

Summer 1976

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Recommended Citation

Dickson, James (1976) "Authorization of a Petition of Delinquency: The Juvenile's Right to a Preliminary Hearing and Standards Limiting Judicial Discretion," *Indiana Law Journal*: Vol. 51 : Iss. 4 , Article 6.

Available at: <http://www.repository.law.indiana.edu/ilj/vol51/iss4/6>

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Authorization of a Petition of Delinquency: The Juvenile's Right to a Preliminary Hearing and Standards Limiting Judicial Discretion

The acquisition of formal jurisdiction by the juvenile court is achieved by the authorization of a petition of delinquency. This is a crucial stage in juvenile proceedings.¹ Half of all juveniles referred to a court for acts of delinquency² never enter the formal process of adjudication of delinquency; they are diverted from the formal system.³

¹ Juvenile law in Indiana and across the country has undergone extensive examination in recent years. Standards and procedures affecting transfer to criminal court have been well developed. *See, e.g.,* Kent v. United States, 383 U.S. 541 (1967); Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967); Seay v. State, — Ind. App. —, 337 N.E.2d 489 (1975); IND. CODE § 31-5-7-14 (Burns Supp. 1976). Rights of the juvenile at the adjudication hearing have been examined in detail. *See In re Gault*, 387 U.S. 1 (1967). And "proof beyond a reasonable doubt" has been determined to be the standard to be applied at the adjudication hearing. *See In re Winship*, 397 U.S. 358 (1970).

While these areas have been and continue to be subjected to close scrutiny by the courts, legislatures and commentators, the judicial procedures utilized in the initial acquisition of formal jurisdiction have received little attention.

² Under Indiana law a juvenile may be adjudicated a delinquent child if he/she:

- a) Commits an act which, if committed by an adult, would be a crime except:
 - (1) first degree murder or a lesser included offense in a case in which the offender was charged with first degree murder; or
 - (2) violations of any of the traffic laws of the state or any traffic ordinances of a subdivision of the state if committed by a person sixteen [16] years of age or older.
- b) Is incorrigible, ungovernable, or habitually disobedient and beyond the control of his parent, guardian, or other custodian;
- c) Is habitually truant; or
- d) Being under the age of thirteen [13] years is present upon any street, highway, park, public building or other public place between the hours of 10:01 P.M. and 5:00 A.M. unless he is accompanied or supervised by his parent or legal guardian or other responsible companion at least eighteen [18] years of age delegated by said parent or legal guardian to accompany him; or having attained the age of thirteen [13] years but note the age of eighteen [18] years is wandering, standing or loitering about any street, highway, park, public building or other public place between the hours of 11:01 p.m. on Sunday through Thursday and 5:00 a.m. on Monday through Friday or between the hours of 1:01 a.m. and 5 a.m. on Saturday and Sunday, unless he is accompanied or supervised by his parent or legal guardian or other responsible companion at least eighteen [18] years of age delegated by said parent or legal guardian to accompany him. This subsection does not apply to a child while in a public building or place attending or participating in or returning home from a religious, educational, entertainment, social or athletic event or lawful employment.
- e) Commits an offense under IC 7.1-5-7 [7.1-5-7-1—7.1-5-7-14]. [alcohol related offenses]

IND. CODE § 31-5-7-4.1 (Burns Supp. 1976).

³ As early as 1913 almost all probation offices surveyed had independently developed some sort of ad hoc treatment of juveniles. *See* Wallace & Brennan, *Intake and the Family Court*, 12 BUFFALO L. REV. 442, 443 (1963). Nationally, over fifty percent of all cases

Those that do enter the formal process may be committed to a state institution for an indefinite period of time or even waived to adult criminal court.⁴ At a minimum, a court's acquisition of formal jurisdiction will result in an official record of delinquency and the restrictions of probation.⁵ The standards and procedures utilized by a court in making the decision either to divert the child to an informal process or to refer the child to formal court action is, thus, a crucially important decision to the child.

In spite of the importance of this decision, the Indiana statutes, as the statutes of most states with juvenile laws based upon the Standard Juvenile Act of 1959,⁶ do not adequately deal with the question of what procedures and standards should be utilized in making the decision. Though Indiana requires the judge, personally, to make the decision whether to file a formal petition of delinquency, neither the Legislature nor the courts have resolved the issues of whether a hearing is required prior to the determination to file a petition of delinquency and what standards are appropriate to such a determination. This note will attempt to resolve these issues.

THE RIGHT TO A PRELIMINARY HEARING

When a child is referred to the juvenile court for an act of delinquency, the court does not automatically achieve jurisdiction.⁷ Jurisdiction can be achieved only after compliance with a series of steps required by statute resulting in the judge's authorization to a proba-

that reach the juvenile courts are diverted from formal court action by the intake service. See Children's Bureau, United States Dept. of HEW, Juvenile Court Statistics Table (1) (1970), cited in D. BESHAROV, *JUVENILE JUSTICE ADVOCACY* at 158 (1974). Of the 745,000 cases in the United States in 1966 involving 642,000 youths referred to courts, 52% were handled informally. Skoler, *Counsel in Juvenile Court Proceedings: A Total Criminal Justice Prospective*, 8 J. FAM. L. 243, 244 (1968).

⁴ See, e.g., *Atkins v. State*, 259 Ind. 596, 290 N.E.2d 441 (1972) (discussing formal court dispositions in detail).

⁵ See Rubin, *The Juvenile Court System in Evolution*, 2 VAL. L. REV. 1, 15-16 (1967). The common juvenile dispositions are probation or commitment to a state institution. The effect of a juvenile record may bar him from gaining a professional license in law or medicine, and deny him entrance to the Job Corps, many Civil Service jobs or the military service. See also *In re Contreras*, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952).

⁶ Standard Juvenile Court Act, prepared by the National Council on Crime and Delinquency (1959).

⁷ The Indiana statutes regarding juvenile court jurisdiction provide that:

A person subject to the jurisdiction of the juvenile court under this act [31-5-7-1—31-5-7-25] may be brought before it by either of the following means and no other:

(a) By petition praying that the person be adjudged delinquent or dependent or neglected;

(b) Certification and transfer from any other court before which any such person is brought charged with the commission of a crime. Provided, That upon discharge of a dependent or neglected child from a state psychiatric hospital or

tion officer to file a petition of delinquency.⁸ In considering whether to authorize the petition, the judge is required to conduct a preliminary inquiry which "if possible shall include a preliminary investigation of the home environment and previous legal history to determine whether it is in the best interest of the child and society for formal action to be taken."⁹ Investigations have traditionally been a duty of the proba-

school for the mentally retarded, the committing court shall resume jurisdiction over such child.

