crime punishable by "death or life imprisonment" is within the jurisdiction of the criminal court, while under the transfer section,\textsuperscript{42} only children who commit "capital offenses" are within the jurisdiction of the criminal court. Thus, a child who can be punished by life imprisonment only is outside the jurisdiction of the juvenile court under the definitional section and within the juvenile court jurisdiction under the transfer section. The court harmonized the two sections by interpreting both "capital punishment" and "punishment by death or life imprisonment" to apply only to crimes for which the death penalty is possible. Thus, as in \textit{Cummings}, where only life imprisonment was possible, the juvenile court had exclusive jurisdiction.

\footnotesize{37.} \textsc{Ind. Ann. Stat.} §§ 9-3208 and 9-3119 (Burns Repl. 1956) (Burns Supp. 1969) provide for preliminary inquiry and informal adjustment of children who come within the jurisdiction of the juvenile court.

\footnotesize{38.} See note 31 \textit{supra}, at 56.

\footnotesize{39.} \textsc{Ind. Ann. Stat.} § 9-3201 (Burns Repl. 1956) states, "The purpose of this act [§§ 9-3201—9-3225] is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state . . . ."

\footnotesize{40.} \textit{Ind.} ---, 251 N.E.2d 663 (1969).

\footnotesize{41.} \textsc{Ind. Ann. Stat.} § 9-3204 (Burns Supp. 1967). See note 34 \textit{supra}.

\footnotesize{42.} \textsc{Ind. Ann. Stat.} § 9-3213 (Burns Repl. 1956) provides,

If a complaint or charge of a criminal or quasi-criminal nature is made or pending against any person in any other court, and, it shall be ascertained that said person was under the age of eighteen [18] years at the time the offense is alleged to have been committed, it shall be the duty of such court to transfer such case . . . to the juvenile court, excepting . . . cases against children charged with a violation of the law, which if, committed by an adult, would be a capital offense.
The court justified its tortured interpretation of the language by relying upon the proposed revision of the Act which would increase juvenile court jurisdiction to include capital as well as all other offenses committed by children under eighteen years of age (except traffic offenses committed by persons over sixteen). The decision gives increased discretion to the juvenile court by allowing the judge to determine whether a child charged with an act which would be punishable by life imprisonment if committed by an adult should be processed by the juvenile court or waived to the criminal court.

Read together Atkins and Cummings support those who would argue in favor of granting the juvenile judge discretion in determining whether a child should be handled by the criminal or juvenile system and thereby reaffirm a basic goal of the juvenile court system: to distinguish between children who can be rehabilitated and those who cannot, retaining the former within the juvenile system. Asserting a belief in the separate rehabilitative treatment of juveniles does not, however, provide guidelines for determining the rights of juveniles in adjudicatory hearings. Originally it was assumed that the informality and flexibility pervading the court’s procedures from the intake phase to the dispositional phase would aid in the rehabilitation of the child. The invalidity of this assumption was asserted in Gault and authorities cited therein. Furthermore, the state has no power to rehabilitate a child until it is determined

43. Proposed revision of the Indiana Juvenile Procedural Code. This proposal was presented to the Indiana Legislature in 1969 but failed to pass the house. It is expected that either it will be resubmitted to the legislature or the Indiana Supreme Court will adopt the procedural part of the proposed rules.

The definitional section defines delinquent child as one who commits an act, "... other than a traffic offense committed by a child who has had his sixteenth (16th) birthday which is designated a crime under the law..." § 4(d)(1). Thus the court will have jurisdiction over those charged with a capital offense.

44. Interestingly the court cites the Comments to § 7 of the proposed revision which state that "[t]his will prohibit a ten-year old, for example, of [sic] being tried for murder under regular criminal procedure without some safeguard. Once he is transferred to the juvenile court the latter may, pursuant to section 22, waive jurisdiction, clearing the way for protection under the criminal statutes of this state." This is obviously wrong because the waiver section in both the present and proposed codes requires a child to be at least fifteen years old before he can be transferred to criminal court!

45. The Comments to § 7 of the proposed revision state that "[t]he intent of this section is to make waiver exclusively the decision of the juvenile court and thus avoid any constitutional objection which might otherwise be raised under Kent v. United States, 383 U.S. 541 (1966)." See note 2 supra.

