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Extending Constitutional Rights to Juveniles-Gault in Indiana

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EXTENDING CONSTITUTIONAL RIGHTS TO JUVENILES—GAULT IN INDIANA

The effect of *In re Gault*[1] on the juvenile process in all jurisdictions has been explored elsewhere in this Symposium. The amount and mode of change in procedure necessitated by this decision will, of course, vary according to the particular structure and characteristics of the juvenile process in a specific jurisdiction. This Note will explore the impact of *Gault*, both as a present statement of law and as a portent of decisions to come, on the Indiana juvenile court system. Attention will be confined to the adjudicative phase of Indiana's system, *i.e.*, those parts of the process in which the juvenile court and its staff are directly involved, as distinguished from those involving the police or the treatment institutions.[2]

THE INDIANA JUVENILE COURT SYSTEM

A brief exposition of the Indiana juvenile court system is necessary to understand the impact of *Gault* on that system.[3] Shortly after Cook County, Illinois, pioneered the juvenile court concept in 1899,[4] Indiana adopted its Juvenile Court Act of 1905[5] which followed the general pattern emerging in other states. Following piecemeal amendment, the Indiana legislature enacted more substantial amendatory legislation in 1941,[6] dealing with procedural matters, and finally undertook a general revision of the juvenile court system in 1945.[7] This 1945 Act, with minor adjustments, constitutes the current statutory scheme.[8] This scheme can be broken down, for present purposes, into three classes of provisions

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1. 387 U.S. 1 (1967).

2. This narrowing of focus corresponds to the express limiting of the *Gault* opinion to the judicial phase. 387 U.S. 1, 13 (1967). For a study revealing the practical importance to the juvenile of the pre-adjudicatory phases of the process, see Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

Since waiver proceedings are covered elsewhere in this Symposium, only brief mention of them will be made here.

3. Judicial interpretation of statutory provisions is included in this section where it does not directly relate to the *Gault* holdings or implications; where the interpretation does so relate, it is included in the discussion of the specific issues, *infra*.

4. For an early history of the juvenile court movement, see H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927).

5. Ind. Acts 1905, chs. 45 § 1 and 145 § 1; Ind. Acts 1907, ch. 203, §§ 1, 2.

6. Ind. Acts 1941, ch. 233, §§ 1-34.

7. IND. ANN. STAT. §§ 9-3101 to 3124 and 9-3201 to 3224 (Burns Supp. 1967). The 1945 Act followed in many respects the 1943 Standard Juvenile Court Act drafted by the National Council on Crime and Delinquency. Companion legislation gave concurrent jurisdiction over the crime of contributing to the delinquency of a minor to the courts of general jurisdiction. IND. ANN. STAT. §§ 10-812-816. (Burns Supp. 1967).

8. Provisions prior to 1945 were finally repealed by Ind. Acts 1963, ch. 12, §§ 2, 10, 11, 14, 22-24.

relating to the adjudicative process: court structure, jurisdiction, and procedure.

Court Structure

In counties with a population greater than 250,000 (practically speaking, all the substantial urban areas), a special juvenile court is established with a separate, elected judge;[9] in all other counties the circuit court performs the duties of the juvenile court.[10] In certain counties the court exercising juvenile jurisdiction may appoint a referee to hear juvenile cases, but the referee's findings must be approved by the court.[11]

Probation officers, their permissible number varying with the population of the county, are appointed by and are directly responsible to the juvenile judge. There are elaborate salary provisions.[12] A probation officer's statutory duties include making investigations under the direction of the judge, giving a written statement of probation conditions to a juvenile placed on probation and keeping informed regarding him, and helping to improve the conduct and condition of juveniles placed on probation. Information obtained by the probation department is not admissible as evidence, and is not to be disclosed outside the department without authorization.[13]

Jurisdiction

The juvenile court[14] has "original, exclusive jurisdiction" in cases involving delinquent, dependent, and neglected children.[15] The definition of delinquent children is at once broad, vague, and specific. With the

9. IND. ANN. STAT. § 9-3101 (Burns 1956 Repl.).

10. IND. ANN. STAT. § 9-3102 (Burns 1956 Repl.). Additionally, IND. ANN. STAT. § 9-3112 (Burns 1956 Repl.) gives concurrent juvenile jurisdiction to those few superior courts which do not sit in the county seat and which are in counties with less than 50,000 population.

11. IND. ANN. STAT. § 9-3116 (Burns Supp. 1967). A salary limit is fixed.

12. IND. ANN. STAT. § 9-3117 (Burns 1956 Repl.). In counties with less than 100,000 population, one chief probation officer and one additional officer for each 25,000 population is permitted; in all other counties with less than 250,000 population, an adult probation officer is permitted as well; in counties with more than 250,000 population, any number is permitted.

13. IND. ANN. STAT. § 9-3119 (Burns 1956 Repl.).

14. No distinction is made between the special juvenile courts in the larger counties and those in which the cricuit court judge exercises juvenile jurisdiction. See text accompanying notes 9 and 10, *supra*. A post-*Gault* case, Hicks v. State, ——Ind. ——, 230 N.E.2d 757 (1967), overruled language in Harris v. Souder, 233 Ind. 287, 119 N.E.2d 8 (1954), which indicated that such a distinction existed.