IND. CODE § 31-5-7-7 (Burns 1973).

⁸ The steps necessary to the juvenile court's exclusive original jurisdiction are set forth as follows:

Any person may and any peace officer shall give to the court information . . . that there is within the county or residing within the county, a . . . delinquent child. Thereupon, the court shall, as far as possible, make preliminary inquiry to determine whether . . . further action [need] be taken. Whenever practicable such inquiry shall include a preliminary investigation of the home and environmental situation of the child, his previous history and the circumstances of the condition alleged and if the court shall determine that formal jurisdiction should be acquired, shall authorize a petition to be filed by the probation officer . . .

IND. CODE § 31-5-7-8 (Burns 1973).

This provision has been applied by the Indiana courts as follows:

It has been held that § 9-3208 [31-5-7-5], *supra*, is implementive of § 9-3207 [31-5-7-7], *supra*, and that it was the intent of the legislature in such cases that if the judge of the juvenile court believed that formal jurisdiction should be acquired, the judge should authorize a petition to be filed.

Thus the exclusive original jurisdiction may only be obtained by the juvenile court as set forth above and unless such preliminary statutory procedural steps are taken there is no jurisdiction established.

Summers v. State, 248 Ind. 551, 556-557; 230 N.E.2d 320, 323 (1967). For a comparison of methods of initiating court jurisdiction in other states see N.Y. FAM. CT. ACT § 753 (McKinney 1975); CAL. WELF. & INST. CODE § 650 (West 1972).

⁹ IND. CODE § 31-5-7-8 (Burns 1973). The language of this statute illustrates the conflict that permeates juvenile law. The traditional philosophy of juvenile court has been as *parens patrie* to the child. This was well described in *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319 (1970):

[T]he juvenile hearing was to be conducted free from the formalities, procedural complexities, and inflexible aspects of criminal proceedings. Having discarded the 'punishment-alone theory' of yesteryear, the juvenile court was conceived as an institution where corrective and rehabilitative attention was to be given the juvenile, where he was to be subjected to the closest scrutiny and care in order to help him avoid a life of crime.

Id. at 383, 254 N.E.2d at 323.

Another view is available from an early twentieth century writer shortly after the creation of juvenile courts:

The problem for determination by the judge is . . . what he is, how he [the juvenile] has become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. . . . Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulders and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Note, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

At the other extreme is the view of constitutional revisionists. They wish to avoid all distinctions at the adjudicatory stage of the juvenile court and the criminal court. They wish to give the juvenile the same rights as the adult without a distinction between the two processes. See Comment, *The Conflict of Parens Patrie and Constitutional Concepts of Juvenile Justice*, 6 LINCOLN L. REV. 65 (1970).

tion office,¹⁰ and many juvenile courts have adopted the practice of authorizing delinquency petitions solely upon the recommendation of a probation officer, often without any close judicial scrutiny of the child's background, the offense, or the child's prior legal history.¹¹ This near total reliance on the probation office may serve judicial economy well, but it raises both statutory and constitutional considerations. While courts have held that a judge alone may authorize a petition of delinquency and while they have not, thus far, required that the preliminary inquiry be in the form of a hearing,¹² both the relevant jurisdictional statutes and the constitutional doctrine surrounding the due process clause would seem to confer upon the juvenile a right to such a preliminary hearing as a part of the process by which a juvenile court achieves jurisdiction.

Statutory Juvenile Court Jurisdiction

The statutes which vest jurisdiction in a juvenile court set forth the exclusive method by which such a court may achieve jurisdiction over a juvenile.¹³ In taking jurisdiction, the court should strictly scrutinize the facts alleged to support the statute's application,¹⁴ attempting to discover and give effect in that context to the intention of the Legis-

¹⁰ IND. CODE § 33-12-2-14 (Burns 1973); IND. CODE § 33-12-2-22 (Burns 1973); IND. CODE § 31-5-7-15 (Burns Supp. 1976).

¹¹ Realistically, the steps taken prior to the filing of the petition are often left to the probation department with the judge actively participating only after the petition is filed. See Comment, *Extending Constitutional Rights to Juveniles—Gault in Indiana*, 43 IND. L.J. 661, 664-65 (1968).

¹² See *Shupe v. Bell*, 127 Ind. App. 292, 141 N.E.2d 351 (1957) (holding that a petition could not be filed without a judge's authorization); accord, *Summers v. State*, 248 Ind. 551, 230 N.E.2d 320 (1967).

¹³ See notes 8-9 *supra*. See also *Summers v. State*, 248 Ind. 551, 556-57, 230 N.E.2d 320, 323 (1967).

¹⁴ 'If the jurisdiction of the court is derived from statutory authority, in a proceeding not in accordance with the ordinary proceedings of the common law . . . in such cases the rule is more strict, and the facts conferring jurisdiction must appear of record.'

Summers v. State, 248 Ind. 551, 557, 230 N.E.2d 320, 323 (1967).

In a recent Indiana case, the First District Court of Appeals has indicated that the basis of the determination to authorize a petition must be specified to allow appellate review. *Seay v. State*, — Ind. —, 337 N.E.2d 489, 498 (1975) (dictum).

In considering *Seay's* challenge to the court's jurisdiction over him the court noted that the order to file a petition did not set out reasons justifying assumption of juvenile court jurisdiction, but merely stated that a hearing had been held and evidence heard. The court expressly found that this was not sufficient to permit meaningful review. Nevertheless, since it was able to adduce the facts upon which the authorization was based from a transcript of the preliminary hearing, it did not vacate the order. The court did recommend that in the future a brief statement of facts should be included in the authorization order supporting the conclusion of the judge or referee to file a petition. *Id.* at 496-97. It is to be hoped that soon the court will hold in an appropriate case that such specificity is a requirement, so that appellate review may proceed to check arbitrary or discriminatory authorizations to file delinquency petitions.

lature.¹⁵ Ordinarily such intent must be determined from construing the language of the statute itself.¹⁶ In Indiana, the statute directs that the judge to conduct a preliminary inquiry which "shall include a preliminary investigation."¹⁷ The statutory command that the inquiry by the judge *include* an investigation, presumably by a probation officer, indicates that the inquiry contemplated is not coextensive with the investigation traditionally within the purview of the probation office. The Legislature has chosen to distinguish between the two, contemplating that the judge will do more than merely ratify the content and recommendation of the preliminary investigation. Thus, this language of the statute is consonant with a legislative determination that the judge is the best qualified official to determine whether to file a petition or to divert to an informal action.¹⁸

For the inquiry to "include" more than a probation investigation, however, the judge must conduct the inquiry himself and base the decision upon his independent evaluation.¹⁹ In *Shupe v. Bell*,²⁰ holding that jurisdiction was obtained by the juvenile court only after the judge authorized a petition to be filed, the court emphasized the clear statutory requirement of judicial authorization. It noted that no matter how closely aligned with the court a probation officer or other court

¹⁵ See *State ex rel. Rogers v. Davis*, 230 Ind. 479, 482, 104 N.E.2d 382, 383 (1952).