46. See note 2 supra. They [recent studies] suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.

Id. at 26. See also sources set forth in id. n.37.
that he needs such treatment, which determination is made at the dispositional phase. Thus to assert, as did the State in Winship,\(^\text{47}\) that a procedural right applicable in the adjudicatory hearing destroys the rehabilitative function of the court is to assume falsely that rehabilitation occurs in that hearing. In order, then, to deny a right at this hearing, it is necessary to consider other features of the system which that right could destroy. The Court in Winship considered other features\(^\text{48}\) and decided that application of the reasonable doubt standard would not adversely affect them.

The Pigg, Atkins and Cummings opinions did not indicate where the Indiana Supreme Court would draw the line between those rights applicable to juvenile hearings and those not applicable. This line was drawn in Bible v. State\(^\text{49}\) by declaring constitutional the provision\(^\text{50}\) in the juvenile court statute denying juveniles the right to jury trial. In that case two brothers who were adjudicated delinquents on the ground that they committed assault and battery, asserted the right to a jury trial. In upholding the juvenile judge's denial of that right, the Indiana court declared that Gault made "... a careful effort ... to emphasize ... no wholesale incorporation of the rights of adults in criminal trials, into the juvenile system."\(^\text{51}\) Such an interpretation of Gault guidelines rejects the "total right" approach towards which the court had leaned in Pigg. The test stated by the court required weighing the benefits which would accrue to a juvenile by adopting a constitutional safeguard against any harmful effects the right might have upon the juvenile system.\(^\text{52}\)

\(^{47}\) 397 U.S. 358 (1970). The Court rejected the state and court of appeal's argument that the preponderance of evidence standard was justified in the fact-finding hearing because juvenile proceedings are designed "not to punish, but to save the child." Id. at 365.

\(^{48}\) These included: whether the adoption of the reasonable doubt standard would tend to equate an adjudication of delinquency with a criminal conviction, whether the standard would destroy the confidentiality of the proceedings, whether it would have "any effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place." Supra note 47, at 366. See also Justice Harlan's concurring opinion, supra note 47, at 368.

\(^{49}\) ___ Ind. ___ , 254 N.E.2d 319 (1970).

\(^{50}\) IND. ANN. STAT. § 9-3215 (Burns Supp. 1967) provides in part: "All cases for the determination of a petition requesting that a person be determined to be a delinquent or dependent or neglected child shall be heard separately and apart from the trial of cases against adults, and the court shall hear and determine such cases without a jury."

\(^{51}\) Supra note 49, at 326. The court indicated they were following the "fair treatment and due process" test set forth in Kent v. United States, 383 U.S. 541 (1966), supra note 2, and Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959). That court stated, "The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment. . . ." Id. at 559. See, e.g., In re Contreras, 109 Cal. App. 2d 787, 241 P. 631 (1951).

\(^{52}\) See note 49 supra, at 325-328. The court in considering these factors may have been influenced by Note, A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court, 64 No.W. L. Rev. 87, 115 (1969). "The suggested proposal involves bal-
RIGHT TO JURY TRIAL

The Right to Jury Trial

The Supreme Court has had two opportunities to resolve the juvenile jury trial issue but has declined to do so. In 1968 the Supreme Court decided *In re Whittington* involving a fifteen year old charged with murder. The case raised most of the substantive issues left unanswered by *Gault* including the right to jury trial in delinquency hearings. The Court was obviously surprised at the bizarre chronology of the case in which Whittington had been detained for over two years without a valid delinquency hearing. In a short per curiam order the Court refused to rule on the substantive issues and remanded the case to untangle the procedural and jurisdictional confusion caused by an invalid transfer order issued prior to *Kent* and *Gault*.

More recently, in *DeBacker v. Brainard* the issue was whether the fourteenth and sixth amendments require jury trial in delinquency hearings in light of the Court's decisions in *Duncan v. Louisiana* and *Bloom v. Illinois* which granted adults the right to jury trial in serious misdemeanor cases. The Court again refused to rule on the issue, holding that the right established in *Duncan* and *Bloom* should receive only prospective application. Since DeBacker's juvenile hearing was held prior to the two decisions, he would have had no constitutional right to a jury trial if he had been tried as an adult in a criminal court. Thus, before a right becomes applicable in juvenile cases, that right must be constitutionally required in criminal cases. A possible inference to be drawn is that if an adult had been entitled to this right in a criminal proceeding, a juvenile would have the same right in a delinquency hearing.

