NEGLECTED CHILDREN AND THEIR PARENTS IN INDIANA

I. Introduction

In the landmark decision of *In re Gault*,[1] the United States Supreme Court held that "delinquent" children were no longer to be excluded from the constitutional scheme of due process. *Gault* required that certain constitutional rights[2] be accorded all juveniles and their parents in the adjudicatory phase[3] of delinquency proceedings whenever the possible outcome was commitment to a state institution. The mandates of *Gault* have received widespread application to delinquency proceedings in Indiana.[4] In addition to delinquents, the juvenile court must also deal with children who are, in Justice Harlan's words, "not in any sense guilty of criminal misconduct," but are merely "in some manner distressed."[5] By Indiana statute these distressed children are classified as either "dependent"[6] or "neglected."[7] The distinction

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

[2]*Gault* provided that the child and his parents were constitutionally entitled to (1) a written notice of the hearing and of the charges sufficiently in advance to prepare, (2) representation by counsel, including appointment of counsel, if necessary, (3) the privilege against self-incrimination, and (4) the right to confrontation and cross-examination of witnesses. *Id.* at 31-59.

[3]The Court adopted a tripartite scheme for consideration of constitutional rights in juvenile matters: prejudicial, adjudicative, and post-adjudicative or dispositional. The holding in *Gault* is limited to the adjudicative phase of proceedings. *Id.* at 13.

[4]*Gault* was originally cited in Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967) for the proposition that juveniles must be afforded due process. However, *Summers* involved a waiver of juvenile court jurisdiction. Therefore, primary reliance as in *Gault* was upon the factually analogous case of Kent v. United States, 383 U.S. 541 (1966). Since *Summers*, *Gault* has frequently been relied on by Indiana courts. *See* State *ex rel.* McClintock v. Hamilton Cir. Ct., 249 Ind. 337, 232 N.E.2d 356 (1968), which overruled denial of a motion for change of venue in a judicial matter when summons was issued one day and trial set for the next, since the cause was not at issue and a plea had not been entered; Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970), which drew an analogy between commitment under juvenile code and involuntary commitment under criminal sexual psychopath statute; Lewis v. State, 255 Ind. 436, 288 N.E.2d 138 (1972), which held that a juvenile confession was inadmissible when parents are not advised of right to have counsel before and during questioning; Bridges v. State, 299 N.E.2d 616 (Ind. 1973), which held that juveniles are entitled to counsel at every stage of proceedings.

[5]387 U.S. at 76 (Harlan, J., concurring).

[6]A dependent child is a boy under the age of sixteen or a girl under the age of seventeen who is dependent upon the public for support, is destitute, or is homeless or abandoned. Ind. Code § 31-5-5-1 (1971).

[7]A neglected child is a boy under the age of sixteen or a girl under the

between these terms is that a finding of dependency carries no implication of parental fault, while a finding of neglect involves some parental culpability.[8] Any discussion of dependent children[9] is beyond the scope of this Note. Instead, this Note focuses upon the rights of the parent and the child in civil neglect proceedings.

II. Parental Rights

A. *Substantive Basis*

In 1923, while striking down a statute which forbade the teaching of German to children, the Supreme Court expanded the

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age of seventeen who (1) does not have proper parental care or guardianship, (2) habitually begs or receives alms, (3) is found living in any house of ill fame, or with any vicious or disreputable person, (4) is employed in any saloon, (5) whose home, by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child, or (6) whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship. *Id.* § 31-5-5-2. The definition under the criminal code is quite different:

> Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being: Provided, however, that no provision of this act shall be construed to mean that a child is neglected or lacks proper parental care whose parent, guardian or custodian in good faith selects and depends upon spiritual means or prayer for the treatment or cure of disease or remedial care of such child.

Id. § 35-14-1-2.

[8]Hence a parent charged with cruelty or neglect of children under section 35-14-1-2 or contributing to neglect under section 31-5-5-4, and who is subsequently acquitted or has his case dismissed, may still be deprived of his child in a civil neglect proceeding. *Id.* § 35-14-1-6.

[9]A finding of dependency is primarily administrative, not adjudicative, in nature. *See* Becker, *Due Process and Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children*, 2 Cum.-Sam. L. Rev. 247, 265 (1971). In Indiana the statutory definition of neglected child embodies behavior which conceptually one would expect to find in the definition of dependent child. *See* notes 6, 7 *supra*. *See also* Note, *Dependency and Neglect: Indiana's Definitional Confusion*, 45 Ind. L.J. 606 (1970). One result of this confusion has often been the filing of a neglect petition when the proper and more expeditious procedure would have been to file for dependency based on an information by the parents of the needy child. Ind. Code § 31-5-7-8 (1971).

meaning of liberty under the fourteenth amendment.[10] Mr. Justice McReynolds stated that liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children . . . ."[11] From a parental viewpoint "bringing up children" encompasses the legal right to custody of the child and the concommitant enjoyment of the child's love, affection, and earnings.[12] Regardless of whether the right to raise one's child is fully cognizable as a substantive right,[13] it is not an absolute right.[14] The parental right to raise a child may be denied even before the child is *in esse*.[15]

B. *Effect of Neglect Proceedings on Parental Rights*

A direct outcome of neglect proceedings is the abridgement of the parents' rights to raise their children. By statute,[16] Indiana

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[10]Meyer v. Nebraska, 262 U.S. 390 (1923).

[11]*Id.* at 399. This position was affirmed in Pierce v. Society of Sisters, 268 U.S. 510 (1925). Both *Meyer* and *Pierce* were cited with approval in Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring), which struck down a birth-control statute.

[12]Ekendahl v. Svolos, 388 Ill. 412, 58 N.E.2d 585 (1945).