¹⁶ *State ex rel. Roberts v. Graham*, 231 Ind. 680, 686, 110 N.E.2d 855, 858 (1953).

¹⁷ See note 8 *supra*.

¹⁸ Jurisdiction by any court can never be attained when there is non-compliance with the governing statute; nor can jurisdiction be asserted upon the whim or caprice of the judge of the court; nor should jurisdiction and ultimate commitment depend upon a hearsay report by a probation officer or a social worker.

Johnson v. State, 136 Ind. App. 528, 546, 202 N.E.2d 895, 904 (1964).

Types of information that the judge may take include:

- a) referrals to social agencies such as Youth Service Bureaus, Big Brothers-Big Sisters, Mental Health Centers, Family Counseling Services, Boys or Girls Club, Neighborhood Youth Corps, etc.;
- b) referral to vocational-educational services, Job Corps, public vocational education, alternative school programs, and military services;
- c) shock programs such as Project Aware sponsored by the Federal prison in Terre Haute, Ind., where groups of youth meet and talk with prisoners about prison life and how they came to the prison, and the Crime Prevention Teen Program sponsored by the Colorado State Prison where inmates travel to communities to meet with troubled youth; and
- d) referral to volunteer programs such as Volunteers in Court already established in Dallas, Tex., Denver, Colo., Salt Lake City, Utah, Kalamazoo, Mich., the state of Florida and Ft. Wayne, Ind.

See generally R. KOBETZ & B. BOSARGE, *JUVENILE ADMINISTRATION*, 518-40 (1973).

¹⁹ See *Johnson v. State*, 136 Ind. App. 528, 533, 202 N.E.2d 895, 897 (1964) (Hunter J., concurring), in which three procedural steps required by this provision are enunciated: 1) preliminary inquiry to determine whether further action should be taken; 2) preliminary investigation of home, environment, previous history and circumstances of alleged delinquency prior to above inquiry; 3) court determination that it should acquire formal jurisdiction. *Id.* at 538, 202 N.E.2d at 900.

²⁰ 127 Ind. App. 292, 141 N.E.2d 351 (1957).

official may be, the Legislature intended the judge to authorize the petition himself.²¹

For the judge to exercise his best judgment in this regard, he must have the opportunity to evaluate the information gathered concerning the child. Allowing the determination to be based on a probation officer's recommendation or even written reports alone undercuts the legislative policy. Even the best trained, most highly motivated probation officers have personal biases, and the selectivity necessary to investigations generally will affect both perceptions and judgment, thus affecting the information passed on in the report to the judge.²² Without independent verification, the judge is without adequate data upon which to base his decision. This seems at a minimum to require contact between the judge and the child and the child's family prior to the authorization of a petition. This contact can best be realized in the form of a hearing. Only a hearing provides the opportunity for personal judgment to be based upon an adequate review of the preliminary report on the child's background, home environment, legal history and present offense and to evaluate the attitude of the child and family and other intangibles not apprehensible upon review of a written report,²³ including in appropriate cases the investigator's methods in arriving at his recommendations.

This statutory interpretation finds support in two recent Indiana Court of Appeals decisions. In *Ingram v. State*,²⁴ the court reviewed the procedures by which a juvenile court had gained jurisdiction over a juvenile. A hearing *had* been held prior to the authorization of a petition of delinquency, but the juvenile judge considered only a police

²¹ In construing the above sections we believe it was the intent of the Legislature in such cases as the one before us, that if the Judge of the Juvenile Court believed . . . that *formal jurisdiction should be acquired*, the court shall authorize a *petition to be filed by a Probation Officer*

Id. at 297, 141 N.E.2d at 354.

²² A case worker, even under the best of conditions, cannot explore all facets of life of the client. He must be selective, which means that he must begin to order his investigation around hypotheses as to what happened or what this adolescent and environment are like. The selection of the hypotheses which serve to shape this investigation will depend on many factors including training, professional proclivities, theoretical notions, and past experience. Even in the best of people there is the ever present urge to pre-judge in light of experience. Social workers, particularly when they are over worked are, no exception.

Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 41.

²³ A probation officer's investigation can serve the useful function of providing background information about the child and family which can aid the judge's personal evaluation of the child and his needs.

²⁴ — Ind. App. —, 310 N.E.2d 903 (1974) (waiver to criminal court reversed on grounds that juvenile court had not gained jurisdiction).

affidavit concerning the alleged crime and surrounding circumstances.²⁵ In dismissing the petition against the juvenile, the court stated:

Though the *required preliminary hearing* was held to determine whether a petition should be filed . . . evidence of the circumstances of the offense is only one of the facts to be considered.²⁶

In ruling that the court must consider factors in addition to probable cause, the court implied that consideration of these factors should occur in the "required preliminary hearing."

This preliminary process was again considered in *Seay v. State*.²⁷ As in *Ingram*, a juvenile challenged the juvenile court's jurisdiction in waiving him to criminal court. This challenge was based on allegedly improper procedures by the juvenile court in authorizing the filing of two petitions. In response to the challenge to the first petition, the court stated:

The transcript of the [preliminary] hearing indicates that evidence concerning Seay's prior juvenile record and schooling was presented. This type of evidence is precisely what the statute requires and we find that the order order [sic] directing the probation officer to file a delinquency petition was properly entered.²⁸

From this statement it may be surmised that the failure to hold a preliminary hearing and to weigh the above evidence may result in an *improper* order to file a petition of delinquency. This inference is more clearly drawn from the *Seay* court's response to the second petition challenge. This second petition, the juvenile successfully contended, was improperly filed as no preliminary hearing regarding it took place. The court stated:

Our next concern is that we find no request for a pre-petition hearing or a transcript of such a hearing with regard to juvenile cause No. 317.