The Indiana Supreme Court, however, did not adopt this inference when deciding *Bible*. Concluding that a juvenile is not entitled to a jury

ancing three factors: the significance of the right to juvenile procedural fairness, the additional administrative and economic problems the grant of the right would create, and the effect of the right on the juvenile court as a rehabilitative agency." In applying this analysis to jury trials this note concluded that it, "... would greatly increase the administrative and economic problems, lessen the effectiveness of the court, and not particularly enhance procedural fairness. ..." *Id.* at 113. See text after note 53 infra for discussion of right to jury trial.


54. These included, the right of a juvenile to bail, trial by jury, proof beyond a reasonable doubt, and impartiality of the presiding judicial officer. *See generally 3 CRIM. L. REP. 4025-27* (1968).

55. See note 53 supra, at 344. Whittington was declared delinquent in a waiver hearing which did not meet the standards of *Gault* or *Kent*, supra note 2. For a full treatment of the background, chronology and legal results of the case, see Ketcham, *What Happened to Whittington*, 37 GEO. WASH. L. REV. 324 (1968).


57. See note 9 supra.

58. See note 9 supra.
trial, the court emphasized that the function of the juvenile court system is
to provide correction and rehabilitation. This, the court reasoned, could be accomplished only through an informal fact-finding hearing in which
the juvenile court judge would have wide discretion. The court developed
this concept through the following analysis of the section 9 of the Indiana
code which outlines the procedure for hearing and judgment:

During the hearing the juvenile court judge takes into account
such factors as the child's age, his family life, the nature of the
charges against him, the environment in which he lives, his
relationship with his parents, previous acts of delinquency and
any other pertinent factors relevant to the child and his conduct.
Upon the determination of these findings, he may then proceed
to make the appropriate order authorized by the statute.

This concept of judicial discretion during the delinquency fact-finding
hearing is inaccurate because factors such as a child's family life and
environment do not define delinquency under the statute and thus
should not be considered during the adjudicatory hearing. Taking these
factors into account during that hearing would necessarily require ad-
mitting hearsay evidence such as the probation officer's report. Gault
specifically required that only competent evidence, capable of confronta-
tion and cross-examination, be admitted in the fact-finding hearing.
Thus, only at the dispositional phase can the probation officer's report be
introduced.

60. Supra note 49, at 323.
rather than a formal split between the adjudicative and dispositional phases which is re-
1967), Uniform Juv. Ct. Act. § 29(a) and (b) (3d Tent. Draft), Proposed Revision

However, In re Coyle, 122 Ind. App. 217, 101 N.E.2d 192 (1951) held that a specific
act must be charged as constituting delinquency and proven in adversary proceedings
before the child can be adjudicated a delinquent. Gault required that evidence used in
proving the act must be capable of confrontation and cross-examination. Therefore, even
under the present act the fact finding determination must conform to Gault requirements
If it is determined the child has committed the act there must then be a finding that
the child is in need of care and treatment before disposition can be made. In re Johnson,
30 Ill. App. 439, 174 N.E.2d 907 (1961) reversed the commitment of two boys. It was
proven that the juveniles had done property damage to a deserted house, but the court
held that an isolated misdemeanor did not indicate that they should be taken away from
their parents and put under state supervision. But cf. In re Lewis, 11 N.J. 217, 94A 2d.
328 (1953) which held that the juveniles' careless operation of a motor vehicle which
resulted in two deaths did constitute proper cause for commitment although no determina-
tion was made that the child was in need of care or treatment.

62. See note 34 supra.
63. See note 2 supra.
RIGHT TO JURY TRIAL

The court's three interrelated reasons for allowing wide judicial discretion constitute a defect in the opinion because they are assumptions concerning the effects of the lack of procedural rights on juveniles whose validity *Gault* denied. First, the court stated,

The child will feel that he is being dealt with fairly, firmly and compassionately by the State. The less complex the procedure and the less formal the relationship between judge and juvenile, the more likely the child will understand the proceedings before him and the disposition thereof.