15. IND. ANN. STAT. § 9-3103 (Burns 1956 Repl.). The juvenile court's jurisdiction over dependent and neglected children does not fall strictly within the scope of the *Gault* case or this Note; however, since such children are subject in Indiana to the same disposition as "delinquent" children, including commitment to a state institution, *Gault* may indeed apply in cases of dependent and neglected children as well. For the definition of dependent and neglected children, see IND. ANN. STAT. §§ 9-3205, 3206 (Burns 1956 Repl.).

general requirement that the child be under eighteen,[16] the definition includes, *e.g.*, those who commit crimes not punishable by death or life imprisonment, who are incorrigible or ungovernable, who are habitually truant, who violate the curfew, who "associate with immoral or vicious persons," who are found in or about truck terminals, and who are "guilty of indecent or immoral conduct."[17]

The provision for original, exclusive jurisdiction of the juvenile court is strengthened by another provision requiring other courts, unless a "capital" or minor traffic offense is involved, to transfer a criminal case, with its attendant papers, to the juvenile court whenever the defendant is found to have been under eighteen at time of the alleged crime.[18] Conversely, the juvenile court is given the discretionary power,

16. "Under 18" means not having reached the eighteenth birthday. State *ex rel.* Neel v. Criminal Ct., 225 Ind. 23, 72 N.E.2d 357 (1947). According to dicta in Miller v. Supt. of Boys' School, 209 Ind. 105, 198 N.E. 66 (1935), the time of the offense, not the time of charging, determines jurisdiction.

17. IND. ANN. STAT. § 9-3204 (Burns Supp. 1967). The section reads: The words "delinquent child" shall include any boy under the full age of eighteen (18) years and any girl under the full age of eighteen (18) years who:

(1) Commits an act which, if committed by an adult, would be a crime not punishable by death or life imprisonment;
(2) Is incorrigible, ungovernable or habitually disobedient and beyond the control of his parent, guardian, or other custodian;
(3) Is habitually truant;
(4) Without just cause and without the consent of his parent, guardian, or other custodian, repeatedly deserts his home or place of abode;
(5) Engages in an occupation which is in violation of law;
(6) Associates with immoral or vicious persons;
(7) Frequents a place the existence of which is in violation of the law;
(8) Is found begging, receiving or gathering alms, whether actually begging or under the pretext of selling or offering anything for sale;
(9) Unaccompanied by parent, patronizes or visits any room wherein there is a bar where intoxicating liquors are sold;
(10) Wanders about the streets of any city, or on or about any highway or any public place between the hours of eleven o'clock p.m. and five o'clock a.m. without being on any lawful business or occupation, except returning home or to his place of abode after attending a religious or educational meeting or social function sponsored by a church or school;
(11) Is found in or about railroad yards or tracks; or who jumps on or off trains; or who enters a car or engine without lawful authority;
(12) Is found in or about truck terminals, including freight docks, garages, other buildings incidental thereto or who enters a truck or trailer without lawful authority;
(13) Uses vile, obscene, vulgar or indecent language;
(14) Uses intoxicating liquor as a beverage, or who uses opium, cocaine, morphine or other similar drugs without the direction of a competent physician;
(15) Knowingly associates with thieves or other maliciously vicious persons;
(16) Is guilty of indecent or immoral conduct;
(17) Deports himself so as to wilfully injure or endanger the morals or health of himself or others;
(18) Deports himself so as to wilfully injure or endanger the person or property of himself or others.

18. IND. ANN. STAT. § 9-3213 (Burns 1956 Repl.). Transfer must be made even where, *e.g.*, the circuit court judge hearing the criminal case is also the juvenile court

after a "full hearing," to waive its jurisdiction to a court of criminal jurisdiction if the child is fifteen or older and is charged with a crime.[19] Despite statutory silence, the Indiana courts have extended the right to a change of judge and venue to delinquency,[20] dependency, and neglect cases.[21]

Procedure

The means by which jurisdiction is obtained by the juvenile court are two-fold: "(a) by petition praying that the person be adjudged delinquent or dependent or neglected; [or by] (b) certification and transfer from any other court before which any such person is brought charged with the commission of a crime."[22] The petition method of obtaining jurisdiction is by far the primary one and forms the basic framework for the work of the juvenile court and its probation department prior to the actual adjudicatory hearing.

The provision setting out the petition method[23] states that information regarding a delinquent child may be given to the court (practically speaking, to the court's probation department) by any person, whereupon the court is to make a "preliminary inquiry" to determine whether "further action" should be taken, including, where practicable, an investigation of the home and circumstances of the juvenile.[24] If formal jurisdiction is found to be appropriate, the court is to authorize a petition[25] to be filed and vertified by the probation officer.[26] The petition

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judge, and he intends to waive juvenile jurisdiction back to the circuit court. Hicks v. State, ——Ind.——, 230 N.E.2d 757 (1967).

The exception to transfer for "capital" cases and the exclusion from the delinquency definition of "crimes punishable by death or life imprisonment" constitute a formal distinction presently without a difference; since the two provisions logically should be congruent, the distinction is undoubtedly a quick of drafting, with potentialities for trouble if capital punishment is abolished or a particular crime is made punishable only by life imprisonment.

19. IND. ANN. STAT. § 9-3214 (Burns Supp. 1967). For a full discussion see the accompanying Symposium article, Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 IND. L.J. 583 (1968).