In light of the explicit language of the statute that "no other" means than petition or transfer may vest the juvenile court with jurisdiction, we must conclude that proceedings regarding Cause No. 317 were not properly instituted. As the case graphically illustrates, the beginning of juvenile proceedings may be but the first of a number of steps in the criminal process. In actions involving waiver from juvenile court each step is dependent upon the one before it, and we cannot assume that an initial, essential step was properly taken. We hold therefore that all proceedings which were taken with regard to

²⁵ *Id.* at 904.

²⁶ *Id.* at 904.

²⁷ — Ind. App. —, 337 N.E.2d 489 (1975).

²⁸ *Id.* at 498.

Cause No. 317 were void, as they were conducted without the proper assumption of jurisdiction by the juvenile court.²⁹

This language clearly indicates that Indiana law requires a preliminary hearing to determine whether a petition of delinquency should be filed. The failure to make the required inquiries in a preliminary hearing appears to be a fatal flaw in any juvenile court's jurisdiction.

Due Process Considerations

The due process clause of the Constitution independently supports a juvenile's right to a preliminary hearing. The core of due process is the avoidance of arbitrary deprivation of liberty,³⁰ and the filing of a petition of delinquency results in many deprivations of liberty. The child may be placed in detention.³¹ He is likely to have restrictions placed on his behavior.³² His freedom to associate may be restricted; for example, he is barred from joining the military service or the Job Corp pending adjudication.³³ He is likely to be placed under close supervision by school authorities and potential employers.³⁴ He must obtain counsel and remain under the continuing threat of prosecution.³⁵ The child is also likely to suffer from being stigmatized as a delinquent even without adjudication.³⁶ Causing such deprivations by filing a petition of delinquency and bringing the child within formal court jurisdiction without a preliminary hearing is an arbitrary denial of due process.³⁷

²⁹ *Id.* at 498.

³⁰ See *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (deprivation of welfare aid without a pre-deprivation hearing held to be a denial of due process).

³¹ *Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969) (detention of a juvenile without a preliminary or probable cause hearing held to be a violation of the Fourth Amendment).

³² *Id.* at 840-41. See also *In re Contreras*, 109 Cal. App. 2d 787, 241 P.2d 631 (1952):

It is common knowledge that such an adjudication . . . is a blight upon the character of and is a serious impediment to the future of such a minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile court record.

Id. at 789-90, 241 P.2d at 633.

³³ See *Brown v. Fauntleroy*, 442 F.2d 838, 842 n.7 (D.C. Cir. 1971). See also note 5 *supra*.

³⁴ 442 F.2d at 842, n.7.

³⁵ See Comment, *Juvenile Law—Fourth Amendment—Probable Cause Not Required to Initiate Formal Proceedings*, 4 RUT.-CAM. L.J. 171, 173 (1972).

³⁶ The evidence suggests that official response to the behavior in question may initiate processes that push the misbehaving juvenile toward further delinquent conduct, and, at least, make it more difficult for them to re-enter the conventional world. . . .

. . . .
 . . . [I]t is not all clear that doing something is better than doing nothing or that doing one thing is better than doing another. . . .

Wheeler & Cottrell, *Juvenile Delinquency: Its Prevention and Control*, in *JUVENILE COURTS: CASES AND MATERIALS* 420-423 (Ketchum & Paulsen ed. 1967).

³⁷ The effect of this denial has a much more severe impact on juveniles than adults and thus the denial of a preliminary hearing to a juvenile is more clearly a denial of

Although few juvenile courts have directly considered the ramifications of due process requirements in this area of juvenile law, close analogies can be drawn from other related areas of law.

In *Morrissey v. Brewer*³⁸ the Supreme Court held that a parolee could be picked up and his parole could be revoked only after an informal preliminary hearing and a later formal hearing.³⁹ The Court required that before a parolee could be deprived of his liberty he must first be given a preliminary hearing to determine if probable and reasonable cause exists for such revocation.⁴⁰ This initial informal hearing must then be followed by a formal revocation hearing to examine the legal justifications for such a revocation.⁴¹ While the preliminary hearing may be informal, it must offer the parolee the opportunity to challenge any deprivations of his liberty prior to the revocation. At this hearing

due process than such a denial to an adult.

The criminal system is more highly formalized with greater safeguards than the juvenile system which has retained the remnants of *parens patrie* and has failed to establish any uniform rules of procedure. Various legislative and judicial committees have attempted in recent years to develop a set of uniform juvenile procedures but none has yet produced such procedures.

The juvenile court was founded on the basis that a juvenile was less likely to appreciate the gravity of an offense and thus should not suffer the same penalties as an adult. Likewise a juvenile that is apprehended for an offense is less likely to be prepared for the impact of detention, court hearings, and labeling by society. See generally R. KOBETZ and B. BOSARGE, *JUVENILE JUSTICE ADMINISTRATION* 74-78 (1973) Yet juveniles seemingly are subject to deprivations at least as severe as those imposed through the criminal process where an adult has greater rights than a child; for instance, the right to bond or the right to a jury trial by peers. The child has no right to bond in Indiana. See IND. CODE § 31-5-7-23 (Burns 1971); R. KOBETZ & B. BOSARGE, *JUVENILE JUSTICE ADMINISTRATION* 74-78 (1973). A child has no right to a jury trial in Indiana. See *Bible v. State*, 253 Ind. 373, 251 N.E.2d 319 (1970); see also *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

³⁸ 408 U.S. 471 (1972).

³⁹ [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. [citation omitted] Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. [citation omitted]

In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. . . . The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. *Goldberg v. Kelly* found it unnecessary to impugn the motives of the decision-maker to examine the initial decision.

Id. at 485-86.

⁴⁰ *Id.* at 487.

The Court noted that this preliminary hearing may be informal: It should be remembered that this is not a final determination calling for formal findings of fact and conclusions of law. [citation omitted] No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.

Id. at 487.

⁴¹ *Id.* at 487.

he is entitled to speak on his own behalf and to bring letters, documents or individuals which can give relevant information to the hearing officer.⁴² This preliminary hearing is not a final determination of conclusions of law or findings of fact. It like the preliminary inquiry in a juvenile court is simply the preliminary determination of whether further action need be taken. The formal revocation hearing provides a full evaluation of the facts to make a final determination of whether the parole should be revoked.