This statement is based on the assumption that a child who has no procedural rights will perceive the hearing as fair because he can understand the proceeding. It overlooks the very real possibility that a child can understand informal procedures and perceive them as unfair. Authorities such as those relied upon in *Gault* suggest that the kind of informal atmosphere which the court envisions is just as likely to create in the child a reaction of confusion and a feeling of helplessness.

Second, the court assumed that wide discretion in the hands of the juvenile judge would allow him to develop a "meaningful relationship" with the child which in turn would motivate the child to comply with the

64. Furthermore, no authority was cited to substantiate these assumptions. This is not to say that no authority exists. See Commissioner's Task Force Report, Juvenile Delinquency and Youth Crime, 38 (1967); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 559 (1957). These articles are based on the assumption that such procedure will make the child feel he is being dealt with fairly. Dorsen and Rezneck, supra note 15, at 23, respond to the argument that jury trials would undermine informality and confidentiality by stating, "... it may be answered that trial by jury is not a matter of form—like a judge's robe or gavel—but of substance, the product of long historical experience and expressing a profound judgment by our legal system about the means of adjudicating criminal behavior. If it thereby introduces an aura of formality or solemnity, it is formality desirable in a matter of such consequence."

65. Supra note 49, at 323.

66. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 85 (1967). The Commission makes no recommendations on jury trials but does reject informality due to increasing evidence which indicates that these procedures engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers. ... [E]fforts to help and heal and treat, if they are to have any chance of success, must be based upon an accurate determination of the facts. ... The essential attributes of a judicial trial are the best guarantee our system has been able to devise for assuring reliable determination of fact.

Id. See also Studt, The Client's Image of the Juvenile Court, Justice For The Child, 200 (M. Rosenheim ed. 1962), and W. Cavenaugh, Juvenile Courts, The Child and the Law, 212-22 (1962) which concludes that children are bewildered when an apparently friendly judge pronounces different and possibly lighter penalties for other children who have committed the same offense or have been in court the same number of times.
law.67 On the other hand, the Gault decision was supported by studies consistent with the position that "formality is more likely to infuse a juvenile with respect for the legal system than to heighten his feelings of alienation and in that sense may ultimately be therapeutic."68

Finally, the court advanced the argument that an informal hearing held in the judge's private chambers or the courtroom would induce a child to divulge his difficulties of home, family, friends and school. Such cooperation would make the child easier to rehabilitate than "one who stands defiant before the court."69 Again, authority in Gault suggests that the child's cooperation induced by the flexible procedures of officials and resulting in the child's institutionalization will engender a feeling of deception and thus diminish the effectiveness of rehabilitation.70 These three assumptions ignore Gault as well as Indiana precedent.71

The Gault court emphasized that the purpose of an adjudicatory hearing was to make an accurate finding of facts.72 In contrast the reasons relied upon by the Bible court focus on the rehabilitative function of the adjudicatory hearing which function becomes operative not at that hearing but at the dispositional phase. Thus, rehabilitation should have no bearing upon whether a juvenile is entitled to a jury trial or any other procedural right in the fact-finding hearing.73

The court stated one reason for denying the right which specifically pertains to the effects which jury trials would have on the juvenile system. Jury trials would interfere with administrative efficiency.74 There can be no doubt that the presence of jury trials would increase administrative

67. See note 49 supra, at 319, 324.
69. Supra note 49, at 324.
70. See note 1 supra.
[W]here children are induced to confess by "paternal" urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse . . . the child may well feel . . . he is being punished. Id. at 51, 52. See also authorities cited in n.37 at 26.
71. In re Pigg, supra, text accompanying notes 24-29, narrowed judicial discretion. In addition the court cites other cases which have narrowed judicial discretion: State ex rel. Jones v. Gecker, 214 Ind. 574, 16 N.E.2d 875 (1938) which allowed a juvenile a change of judge where bias or prejudice is shown; In re Coyle, 122 Ind. App. 217, 101 N.E.2d 819 (1951) which held a specific act must be charged as constituting the delinquency and determined in adversary proceedings; McClintock v. State, ____ Ind., 255 N.E.2d 233 (1969) which held inadmissable a fourteen year old's prejudicial confession. See additional cases cited in Bible, supra note 49, at 324, 325.
72. See note 2 supra.
73. See text accompanying notes 19-22 supra.
74. "... the presence of a jury would interfere with the proper administration of the juvenile system. . . ." Supra note 49, at 328.
burdens by requiring more time, personnel, paperwork and financial expenditures. However, if jury trials are necessary to protect juveniles then administrative difficulties cannot be relied upon to destroy this right. In addition, juvenile jury trial procedures do not have to parallel those of criminal courts. "Due process of law, as applied to juvenile proceedings, would likely permit states to implement the jury trial provision in a manner they believe to be the most beneficial to children. . ." Various states have implemented this right by providing a jury trial only when demanded, having fewer than twelve jurors, allowing jury trial only upon appeal, referring a child to district court for jury trial and transferring the case to juvenile court for disposition, and providing a young adult advisory panel to assist the judge in determining the facts. Thus, administrative inconvenience, although a factor weighing against the adoption of jury trials in juvenile courts, is not an insurmountable burden.