20. State *ex rel.* McClintock v. Hamilton Cir. Ct., —— Ind.——, 232 N.E.2d 356 (1968); State *ex rel.* Duffy v. Lake Juv. Ct., 238 Ind. 404, 151 N.E.2d 293 (1958).

21. State *ex rel.* Dunn v. Lake Juv. Ct., —— Ind. ——, 228 N.E.2d 16 (1967); State *ex rel.* Bryant v. Warrick Cir. Ct. 232 Ind. 655, 115 N.E.2d 742 (1953).

22. IND. ANN. STAT. § 9-3207 (Burns Supp. 1967).

23. IND. ANN. STAT. § 9-3208 (Burns Supp. 1967).

24. The necessity for "preliminary inquiry" has received from the courts a reception ranging from cold to lukewarm. In Akers v. State, 114 Ind. App. 195, 51 N.E.2d 91 (1943), under the prior similar statute, the court opined in dicta that such inquiry was entirely within the judge's discretion and thus not necessary, while in Johnson v. State, 136 Ind. App. 528, 202 N.E.2d 895 (1964), the concurring opinion disapprovingly noted the lack of any preliminary inquiry in the record. For the possible application at this stage of the more mandatory investigation provision in the statute, see note 31, *infra.*

25. Realistically, these steps taken prior to the filing of the peition are often left

is to contain the facts constituting the delinquency, the name, age, and residence of the juvenile, and the names and residence of his parents, if known.

After a petition is filed, the court, unless the person voluntarily appears, is to "issue a summons reciting briefly the substance of the petition, and requiring the person . . . who have the custody or control of the child to appear personally and bring the child before the court . . ." and, if the parents do not have custody, they must be "notified of the pendency of the case" by personal service.[27] Service of the summons or notice is to be made personally if practicable but, if not, service by registered mail to the last known address of the person summoned or notified is permissible; service is sufficient to confer jurisdiction if it is made at least twenty-four hours before the time fixed for the summons' return.[28]

The delinquency hearing itself is in many respects conducted according to the discretion of the judge: he may be informal, he may conduct the hearing in chambers, he may include or exclude any person from the hearing room, he may make the names of the parties and the offense a public record, and he may order finger printing and photographing of a juvenile fifteen or older.[29] Non-discretionary provisions of the statute direct that all juvenile cases are to be heard separately from any adult trial, that the court is to hear juvenile cases without a jury, that the court reporter is to be present to record rulings and oral testimony, and that a probation officer is to be present "in the interest of the child."[30] No hearing is to be finally disposed of before a written prehearing investigation report" is considered by the judge, and either the judge or the probation department may order a mental or physical examination of the juvenile as part of the report.[31]

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to the probation department, with the judge actively participating only after the petition is filed, although some judges do hold a full hearing before authorizing a petition. Record entries of these steps are probably rare, if Johnson v. State, 136 Ind. App. 528, 202 N.E.2d 895 (1964), and Anton v. State, ——Ind. App. ———, 224 N.E.2d 516 (1967), are any indication.

26. The necessity that the probation officer and no one else file the petition has been much litigated in dependency and neglect proceedings. Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964); Shupe v. Bell, 127 Ind. App. 292, 141 N.E.2d 351 (1957). The culmination was a statutory amendment to IND. ANN. STAT. § 9-3208 (Burns Supp. 1967) in 1959 allowing the county welfare department to file a petition in such proceedings. Except for these welfare department cases, the probation officer must sign the petition. *In re* Rosenbarger, 127 Ind. App. 497, 153 N.E.2d 619 (1957).

27. IND. ANN. STAT. § 9-3209 (Burns 1956 Repl.). For further discussion of this aspect, see text accompanying notes 48-55, *infra*.

28. IND. ANN. STAT. § 9-3210 (Burns 1956 Repl.).

29. IND. ANN. STAT. §§ 9-3113-3215 (Burns Supp. 1967).

30. *Id.*

31. IND. ANN. STAT. § 9-3113a (Burns Supp. 1967). This 1959 amendment is generally veiwed as requiring a dispositional report analogous to the pre-commitment

Following a determination of delinquency, the court may choose among several dispositions of the juvenile: (1) placement on probation or supervision, upon terms of the court's choosing, in the home or in another's custody; (2) commitment to a public institution,[32] including a mental hospital, or an approved private insitution or home; (3) wardship in the court, public welfare agency, or child placement agency; (4) postponement of judgment for two years, unless sooner requested by the juvenile; and (5) further disposition deemed to be in the best interests of the juvenile.[33]

A determination of delinquency does not stamp a "criminal" label on the case: a determination is deemed not to be a conviction, there are no "civil disabilities" imposed, there is no civil service disqualification, and the determination and evidence in the case cannot be used as evidence against the juvenile in any other court.[34] Expungement of all records is provided after a two-year period if the court deems the juvenile to be reformed.[35]

Appeals from final orders or judgments of the juvenile court may be taken "in the manner provided by law for appeals in criminal cases,"[36]

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report in the criminal area, but the section's directive that "no *hearing* . . . shall be finally disposed of" (emphasis added) can be read as requiring a separate report for each hearing in a case, *e.g.*, a report for a preliminary hearing, for a waiver hearing, and for a detention hearing, as well as for the delinquency hearing itself.