In *Morrissey*, the Court found that due process required that a parolee be given both hearings even though the Court also recognized that "the parolee does not have the full liberty to which every citizen is entitled but only a conditional liberty dependent on observance of special parole restrictions."⁴³ The Court explicitly rejected the argument that the *parens patrie* role of the parole board would be aborted if a preliminary hearing were required.⁴⁴

The Court held that *Morrissey*, a felon sentenced to prison but released pending continued compliance with parole conditions, had the right to a preliminary hearing as well as a formal fact finding hearing prior to any revocation of his conditional liberty. This right, the Court said, is a fundamental application of due process. A juvenile has no conditions on his liberty. At a minimum, he too should be afforded the same protections of due process as a convicted felon. Before the extent of his liberty may be curtailed by the filing of a petition of delinquency, a preliminary hearing must be held.⁴⁵

⁴² *Id.* at 487.

⁴³ *Id.* at 480.

⁴⁴ *Id.* at 483.

⁴⁵ The Court reiterated its holding of *Morrissey* in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Basing its holding on *Morrissey*, the Court held that a probationer or parolee had the right to a preliminary and a final hearing prior to revocation of probation. The Court stated:

Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*

. . . . Both the probationer or parolee and the state have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

It was to serve all of these interests that *Morrissey* mandated preliminary and final revocation hearings.

Id. at 782-86.

When a child is brought to the attention of the juvenile court the decision to file a petition results in the loss of liberty to the child. Both the child and the court have interests in the accurate determination of probable cause and the informed use of discretion. The child is concerned that restraints and labels not be placed on him. The

The juvenile's right to a preliminary hearing finds support in a wide spectrum of cases applying standards of due process to procedures involving loss of property rights. In *Goldberg v. Kelly*,⁴⁶ the Supreme Court held that a welfare recipient had the right to a pre-termination hearing concerning welfare benefits even though adequate post-termination procedures and hearings were available to challenge the termination. The Court noted that "the opportunity to be heard" is the core of due process.⁴⁷ It thus found that the denial of any opportunity to be heard prior to the deprivation of welfare benefits was a denial of due process.

The Court has applied this same standard in simple property loss cases. Parties who may suffer the loss of various property rights are now entitled to be heard before any seizure even though procedures are available to challenge the seizure after the fact.⁴⁸ In *Fuentes v. Shevin*,⁴⁹ the Court stated:

. . . depending on the importance of the interests involved and the nature of the subsequent proceedings . . . the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.⁵⁰

Clearly, the deprivations potentiated by the filing of a petition of delinquency represent interests at least as important as those interests protected by the Court in these property right cases. If due process requires a hearing prior to those deprivations, so should it require a hearing prior to the authorization of a delinquency petition.⁵¹

court desires to treat the child in a manner best able to deter future acts of delinquency, not initiate a cycle of progressive criminal activities. To serve all these interests, the mandate of *Morrissey* for a preliminary hearing in addition to a fact finding hearing should be applied to the juvenile court.

⁴⁶ 397 U.S. 254 (1970).

⁴⁷ *Id.* at 267.

⁴⁸ The Supreme Court has consistently held that a pre-termination hearing is required prior to the deprivation of any property rights. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), a preliminary hearing was required *before* property could be replevied even though post-deprivation safeguards were provided; in *Bell v. Burson*, 402 U.S. 535 (1971), the court required a hearing before a driver's license could be suspended. In *Williams v. Dade County School Board*, 441 F.2d 299 (5th Cir. 1971), a hearing was required *before* a student's suspension could be started. The severity of the loss is not a prerequisite to the right to such a preliminary hearing. As long as a property deprivation is not de minimis, its gravity is irrelevant to the question of whether account must be taken of the due process clause. *Mattern v. Weinberger*, 519 F.2d 150 (3rd Cir. 1975).

⁴⁹ 407 U.S. 67 (1972).

⁵⁰ *Id.* at 82 (citation omitted).

⁵¹ Several federal juvenile cases support the validity of these analogies. In *Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969), and in *Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971), the D.C. Circuit held that a juvenile has the right to a preliminary hearing. The court in *Cooley* held that a juvenile could not be "lawfully held in penal custody without a prompt judicial determination of probable cause." 414 F.2d at 1214. In *Brown*, the court went one step further and held that a police referral to juvenile authorities after an arrest required a preliminary hearing to determine probable cause prior to any

Some courts have denied the right to a preliminary hearing on the basis that such a hearing will disrupt the fundamental purpose of the juvenile court.⁵² On this basis these courts thus deny juveniles traditional constitutional protections. On the contrary, a preliminary hearing will not disrupt the purpose of the juvenile court but may rather enhance the achievement of its potential.⁵³ Such a hearing is more likely to resolve the conflict short of formal adjudication.⁵⁴ It can be used not only to determine whether a petition should be filed but also to determine what diversionary programs may be more suitable.⁵⁵ A hearing forces the court to consider alternatives to a formal petition because the child, his family and his counsel are present to provide further information and to suggest alternatives. This can be done in an informal manner, thus affording an opportunity to combine the ideals of *parens patrie* and constitutional protections.⁵⁶ The court can appear as a benefactor while providing the fundamental requisites of due process in giving the child the opportunity to be heard. This process also enhances the decision's integrity, dignity and fairness in the eyes of the child and

court action, whether or not the child was detained. 442 F.2d at 842. This right to a probable cause determination is based on the fourth amendment. The fourth amendment, however, allows such a determination to be made in an *ex parte* hearing. *Gerstein v. Pugh*, 420 U.S. 103, 119-23 (1975). Due process on the other hand requires the child be given the "opportunity to be heard." This can not be done in an *ex parte* hearing. The right to a preliminary hearing must thus be based on due process. Although the *Cooley* and *Brown* courts based those holdings on the fourth amendment, they noted that similar holdings could have been based on due process grounds. *Cooley v. Stone*, 414 F.2d at 1215; *Brown v. Fauntleroy*, 442 F.2d at 389.

⁵² For example, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court held that a juvenile was not entitled to a jury trial in the juvenile system. This rule is especially true in cases where the unique purpose of the juvenile court was jeopardized. The formality of a jury trial, the Court thus held, jeopardized the treatment goals of the juvenile court by injecting publicity, technical formalities and the increased likelihood of labeling. The Court suggested that the appropriate standard of due process in juvenile court was a balance of fundamental fairness between the standards of criminal due process and the unique goals of juvenile court.

In the present situation, however, the limitations of *McKeiver* have no effect. The right to a preliminary hearing is not a balance between criminal due process and the unique goals of juvenile court. The right is an extension of criminal due process based on the uniqueness of the juvenile court. In the present situation due process gives juveniles a right not given to criminal defendants. This right is based on deprivations to juveniles which do not occur in the criminal process. See note 37 *supra*.