Although the Bible court did not discuss specifically whether the considerations which made jury trial a right in criminal proceedings are valid in juvenile proceedings, it indicated a negative response to that issue by relying upon Dryden v. Commonwealth, which denied juveniles the right to jury trial in Kentucky. That opinion asserted, "certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a

76. See text following note 85 infra.
78. Id.
79. — Ky. —, 435 S.W.2d 457 (1968). However that court relied upon the rationale set forth by Professor 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 trial by judge. The jury provides the accused with a weapon against political crimes repressive of civil liberties, a weapon juveniles do not generally need.
Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 559 (1957). Professor Paulsen is no longer such a strong exponent of non-jury juvenile proceedings; he has stated,
It is probably true that some of the adult protection 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 with jury trials, although in fact, the right is usually waived. 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 a doctor's office.
competent and conscientious circuit judge.” The contention requires analysis. The Supreme Court has held in *Duncan v. Louisiana* that an adult charged with a serious misdemeanor is entitled to a jury trial as a fundamental right guaranteed by the sixth amendment made applicable to the states through the fourteenth amendment due process clause. Tracing the history and the policy of trial by jury in criminal cases, the Court stated that “[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the government.” Other goals of the jury system are to provide an “... inestimable safeguard against the corrupt or over zealous prosecutor and against the compliant, biased, or eccentric judge.” In short, the right to jury trial in serious criminal cases reflects a commitment to protect the life and liberty of a citizen from arbitrary judicial action. Furthermore, an exhaustive study of the jury system in criminal cases has attested to the efficacy of the jury’s function of weighing the evidence and evaluating the credibility of witnesses. Thus, the *Dryden* assertion is not substantiated by authority regarding criminal trials. There is no evidence to indicate that juveniles need the protection which the right affords any less than adults.

A number of factors attest to the need of the right to jury trial in the juvenile system. First, if a juvenile court judge is expert, it is not in fact-finding but in determining what care and treatment is needed for each individual child. Second, as *Gault, Kent, and Pigg* indicate, the...

80. *Supra* note 79, at 461. To support this contention the court emphasized that Peter Bible had already had eight delinquency hearings since the age of eleven and his brother John had six hearings in a similar time period. *Supra* note 49, at 328. These facts, the court felt, strengthened their rejection of jury trials in juvenile proceedings. Such logic is confusing because this high rate of recidivism indicates that the procedures followed by the juvenile judge failed in rehabilitating the youth. A more plausible reason for their repeated appearances in juvenile court is the probable lack of resources available to the court to draw upon the learning of sociologists and psychiatrists. “If... facilities are lacking at the treatment stage then the major rationale for the withdrawal of some of the safeguards provided by the criminal court is also lacking.” Wheeler, Cottrell, and Romasco, *Juvenile Delinquency—Its Prevention and Control, *“Task Force,” *supra* note 63, at 421.


83. *Supra* note 81, at 155.

84. *Supra* note 81, at 156.

85. H. Kalven and H. ZuseL, *The American Jury* (1966). In concluding that judges have no superiority over juries in the fact-finding process, the authors stated, “[c]ontrary to an often voiced suspicion, the jury does by and large understand the facts and get the case straight.” *Id.* at 149.