32. The Boys' School and Girls' School in Indiana comprise virtually the only institutional alternatives to probation in the disposition of delinquents. These institutions have been severely criticized in a recent survey report commissioned by the Indiana Legislature's Department of Correction Study Committee, 2 National Council on Crime and Delinquency, Corrections in Indiana (1967), abridged in 1 IND. LEGAL F. 33, 37-69 (1967), and they illustrate the view, frequently stated in *Gault*, that commitment to a juvenile "training school" is often little different from commitment to an adult prison. The resulting reluctance on the part of judges to use the Boys' and Girls' Schools, coupled with the lack of less severe out-of-the-home alternatives, often forces the judge merely to place on probation those juveniles who need more help than the local probation department is equipped to give.

33. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967). It is to be noted that all of these dispositional choices including commitment are available once a determination of delinquency is made. This broad discretion comports with the concept of individualized treatment—dealing with what the juvenile *is*, not just with what he has *done*—but collides with the criminal concept of equal punishment for equal crimes (which is itself being modified by the growth of indeterminate sentences). Some states have provided a rudimentary breakdown to allow the more drastic forms of treatment such as commitment only if the act charged is one of the more serious forms of delinquency. *See, e.g.*, CAL. WELF. & INST'NS CODE §§ 725-740 (West 1966); ILL. ANN. STAT. ch. 37, § 705-2 (Smith-Hurd Supp. 1967); KAN. GEN. ANN. STAT. §§ 38-802-826 (1965).

34. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967). In Noel v. State, ——Ind.——, 215 N.E.2d 539 (1966), a prosecuting witness' juvenile record could not be used to impeach the witness because the record was not "criminal."

35. IND. ANN. STAT. § 9-3215a (Burns Supp. 1967).

36. IND. ANN. STAT. § 9-3221 (Burns 1956 Repl.). This clause apparently refers to the extent and manner of appeal rather than the court to which appeal should be taken. See text accompanying notes 45-47, *infra*. The present appeal system contrasts sharply with that of the prior statute. See note 79, *infra*.

and the Indiana Appellate Court has exclusive jurisdiction of the appeal.[37]

THE STANDARDS: GAULT AND BEYOND

The system described above must now be measured against the standards enunciated in *Gault*. Under these standards, briefly stated, an accused juvenile offender is entitled to notice of specific charges in time to prepare adequately to meet them; the assistance of counsel, appointed if necessary; confrontation by and cross-examination of the witnesses against him; and the privilege against self-incrimination.

The sweeping nature and due process basis of the *Gault* decision suggest that the Supreme Court may later extend other criminal law standards to juvenile proceedings, such as the right to appellate review and a transcript of the proceedings, the right to bar evidence gained from unlawful search and seizure, the right to a criminal standard of proof, the right to a public trial, and the right to a jury trial. Whether or not this will happen depends, of course, upon an evaluation of both the precise constitutional basis of a particular criminal standard and the suitability of its application to the different demands of the juvenile process. Such an evaluation will not be attempted here. Instead, this Note will attempt to suggest the changes required in the Indiana law in order to make it conform to *Gault* as well as changes which would be necessary if these other criminal standards were later extend to the juvenile process.

THE INDIANA SYSTEM AS MEASURED BY GAULT

Preliminarily, the basis upon which Indiana (and other states) operated its juvenile system was attacked in *Gault*. In determining the requirements of due process, the Supreme Court looked to the jurisdictional underpinning of the juvenile court concept—the *parens patriae* power of the state[38]—and found its legal credentials wanting.[39] The doctrine's debilitating effect on "fair treatment" was brought about by using it as a justification for labeling juvenile proceedings "civil" rather than "criminal" in nature, thus cutting the juvenile off from constitutional and statutory protections afforded an otherwise similarly-situated adult.[40] The care and treatment supposedly given the juvenile in a state institution—the justification for this loss of protection—was found to be little different from penal incarceration.[41]

37. Adams v. State, 244 Ind. 460, 193 N.E.2d 362 (1963). The basis for the ruling was the "non-penal" nature of juvenile proceedings.

38. "The sovereign power of guardianship over persons under a legal disability." BLACK'S LAW DICTIONARY 1269 (4th ed. 1951).

39. 387 U.S. 1, 16 (1967).

40. 387 U.S. 1, 17-18 (1967). *See* Note, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PENN. L. REV. 1171, 1176 (1966); Note, *In re Gault; Understanding the Attorney's New Role*, 12 VILL. L. REV. 803, 808 (1967).

41. 387 U.S. 1, 18-30 (1967).

The Indiana statute strongly reflects this *parens patriae* basis: "[t]he purpose of this act is to secure . . . care, guidance, and control . . . as nearly as possible equivalent to that which should have been given by his parents."[42] Indiana cases have consistently based juvenile jurisdiction on the *parens patriae* power,[43] and have thus denominated the juvenile process a "civil" proceeding." A clear example involves the question of which court receives the appeal: while the statute directs that juvenile appeals are to be taken "as in criminal cases"[45] and criminal appeals are to be taken to the Indiana Supreme Court,[46] decisions have, nonetheless, directed juvenile appeals to the Indiana Appellate Court because juvenile proceedings are "non-penal."[47]

The standards themselves do not constitute a complete overturning of the relevant portions of the Indiana juvenile court system; with the exception of the privilege against self-incrimination, the *Gault* holding represents a tightening up of principles already recognized in at least a crude form by the Indiana statutes and decisions.