⁵³ Several juvenile courts in Indiana presently use preliminary conferences to determine whether formal jurisdiction should be acquired or whether diversion is more appropriate. One of the best examples is the Juvenile Court of Allen County (Ft. Wayne). Their diversion programs include supervised unofficial probation in neighborhood probation centers and referrals to the Mental Health Center, Big Brothers-Big Sisters, Neighborhood Outreach Services, Family Counseling Services and many other community social agencies.

⁵⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 84 (1976) [hereinafter cited as *CRIME COMMISSION*].

⁵⁵ *CRIME COMMISSION supra* note 54, at 84.

⁵⁶ See note 9 *supra*.

of the child's family, a result which may be rehabilitative in itself. In consideration of these factors, the President's Commission on Law and Order strongly recommended the use of preliminary conferences in the juvenile court process.⁵⁷ Assuming the adoption of the procedures recommended by the Commission and proposed in this note, attention must be focused upon what factors need consideration in a preliminary hearing, and what standards judges should apply in evaluating them.

STANDARDS FOR AUTHORIZING THE FILING OF DELINQUENCY PETITIONS

Indiana's present Juvenile Code requires the court to consider several factors in the decision to authorize the filing of a formal petition of delinquency.⁵⁸ The statute, however, provides no guidance as to the weight to be given to these different factors. Facially the statute gives the judge great discretion in authorizing the filing of delinquency petitions. Unbridled discretion, however, often leads to decisions which are arbitrary, capricious and inconsistent from county to county or even case to case.⁵⁹ Such discretion must be exercised according to as specific standards as possible due to the crucial nature of the decisions involved. Such standards may be developed in the following manner.

The Presumption of Entitlement to the Least Severe Disposition

A keystone to the juvenile system is its purpose "to secure for each child within its provisions such care and guidance and control, preferably in his own home as will serve the child's welfare and the best interest of the state."⁶⁰ This philosophy of *parens patrie* serves to

⁵⁷ CRIME COMMISSION *supra* note 54, at 84.

⁵⁸ The juvenile judge must consider the home and environment of the child, probable cause that the child committed the act, the past legal history of the child and the seriousness of the offense. See IND. CODE § 31-5-7-8 (Burns 1971); *Ingram v. State*, — Ind. App. —, 310 N.E.2d 903 (1974); *Seay v. State*, — Ind. —, 337 N.E.2d 489 (1975).

⁵⁹ Discretion too often is exercised haphazardly and episodically without the salutary obligation to account, and without a foundation in full, and comprehensive information about the offender and about availability and the likelihood of alternative dispositions.

CRIME COMMISSION *supra* note 54, at 82.

No statistics are available for Indiana, but nationally blacks are referred to court more frequently than whites. See KITTRIE, *THE RIGHT TO BE DIFFERENT*, 120 (1971); see also, R. EMERSON, *JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT* 241-45 (1969). Girls are referred more often to court for minor offenses than boys. A recent California study showed that petitions were filed on 63 percent of the boys referred for criminal acts but only 33 percent referred for status offenses. Among girls referred for status offenses, 45 percent had petitions filed. I. SEAIN and W. BURKART, *A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE IN CALIFORNIA*, part III at 37 (1960).

⁶⁰ See IND. CODE § 31-5-7-1 (Burns 1971).

distinguish the juvenile system from the criminal system.⁶¹ The basic dispositions of the juvenile court after formal jurisdiction has been acquired are probation or commitment to a state institution such as the Indiana Boys School or Girls School.⁶² As has been noted by at least one commentator on this subject: "The facts are in general that in probation practice and institutional treatment the facilities for juvenile courts are not particularly better than those of criminal courts."⁶³ Formal court jurisdiction by its nature thus discourages the attainment of the goals which underlay the creation of the juvenile system.⁶⁴ It would appear that the more formal the court action, the less the court can act as *parens patrie* in the child's best interest.

To achieve the stated legislative purpose of the Juvenile Code, courts must create a rebuttable presumption entitling the child to the least severe disposition available to the court at the preliminary inquiry.⁶⁵ A petition should not be filed where less severe alternatives are available. This presumption has already been applied to cases involving the waiver of a juvenile to criminal court and to juvenile commitment to a state institution.⁶⁶ The same principle which created such a presumption in the disposition of a waiver or commitment proceeding is also applicable to the decision to take formal court action.

⁶¹ In our judgment the primary basis for retaining the juvenile court as a court of separate jurisdiction must be the pre-adjudication and disposition treatment alternatives available.

Ralston, *Intake: Informal Disposition or Adversary Proceedings*, 17 CRIME AND DELINQUENCY 160, 167 (1972).

The court in *Summers v. State*, 248 Ind. 551, 230 N.E.2d 320 (1967) stated:

Jurisdiction conferred upon juvenile courts is justified only under the *parens patrie* of the state. Thus, the statutes must be interpreted to conform to the principles essential to the valid exercise of that power. Where the court's exclusive original jurisdiction extends to children, "the legal obligations due to them" as well as "from them" as the "basic purpose and principle" of its functions must be adhered to.

Id. at 558, 230 N.E.2d at 324. See note 9 *supra* for a discussion of *parens patrie*.

⁶² IND. CODE § 31-5-7-15 (Burns 1971).

⁶³ See Rubin, *supra* note 5.

⁶⁴ An authorization order to file a petition takes the child into the formal proceedings of the court. He is given a record of delinquency. He is likely to be internally and externally labeled or stigmatized. He will often be treated and thus come to act similarly to more hardened delinquents. He will be less likely to be offered community services by those who do not wish to be involved with "juvenile delinquents." The child may be placed on probation, but probation officers are not trained in counseling and are generally too overworked to provide any useful supervision. If the child is committed to a state institution he is offered few rehabilitative services but is rather placed in contact with other more serious offenders.

⁶⁵ See *Aktins v. State*, 259 Ind. 596, 290 N.E.2d 441 (1972) (establishing presumption of law to use the least severe disposition available in juvenile court.)