86. *Gault* questioned the assumption of whether the juvenile judge in fact had any expertise at all. The court noted that as of 1964 less than ten per cent were full-time juvenile court judges, a fifth were not members of the bar, a quarter had no law school training. The Court, stated, “it has been observed that while good will, compassion and...
The dangers of judicial arbitrariness in juvenile proceedings are real. The jury system is an essential safeguard against arbitrariness because it assures that the decision will not be influenced by the impact which similar past cases may have on the mind of a judge trying the facts.

Third, it prevents decisions being made by a single individual, the juvenile court judge, who frequently has access to, or has participated in preparing, facts prior to the adjudicatory stage which may be prejudicial to the youth. Fourth, the function of a jury to evaluate the credibility of each witness regardless of how often he has appeared in court or how well known he may be to the judge is particularly desirable in the juvenile system where the probation officer who is the official arm of the juvenile judge appears as a witness to support the case against the youth.

Finally, the contention that a jury trial would destroy the confidential and secret nature of the juvenile hearings is unfounded for several reasons. The hearings have never wholly excluded parents, friends, and relatives. Furthermore, there is no constitutional reason why similar virtues are admirably prevalent throughout the system... expertise, the keystone of the whole venture, is lacking.” 387 U.S. 1, 14 n.14 (citation omitted).


88. Brief for Petitioner at 47, In re Whittington, 391 U.S. 341 (1968) indicates that the juvenile judge personally and through his official arm the probation officer participated in the investigative and accusatory process of the case and that he had access to the facts prior to the adjudicative stage. The proposed Uniform Juvenile Court Act provides: “the judge if he approves the filing of the petition shall not hear or dispose of matters thereafter arising in the case.” National Conference of Commissioners on Uniform State Laws Second Tentative Draft, UNIFORM JUVENILE COURT ACT, § 14, 18-19 (1967). The HEW Children's Bureau has stated:

A court through the use of its own staff should not be placed in the position of investigator and petitioner and also act as the tribunal deciding the validity of allegations in the petition. . . .”

Childrens Bureau, HEW, STANDARDS FOR JUVENILE AND FAMILY COURTS, p. 13. See generally Bloches, Juvenile Justice in California: A Reevaluation, 19 Hastings L.J. 47, 67, 94 (1967); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 308 (1967). IND. ANN. STAT. § 9-3208 (Burns Repl. 1956) directs the court to make a preliminary inquiry to determine whether the interest of the public or the child require that further action be taken. . . . If the court shall determine that formal jurisdiction should be acquired, [it] shall authorize a petition to be filed by the probation officer.

Thus, this section allows the juvenile judge to have access to the facts prior to the hearing and if he has a small staff, he may be required to prepare the facts.

89. Gault recognized that this “claim of secrecy, however, is more rhetoric than reality” and “[e]ven the privacy of the juvenile hearing itself is not always adequately protected.” Supra note 2, at 24, 25 n.35.

90. IND. ANN. STAT. § 9-3216 (Burns Supp. 1967) provides in part The court may conduct the hearing in an informal manner. . . . The names of the child or children, their parents, guardian or custodian, and the nature of the offense shall be a public record, if the court, in its discretion, shall order and direct; and public admittance or participation in the chambers of the trial court shall be within the discretion of the trial judge.
the public at large must be admitted to juvenile jury trials. These con-
siderations make it apparent that jury trials in the juvenile system are
as necessary if not more so than in criminal hearings.

CONCLUSION

It can no longer be assumed that a child's rehabilitation begins in a
pre-Gault kind of hearing where the child was encouraged to confront the
judge as he would a sympathetic parent and accept his chastisement in a
contrite manner. Doubts such as those regarding the fairness of institu-
tionalizing a child for a period of time often longer than that suffered by
an adult for committing the same act and those regarding the effectiveness
of rehabilitation arising from high recidivism rates compel the con-
clusion that the protections afforded adults by the right of trial by jury
are urgently needed by juveniles. Furthermore, the judge's encounter
with a juvenile prior to the adjudicatory hearing which precludes him
from impartially determining the facts suggests that a juvenile's need of
the right may be greater than that of an adult. The only drawback to the
use of juries in juvenile proceedings is the increased administrative
burden they would present. However, with the weight of considerations
favoring the availability of the right to jury trial, administrative dif-
ficulties cannot justify a denial of this right.

ROBERT GULLICK