Notice

Gault requires that notice be given to both the juvenile and his parents "sufficiently in advance to prepare" for the hearing, and that the notice "set forth the alleged misconduct with particularity."[48] The Indiana statute requires a summons, setting forth the "substance" of the petition, to be issued upon the filing of the petition to the person having custody of the juvenile (but not to the juvenile himself). If the parents do not have custody, the statute requires only that "notification" of the pendency of the hearing be sent to the parents.[49] Service of summons or notice may be made by registered mail to the last known address when personal service is impracticable, and service must be effected at least

42. IND. ANN. STAT. § 9-3201 (Burns 1956 Repl.).

43. State *ex rel.* Johnson v. White Cir. Ct., 225 Ind. 602, 608, 77 N.E.2d 298, 301 (1948); Dinson v. Drosta, 39 Ind. App. 432, 434, 80 N.E. 32, 33 (1906).

44. Bd. of Children's Guardians v. Gioscio, 210 Ind. 581, 585, 4 N.E.2d 199, 201 (1936). Conversely, "[t]he constitutional rights of a person charged with crime are not [the juvenile's]" and "[p]roceedings against him in juvenile court are in no sense criminal." Akers v. State, 114 Ind. App. 195, 203, 51 N.E.2d 91, 94 (1943).

There has not been, however, total procedural surrender: "[j]uvenile court procedure has not been so far socialized and individual rights so far diminished that a child . . . may be placed in an institution simply because some court might think that to be in the best interests of the state." *In re* Coyle, 122 Ind. App. 217, 219, 101 N.E.2d 192, 193 (1951) (uncorrected variance between petition and proof).

45. IND. ANN. STAT. § 9-3221 (Burns 1956 Repl.).

46. IND. ANN. STAT. § 4-214 (Burns Supp. 1967).

47. Adams v. State, 244 Ind. 460, 462, 193 N.E.2d 362 (1963); *In re* Rosenbarger, 127 Ind. App. 497, 141 N.E.2d 853 (1957); State *ex rel.* Miller v. Gannon, 117 Ind. App. 677, 75 N.E.2d 678 (1947).

48. 387 U.S. 1, 33 (1967).

49. IND. ANN. STAT. § 9-3209 (Burns 1956 Repl.).

twenty-four hours before the return date.[50] Cases, where notice to the parents was admittedly not issued, would seem to indicate that notice is a jurisdictional requirement.[51] However, this "jurisdictional requirement" has been deemed satisfied where the record did not affirmatively disclose a lack of it.[52]

No cases construe the provision requiring that the "substance" of the petition be noted on the summons. In one case, however, the court overturned a determination of delinquency because the juvenile was not apprised of the charges even during the hearing.[53]

While the Indiana system thus provides for a basic type of notice, such notice as is required does not "set forth the misconduct with particularity" nor does the twenty-four hour service provision realistically assure notice "sufficiently in advance to prepare." While judicial interpretation can provide a short-term solution,[54] it is clear that statutory amendment is needed, providing for separate notice to the juvenile,[55] particularity as to misconduct charged, and a longer interval between service and return of summons.

Counsel

Gault held that the juvenile and his parents must be advised of their right to the assistance of counsel, and to appointment of counsel if indigent, where the hearing may result in commitment to an institution.[56] The Indiana statute is silent as to counsel. However, while a juvenile hearing has often been termed an "adversary" hearing,[57] lack of advice of the right to counsel has been denied the status of a constitutional defect in a habeas corpus proceeding.[58] In addition, an older case, using the "civil" rubric, stated in dicta that the right to counsel was not applicable.[59]

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50. IND. ANN. STAT. § 9-3210 (Burns 1956 Repl.).

51. Johnson v. State, 136 Ind. App. 528, 202 N.E.2d 895 (1964); Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952).

52. Harris v. Souder, 233 Ind. 287, 119 N.E.2d 8 (1954).

53. Green v. State, 123 Ind. App. 81, 108 N.E.2d 647 (1953) (voluntary appearance by the jvuenile and his father prevented the question of summons from arising).

54. It is not particularly difficult to construe the statute's "substance of the petition" to mean *Gault*'s "particular misconduct charged;" it is more difficult, however, judicially to require longer than 24-hours notice or separate notice to the juvenile, when the statute goes so clearly the other way.

55. This is particularly important when the juvenile and his parents take conflicting positions with respect to the case.

56. 387 U.S. 1, 41 (1967). Since commitment is possible no matter what definition of delinquency the juvenile's conduct falls under, see note 33, *supra*, the commitment proviso of the holding in *Gault* makes no difference in Indiana—the right to counsel applies to every delinquency case.

57. State *ex rel.* Duffy v. Lake Juv. Ct., 238 Ind. 404, 407, 151 N.E.2d 293, 295 (1958); *In re* Coyle, 122 Ind. App. 217, 220, 101 N.E.2d 192, 193 (1951).