⁶⁶ *Id.*

In *Atkins v. State*,⁶⁷ the court considered the language of the former waiver statute which stated:

If any child fifteen (15) years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, after full investigation may waive jurisdiction and order such child held for trial⁶⁸

Similar to the language of the preliminary inquiry provision,⁶⁹ this language imposes no limit on the judge's discretion to waive a child to criminal court. The *Atkins* court, however, found that this provision must be interpreted in light of the stated *parens patrie* purpose of the Juvenile Code, and held that a waiver to criminal court would have such a severe impact on the juvenile that such a disposition would be in conflict with the state's *parens patrie* role if less severe alternatives were available.⁷⁰ It further stated that such a presumption was applicable to the commitment of a juvenile to a state institution.⁷¹

⁶⁷ *Id.*

⁶⁸ IND. CODE § 31-5-7-14 (Burns 1971).

This statute was amended by the 1974 state legislature. The amended statute states:

(a) Whenever a child fourteen [14] years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, upon motion by the prosecuting attorney and after full investigation and hearing may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult, if the court finds that there is probable cause to believe that the offense has specific prosecutive merit, that the child is beyond rehabilitation under the regular statutory juvenile system, that it is in the best interest of public welfare and security he stand trial as an adult, and that the offense is either:

(1) heinous or of an aggravated character (greater weight being given to offenses against the person than to offenses against property); or

(2) part of a repetitive pattern of offenses, even though less serious in nature.

(b) Whenever a child sixteen [16] years of age or older is charged with any of the following offenses which would amount to a crime if committed by an adult: second degree murder, voluntary manslaughter, kidnapping, rape, malicious mayhem, commission of a felony while armed, inflicting injury in the commission of a felony, robbery, first degree burglary, aggravated assault and battery, or assault and battery with intent to commit any of the felonies enumerated in this subsection, the juvenile court upon motion by the prosecuting attorney shall, after full investigation and hearing, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by an adult, unless the court finds that either:

(1) there is probable cause to believe the offense does not have specific prosecutive merit; or

(2) It would be in the best interest of the child and of the public welfare and public security for the juvenile to remain with the regular statutory juvenile system.

(c) The juvenile courts of this state who shall waive the jurisdiction of such child as provided herein may at the time of the waiver fix a recognizance bond for the person to answer the charge in the court which would have jurisdiction of such offense if committed by an adult.

IND. CODE § 31-5-7-14 (Burns Supp. 1976).

⁶⁹ See note 8 *supra* & text accompanying.

⁷⁰ 259 Ind. at 602, 290 N.E.2d at 445.

⁷¹ *Id.*

The basis of this holding clearly was not in the statutory language regarding waiver of juvenile court jurisdiction. Rather, this holding stems from the requirement that a judge's discretion to take jurisdiction in order to waive it, which results in a severe impact on a juvenile, must be limited by the statutory purpose of the Juvenile Code. This purpose, the court held, implies a policy to be served by the presumption that the least severe disposition reasonably available must be applied at various dispositional phases of the juvenile system.⁷²

Determination of Least Severe Disposition Available

The employment of the least severe disposition presumption does not mandate the elimination of referrals to court for formal adjudication. Sound policy simply requires that such referrals be considered only when less severe alternatives are not appropriate. Several criteria are available for such determinations.

The juvenile statutes specify the criteria upon which a determination to acquire formal jurisdiction must be based.⁷³ These criteria include considerations of the child's home and environment, his previous legal history and the seriousness of the offense. Consideration of the family's cooperation, family support for the child, the child's attitude and the

⁷² This presumption finds support from numerous authorities. Many commentators have stated that the juvenile system has failed once the child has been referred to court. See e.g., R. KOBETZ and B. BOSARGE, *JUVENILE JUSTICE ADMINISTRATION*, 35 (1973). Most juvenile authorities agree that referral to the court should be used only as a last resort. See Ralston, *Intake: Informal Disposition or Adversary Proceeding?* 17 *CRIME AND DELINQUENCY* 160, (1971).

At a recent conference sponsored by the International Chiefs of Police, participants felt the harm done by referral of first offenders and misdemeanants as a result of their contact with the court outweighs any benefits thereby gained. R. KOBETZ and B. BOSARGE, *supra* at 80-81.

As noted by the President's Commission, a key concern arising from the formal process is the likelihood of a labeling process creating a self fulfilling prophecy.

The evidence suggests that official response to the behavior in question may initiate processes that push the misbehaving juvenile toward further delinquent conduct, and at least, make it more difficult to reenter the conventional world. . . .

. . . The individual begins to think of himself as delinquent and he organizes his behavior accordingly.

. . . .

. . . It is not at all clear that doing something is better than doing nothing or that doing one thing is better than doing another. . . . At least in the absence of strong evidence that they (formal court action) are effective there is reason to guard against intervening in the life of a child or family.

WHEELER and CATTRELL, note 36 *supra*, at 420-21.

Diversion from the formal process avoids this internal self labeling. Diversion also avoids the external stigma of a juvenile record. It avoids loss of time and money incurred by the court in adjudication and may provide greater rehabilitative services to the juvenile. See Note, *Parents Patriae and Statutory Vagueness in the Juvenile Court*, 82 *YALE L.J.* 745, 759 (1972).

⁷³ See note 8 *supra*.

influences of the neighborhood is essential for the court to determine the disposition best for the child. Since these criteria cannot be standardized, the system must rely on the judges discretion. The other factors of past legal history and seriousness of offense are more susceptible to objective standards.

A. *History of Referrals*

Many pre-adjudication dispositions are available to the court. These include informal probation, referral to community agencies, counseling, and vocational training.⁷⁴ Such dispositions are much less severe than formal adjudication. Without prior referral to such programs, it is generally unreasonable to predict in a youth's first encounter with the court that any one or a group of such services will be unsuccessful. The presumption to use the least severe disposition available should therefore not be overcome without the attempt and failure of informal or diversionary dispositions.

This standard finds support in the analogous waiver cases. As previously discussed, the Indiana Supreme court has established that juvenile judges cannot normally waive a juvenile to stand trial in criminal court as an adult unless no less severe dispositions are available.⁷⁵ In applying this presumption the court has held that where no prior disposition within the juvenile system had been made, it could be inferred that a disposition within the juvenile system remained available.⁷⁶ The court reasoned that unless a juvenile disposition had previously been attempted and had failed, it was generally unreasonable to find that no juvenile disposition was available.

B. *Seriousness of the Present Offense*

The seriousness of the offense provides a further standard, both in itself and in relation to past offenses, in the determination of appropriate actions. This criterion is most useful in consideration of the two extremes in juvenile offenses, violent crimes against society and status offenses.

⁷⁴ See note 18 *supra*.

⁷⁵ See notes 67-72 *supra* & text accompanying.