58. Lehman v. Montgomery, 233 Ind. 393, 120 N.E.2d 172 (1954).

59. Akers v. State, 114 Ind. App. 195, 205, 51 N.E.2d 91, 95 (1943).

The right to counsel has historically been a court-generated right, so a statutory change to meet *Gault* is not strictly necessary. But two considerations make statutory amendment desirable. First, the *Gault* holding is expressly confined to the "adjudicative" phase of the juvenile process. Thus, a restrictive interpretation of *Gault* would require advising the juvenile of his right to counsel only when he steps before the judge at the "adjudicative" hearing. A statute, however, should require advising the juvenile of his right at least at the petition-filing stage, and preferably at time of detention.[60] Second, the expanded role of appointed counsel under the *Gault* regime suggests that serious burdens may be placed upon attorneys asked to serve in counties making uncompensated appointments. A statutory scheme providing a flexible schedule of fees and expenses payable from both state and local funds might be needed to implement effectively the right to competent counsel.[61]

Confrontation and Cross-examination

Gault held that, absent a valid confession, confrontation with and sworn testimony from witnesses available for cross-examination are necessary for a determination of delinquency and commitment to a state institution.[62] The ruling does not, however, unequivocally delineate the scope of the requirement of confrontation and cross-examination. Thus, it is not clear whether the requirement is merely that *some* evidence must be from a confronted witness available for cross-examination or that *all* evidence, aside from recognized hearsay exceptions, must be of such a character.[63]

The Indiana decisions make it clear that some evidence subject to

60. Advice of the right to counsel is needed at the detention stage not only to provide time to prepare (this requirement is probably satisfied by advice at the petition-filing stage) but also to provide a salutary control over detention itself. Since the parents should be notified of the juvenile's detention in any case, the notification (which does not replace the "notice" required by *Gault*) should also advise the parents of the right to counsel.

61. Experience under the *Gault* standard is needed before adopting any such scheme. Juveniles may still decline counsel in large numbers, and the resources of the bar may increase because of the new emphasis on criminal representation.

For a survey of the use and compensation of indigent counsel in Indiana, see the Indiana section of 2 L. SILVERSTEIN, DEFENSE OF THE POOR (1965).

62. 387 U.S. 1, 57 (1967).

63. These alternatives represent the extremes. A further breakdown can be made, for example, between requiring evidence of such character only as to some elements of the delinquency or requiring it as to all elements, or at the other end of the spectrum, between using civil rules of admission of hearsay or criminal rules.

The Supreme Court's ultimate position in this regard is hinted at when the opinion cites CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH, EDUC. & WELF., STANDARDS FOR JUVENILE AND FAMILY COURTS (1966), as being "in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence *under rules applicable to civil cases* should be admitted in evidence." 387 U.S. 1, 56 (1967) (emphasis added).

cross-examination must be presented at the adjudicative hearing,[64] so tc that extent Indiana practice conforms to *Gault*. However, if *Gault* is taken to require that *all* evidence be non-hearsay (aside from recognized exceptions, whether under civil or criminal rules), then Indiana's conformity is questionable. The problem lies in the statutory and decisional treatment of the major item of hearsay in any juvenile case, the probation officer's report.[65] On the one hand, the statute and cases prohibit receiving as evidence any information gained by the probation department[66] but, on the other hand, a 1959 amendment requires that a "written prehearing investigation report" be presented to and considered by the judge before any hearing is completed.[67] Since the statutes lack any mandatory provision for separating the adjudicative and dispositional phases of the hearing, this apparently means that, while the hearsay contained in the report cannot form part of the *evidence* considered by the judge, it must be considered by him nonetheless, in some unspecified guise, before final adjudication.

Thus, in order to bring Indiana into conformity with a rule which requires that all evidence be subject to cross-examination aside from the hearsay exceptions, a judicial decision is not enough; it is necessary either to repeal the prehearing investigation report provision or to amend it to provide that the report will not be introduced until after adjudication.[68]

Self-incrimination

Gault held that the privilege against self-incrimination applies to

64. In Green v. State, 123 Ind. App. 81, 86, 108 N.E.2d 647, 650 (1953), the court reversed a juvenile case in which the only evidence was the *ex parte* report of the probation officer, saying, "the [juvenile] act does not . . . sanction the action of a court in finding a juvenile guilty of a wrong against the state in disregard of his rights to a hearing in which he is apprised of the charges against him and the evidence in support thereof and afforded an opportunity to defend himself." *Accord*, Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952).

65. The mental or physical examination report contemplated under IND. ANN. STAT. § 9-3220 (Burns 1956 Repl.) shares the same problem with the probation officer's report, but no case has ruled on such a report.

No statute or decision in Indiana touches upon other hearsay, such as what the investigating police officer heard, so that the local juvenile judge is left to his discretion in admitting such testimony.

66. IND. ANN. STAT. § 9-3119 (Burns 1956 Repl.); Groves v. Smith, 127 Ind. App. 109, 138 N.E.2d 295 (1956); Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952); Kessler v. Williston, 117 Ind. App. 690, 75 N.E.2d 676 (1947).

67. IND. ANN. STAT. § 9-3113a (Burns Supp. 1967).

68. The report *is* necessary for proper disposition, and similar information is also necessary at the pre-adjudicative phases of the process (authorization to file a petition, detention hearings, etc.) where the emphasis, unlike the adjudicative phase, is on what the offender *is*, not what he has *done*. Such procedural niceties are best handled by legislation.

juveniles as well as adults.[69] The opinion does not outline the exact extent of the privilege, but it is clear that the privilege not only requires that the juvenile be warned of his right to keep silent *at* the hearing, but also prohibits the introduction of an admission or confession made prior to the hearing unless it was made "voluntarily"; this the opinion describes as ". . . not coerced or suggested, . . . [nor] the product of ignorance of rights or of adolescent fantasy, fright or despair."[70] The inclusion of "ignorance of rights" as one of the tests of voluntariness would seem to call forth the rules laid down in *Miranda v. Arizona,* 71 but no mention is made of them in the holding.

One difficulty in determining the extent of the applicability of the privilege is the oft-repeated statement in *Gault* that the decision is confined to the adjudicative phase of the juvenile process.[72] If the Supreme Court did not mean to incorporate the *Miranda* rules into the juvenile process, it is difficult to discern just what official conduct, less meticulous than what *Miranda* requires, would satisfy the Court. To compound the difficulty, waiver standards more stringent than are necessary for adults may be required to protect a juvenile due to his lessened understanding.[73] The result, both for the state and the juvenile's counsel, is a sea without safe harbor—no one can tell with any assurance what constitutes a valid waiver.[74]

The Indiana scheme is clearly inadequate in its treatment of the privilege,[75] but the lack of guidelines in *Gault* frustrates any comprehensive statutory attempt to provide "safe" procedures with regard to

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69. 387 U.S. 1, 55 (1967).

70. *Id.*

71. 384 U.S. 436 (1966).

72. Miranda v. Arizona, 384 U.S. 436 (1966), was similarly confined within the criminal process in the sesne that it only prohibited the *use* in a *trial* of a confession obtained in violation of the rules it set down; perhaps that is all the Supreme Court meant in limiting its decision in *Gault.*

73. The majority in *Gault* "appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents." 387 U.S. 1, 55 (1967). Having thus tantalized the reader, the Court, like a good law professor, leaves its students to speculate on what these different techniques might be.

74. The impact of this stringency and uncertainty in juvenile proceedings should be even greater than that of Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), in the criminal area, since the vast majority of juvenile cases are decided to some extent on the basis of confessions. Note, *In re Gault: Understanding the Attorney's New Role,* 12 VILL. L. REV. 803, 816 (1967).

A recent case illustrates what the Illinois Supreme Court, at least, considers a valid waiver under *Gault. In re* Orr, ——— Ill. ———, 231 N.E.2d 424 (1967).

75. The statute is mute on the subject, and cases considering a confession have held it valid (as the only evidence in the case), Akers v. State, 114 Ind. App. 195, 51 N.E.2d 91 (1943), or have declined to rule on a confession admitted over objection because the evidence was insufficient even with it (the juvenile confessed to an act different from that charged). *In re* Coyle, 122 Ind. App. 217, 101 N.E.2d 192 (1951).

the privilege and its waiver. Much, however, can be done in terms of requiring early notification to parents, written waiver forms in simple language, non-intimidating surroundings, and the like, to provide some of the more elementary safeguards.

BEYOND GAULT

Appellate Review and Transcript

Gault explicitly did not rule on the right to appellate review and the right to a transcript of the proceedings.[76] The opinion did comment, however, upon the utility of appellate review as opposed to habeas corpus proceedings and a transcript as opposed to subpoenaing the juvenile judge to testify. Thus, it clearly indicates what the Supreme Court, if not yet the Constitution, considers desirable procedure.[77]

The Indiana statute gives the juvenile the right to appeal a final order or judgment of the juvenile court and decisions have directed these appeals to the Indiana Appellate Court.[78] The scope of this review is the same as in criminal cases and the appeal procedure is subject to the same rules.[79]

While the bare right to appellate review is thus provided, the effective assertion of that right depends upon the completeness of the record before the appellate court. The Indiana scheme gives the juvenile the right to a "record" of the proceedings,[80] but it is not clear what this "record" is to include.[81] That this may, in practice, mean merely the order book entries rather than a stenographic transcript of the case is suggested by *Sheridan v. State,*[82] in which it was held that the right to such a transcript was dependent upon the juvenile's *request* prior to the hearing that one be made, despite the mandatory wording of the statute to the contrary.[83]

To permit meaningful review, all that is necessary is that *Sheridan*

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76. 387 U.S. 1, 58 (1967). Another reason doubtlessly was that no case had yet held that the Constitution requires a state to provide a right to appellate review.

77. *See* Kent v. United States, 383 U.S. 541, 561 (1966).

78. IND. ANN. STAT. § 9-3221 (Burns 1956 Repl.). For a decision, see note 37, *supra.*

79. This contrasts with the appeal procedure of the superseded statute, Ind. Acts 1941, ch. 233, § 30, in which only review of the sufficiency of facts to support the charge and sufficiency of the evidence to support the finding of facts was allowed, with a special bill of particulars to be prepared by the judge constituting the record on review. *See* Akers v. State, 114 Ind. App. 195, 51 N.E.2d 91 (1943).

80. State *ex rel.* Fritz v. Delaware Cir. Ct., 236 Ind. 229, 139 N.E.2d 442 (1957).

81. IND. ANN. STAT. § 9-3114 (Burns 1956 Repl.) provides merely that the "court shall maintain records of all cases brought before it."