⁷⁶ *Atkins v. State*, 259 Ind. 596, 290 N.E.2d 441 (1972). In order to facilitate appellate review it has also been held that when the juvenile court in a waiver concludes that no juvenile dispositions are available, it must specify the reasons for that conclusion "with sufficient specificity to permit a meaningful review." *Summers v. State*, 248 Ind. 551, 560, 230 N.E.2d 320, 325 (1967). See also, *Seay v. State*, — Ind. —, 337 N.E.2d 489 (1975); *Clemons v. State*, — Ind. —, 317 N.E.3d 859 (1974).

The courts have recognized that the policy of protecting the child's best interest must be balanced with the public's interest in safety and deterrence.⁷⁷ Certainly the public must be protected. Serious offenses such as homicide, forcible rape, robbery, purse snatching, aggravated assault, auto theft and burglary are acts which, in the absence of other unusual circumstances, should be sufficient to justify the authorizing of a petition.⁷⁸ A child committing a serious criminal offense, especially a crime of violence, is often a danger to the public and is more likely to need more formal controls.⁷⁹ The legislature in apparent consideration of these realities enacted a new waiver statute in 1974.⁸⁰ This statute creates a rebuttable presumption that juveniles over 16 who commit any one of a list of violent crimes should be transferred to criminal court.⁸¹ For a court to gain jurisdiction to waive a juvenile, a petition of delinquency must be filed. A presumption has thus been created by the legislature that any youth over 16 accused of a listed crime must be brought under formal court jurisdiction.

At the other end of the spectrum, a more complex issue is raised in reference to status offenses. The Indiana Juvenile Code allows a juvenile to be judged a delinquent for incorrigibility, habitual truancy, and habitual curfew violations.⁸² If adjudged a delinquent for these offenses, the juvenile can suffer the same consequences as a juvenile adjudicated for a criminal act, including commitment to a state institution for an indeterminate period.⁸³

Some commentators have challenged the constitutionality of juvenile status offenses but the courts have been reluctant to sustain such challenges.⁸⁴ Stronger challenges to delinquency proceedings in this context come from social scientists who point out that the policies favoring diversion of juveniles from the formal system are most appropriately applicable to a status offender, as such a child does not constitute an example of social harm.⁸⁵ As his behavior is often the result of personal identity problems, he is more likely to act in conformity with

⁷⁷ Courts have long held that a balance between the best interest of the public welfare or the protection of the public security and the rehabilitative goals of the juvenile court must be struck in a hearing to transfer a juvenile to criminal court. *See, e.g.,* Summer v. State, 248 Ind. 551 230 N.E.2d 320, 325-26 (1967).

⁷⁸ Sheridan, *Juvenile Court Intake*, 2 J. FAM. L. 139, 149 (1962).

⁷⁹ I. SHADN & W. BURKART, *supra* note 59, at 37.

⁸⁰ IND. CODE § 31-5-7-14 (Burns Supp. 1974) *as amended*, (Burns Supp. 1976). *See* note 68 *supra*.

⁸¹ *Id.*

⁸² IND. CODE § 31-5-7-4.1 (Burns 1975); *see* note 2 *supra*.

⁸³ *See* note 4 *supra* & text accompanying.

⁸⁴ *See* Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1972).

⁸⁵ *See* R. KOBETZ and B. BOSARGE, *supra* note 37, at 202-18

the label concomitant with formal adjudication. The conclusion reached is that appropriate social agencies should deal with such juveniles, not the court through its formal procedures.⁸⁶ The Crime Commission supported this position and strongly recommended the elimination of status offenses from formal court jurisdiction.⁸⁷ New York has partially adopted this recommendation and has established special statutory procedures for "unruly" children separate from delinquency proceedings.⁸⁸ These policies indicate that it is seldom in the child's best interest to file a petition of delinquency for a status offense.

In Indiana the determination by the juvenile judge to refer a youth to formal court jurisdiction remains largely discretionary. But this discretion must comply with the presumption that the court use the least severe disposition available.⁸⁹ While such a presumption is easily overcome with cases involving crimes of violence, rebuttal is most difficult to justify when the youth is accused of a status offense. In this way the presumption assists in striking the balance between the preservation of the public safety and the best interests of the child.

CONCLUSION

The decision by a juvenile court to authorize the filing of a petition of delinquency is the operative fact by which the court gains statutory jurisdiction over the juvenile. The consequences of a decision to file are significant, including potential stigma, deprivation of liberty, or waiver to stand trial in a criminal court. While the public has a right to protection from those who commit violent antisocial acts, whether they be juveniles or adults, an insufficient amount of attention has heretofore been focused on the procedure of authorization itself. This is especially true in light of the legislative purpose of the Juvenile Code and the state's *parens patrie* role there established.

Under the present system, great discretion is afforded the juvenile judge in determining whether to take the child under the court's formal jurisdiction. Review of this discretion has been most rigorous in the criminal waiver cases. This same review should be applied to the manner in which delinquency petitions are authorized.

The juvenile court's ability to take the action in the best interests of both the child and society at large will be enhanced by requiring that

⁸⁶ CRIME COMMISSION *supra* note 54, at 85.

⁸⁷ *Id.*

⁸⁸ See N.Y. FAMILY COURT ACT, § 712 (McKinney 1975); R. KOBETZ and B. BOSARGE, *supra* note 37, at 75.

⁸⁹ See notes 65-72 *supra* & text accompanying.

the preliminary inquiry as to whether a petition should be filed, i.e., whether the court should take jurisdiction, be made in a hearing. Both statutory and constitutional authority supports the juvenile's right to such a hearing.

Standards employed at the hearing to aid in the determination of whether diversion or adjudication in the juvenile court is the better course of action should include the extent to which informal measures have been attempted, and the degree of their success or failure as well as the seriousness of the present offense. And given the potentially far-reaching consequences ensuing from the decision to assume jurisdiction, the court can best effectuate the purposes of the Juvenile Code by indulging a presumption that the juvenile is generally entitled to the least severe disposition available. While alternatives to adjudication or to waiver to criminal court may not often be appropriate or available for children charged with serious crimes of violence, juveniles accused of status offenses are likely to benefit from diversion. Moreover, diversion where appropriate may reduce the risk of antisocial consequences from premature assumption of formal jurisdiction which itself may be more serious than the offense charged.

Finally, appellate courts should require as a matter of law that the basis for a decision to authorize a delinquency petition be set out explicitly both to promote thoughtful decisionmaking in the juvenile courts and to permit meaningful appellate review. Only in these ways can the interests of the public, adult and juvenile alike, best be served.

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