82. 125 Ind. App. 271, 124 N.E.2d 701 (1955).

83. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967): "The official court reporter shall be present in court and take down in shorthand the oral evidence given in all cases and note all rulings of the judge in respect to said cause."

be overruled, since the provision requiring the presence of a court reporter is adequate (apart from its anachronistic insistence on shorthand). A free transcript for indigents can be required, as in the criminal area, by judicial decision.

Search and Seizure

The right to bar evidence gained from unlawful search and seizure was not considered in *Gault*. If the right to bar such evidence were applied to the Indiana scheme,[84] the problem would arise of keeping the evidence away from the trier of the fact (the juvenile judge at the adjudicative hearing), since the juvenile, unlike the adult, cannot avoid the bias of the judge, who has seen the illegal evidence when passing on its admissibility, by asking for a jury trial.[85] One solution might be to require the judge to rule on disputed evidence at a preliminary hearing (perhaps the hearing in which the authorization to file a petition is given) and then to appoint a referee to sit at the adjudicative hearing. This could be cumbersome, but full protection for the juvenile requires a rule of like tenor.

Criminal Standard of Proof

While *Gault* has been interpreted as not requiring a criminal standard of proof in juvenile cases,[86] the conceptual similarity between *Gault's* more stringent rules on evidence[87] and proof beyond a reasonable doubt is sufficiently close to leave the question open. Neither the Indiana statute nor decisions specify the standard of proof applicable to the Indiana scheme, but the "civil" rubric[88] and the wide discretion given the juvenile judge indicate that the "preponderance of evidence" or, perhaps, "clear and convincing evidence" standard is used. Since the question of the proper standard is difficult to raise on appeal (because there is no jury to instruct), the preferable mode of change is through the legislature.

Public Trial

Closing the hearing to the public has always been one of the keystones of the juvenile philosophy, reflecting the desire that the juvenile not be stigmatized by his involvement with the court; the Indiana statute accordingly gives the juvenile judge complete discretion to exclude[89]

84. No statutory provisions or cases deal with the issue in a juvenile context.
85. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967) prohibits a jury trial in juvenile cases.
86. *In re* Wylie, 231 A.2d 81 (D.C. Mun. Ct. App. 1967).
87. See text accompanying notes 62-68, *supra*.
88. See text accompanying notes 38-47, *supra*.
89. IND. ANN. STAT. 9-3113 (Burns 1956 Repl.).

or let in[90] anyone he wishes.

If a public trial were to be required in juvenile cases, this discretion would need to be removed by repeal. Since the hearing would then be public in all cases, other provisions which attempt to screen the juvenile from publicity would logically fall as well.[91]

Jury Trial

The right to a jury trial, where available to juveniles, is rarely used,[92] due to a desire to keep the proceedings confidential.[93] An earlier Indiana statute granted the juvenile the right to a jury trial[94] but even then the necessity, already established in criminal cases, of advising the accused of the right was not extended to juveniles.[95] The present Indiana statute prohibits use of a jury.[96] If the right to a jury trial were extended to juveniles, the statute would need to be changed. The right to be advised of the option could be extended by decision, although an exercised right to counsel would make such advice less necessary.

CONCLUSION

The changes in the Indiana juvenile court system necessary to conform to the standards set forth in *Gault* involve both legislative and judicial action. One approach would be for the legislature to make as few revisions as possible, thereby thrusting onto the courts, through interpretation, the major burden of conforming the law to *Gault*. But the courts, unlike the legislature, must work within the existing statute and would thus lose some flexibility in shaping rational and integrated procedures. For this reason, if for no other, a more expansive and interdependent legislative program is preferable to an approach stressing the minimum change needed in isolated sections.

Such a program, for example, could include the various types of warnings and notification in one comprehensive procedure covering the different levels of contact that the juvenile has with the system. Thus if a juvenile were detained, notification of his parents would include advice of the right to counsel, while the juvenile would receive advice of both his right to counsel and his right to keep silent. Notification of specific

90. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967).
91. IND. ANN. STAT. § 9-3215 (public record, fingerprints and photographs, use of record in another trial), and § 9-3114 (public record) (Burns Supp. 1967).
92. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 793 (1966).
93. Note, *Criminal Offenders in Juvenile Court: More Brickbats and Another Proposal*, 114 U. PENN. L. REV. 1171, 1186 n.77 (1966).
94. Ind. Acts 1941, ch. 233, § 13.
95. Akers v. State, 114 Ind. App. 195, 51 N.E.2d 91 (1943).
96. IND. ANN. STAT. § 9-3215 (Burns Supp. 1967).

charges would await the petition. If he were not detained, the summons (to the juvenile *and* his parents) would be served so that there was adequate time to prepare a defense before its return date and would contain all warnings and a notice of the specific charges.

In regard to the evidentiary problems arising from the confrontation standard, the hearsay report of the probation officer would be controlled in its submission to the judge by splitting the hearing into its adjudicative and dispositional phases. Other hearsay would be left to the courts to control under civil rules.

By enacting this sort of comprehensive program, the legislature would more adequately meet the Superme Court's challenge in *Gault* to give the juvenile fair treatment in actuality, consistent with the state's espousal of concern for its children.

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