[13]*See* Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 471 (1970).

[14]Ekendahl v. Svolos, 388 Ill. 412, 58 N.E.2d 585 (1945).

[15]If the state in acting for the public good may deny a class of citizens the right to bear children, it may also deny the right to bring up children born to citizens of another class. *See In re* Cavitt, 182 Neb. 712, 714, 157 N.W.2d 171, 175 (1968), which upheld sterilization of mental defectives. *See generally* Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS L.J. 1401, 1405-08 (1972).

[16]If the child is found to come within the definition of a neglected child, the court may:

> (1) Place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court may determine;
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> (2) Commit the child to any suitable public institution or agency, which shall include, but is not limited to, the state institutions for the feeble-minded, epileptic, insane, or any other hospital or institution for the mentally ill, or commit the child to a suitable private institution or agency incorporated or organized under the laws of the state, and authorized to care for children or to place them in suitable approved homes;
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> (3) The court may make such child a ward of the court, a ward of the department of public welfare of the county, or a ward of any licensed child placing agency in the state willing to receive such wardship;

provides the juvenile court with a broad range of remedies from which the court may fashion relief for a neglected child. The court retains the power to modify the adopted remedy[17] until the child reaches his legal majority.[18] Thus, the duration of the loss of the parents' right to raise their children is dependent upon the particular remedy selected by the court.

There is unlimited potential for judicial creativity in shaping a remedy designed to promote the best interests of the child and his parents, as evidenced by the broad statutory purpose of the Juvenile Court Act[19] and the inherent equitable powers of the court.[20] Unfortunately, however, the court rarely fashions family-centered relief, as distinguished from child-centered relief. The competing demand which the delinquency caseload places upon judicial time frequently dictates that the court forego a creative role in the handling of neglected children. Hence, the child-centered remedy generally chosen by the court is the creation of a wardship with the county department of public welfare named

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(4) May take cause under advisement or postpone findings and judgement for a period not to exceed two [2] years unless sooner requested by the party proceeded against in which event not to exceed ninety [90] days.

(6) Make such further disposition as may be deemed to be to the best interests of the child, except as herein otherwise provided.

IND. CODE § 31-5-7-15 (1971).

[17] *Id.* § 31-5-7-17.

[18] *Id.* § 31-5-5-3, *as amended*, P. L. 296, § 8, p. 1577 (1973). Wardship may cease before the child's eighteenth birthday "upon proper showing made." *See* Note, *The Custody Question and Child-Neglect Rehearings*, 35 U. CHI. L. REV. 478 (1968).

[19] IND. CODE § 31-5-7-1 (1971). The purpose of the Juvenile Court Act is:

to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from nelgect or injury and to enforce the legal obligations due to them and from them.

Id.

[20] McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846).

as a guardian.[21] The result of this arrangement is that any parental rights remaining[22] after an adjudication of neglect are dependent upon the objectivity of the welfare department caseworker. When the neglect proceeding has been instituted by a caseworker,[23] it is unlikely that the caseworker will desire to assist the parents in seeking an early termination of the wardship. This is particularly true when criminal neglect[24] charges have been dismissed,[25] for the caseworker may then utilize the wardship as a vehicle for the application of retributive justice to the neglecting parents.[26] Thus, a measure intended by the court to result only in a temporary deprivation of the parental right to raise children may, as applied, greatly prolong the deprivation of that right.

In addition to the loss of the parental right to bring up children, neglect proceedings may adversely affect other interests of the parents. For example, criminal sanctions may be imposed.[27] Similarly, when wardship is established, parents may be deprived of property in the form of a support order.[28]

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[21]*See* note 16 *supra.*

[22]A neglect proceeding may also result in termination of parental rights. *Compare* IND. CODE § 31-3-1-7 (1971) *with id.* § 31-5-7-15(4). The child may then be adopted without notice to the parents. *See* Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964). *Hogg* held that parental consent in adoption proceedings was not required, nor was it necessary to give the parents notice of the adoption proceeding when the parents had been deprived of parental rights in a wardship proceeding of which they had notice.

[23]IND. CODE § 31-5-7-8 (1971).

[24]*See, e.g., id.* §§ 31-5-5-4, 35-14-1-2.

[25]In the child abuse area of neglect, witnesses are rare, and the child may be too young to speak or he may fear his parents' wrath. Without proof contradicting the parents' explanations, criminal charges are usually not even filed. *See* Keating, *Patrolman Has Had Easier Jobs*, The Indianapolis Star, Oct. 10, 1973, at 15, col. 1; Keating, *Neglectful Parents Sentenced*, The Indianapolis Star, Nov. 7, 1973, at 13, col. 1.

[26]An example of manipulation of the ancillary parental relationship created by the wardship may be found in caseworker control of visitation rights. Caseworker discretion in setting the frequency and location of visits is theoretically subject to review. IND. CODE § 31-5-7-17 (1971). But even if a parent succeeds in obtaining an order allowing a certain number of visits per month, the caseworker may, under the protective rhetoric of "best interests of the child," successively remove the child to foster homes more remote from the parents' home. Thus, frequent visits are made inconvenient, if not impossible.

[27]*See, e.g., id.* §§ 31-5-5-4, 35-14-1-2.

[28]*Id.* § 31-5-7-20.

III. Rights of Child

A. *Substantive Basis*

The right of parents to bring up children[29] necessarily implies the correlative right of children to be raised by their parents.[30] The concept of "being raised" is divisible into two distinct components. The first component is the provision of survival needs, including food, shelter, and clothing. The second component is the provision of socialization needs, encompassing moral support, guidance, love, protection, and education. A consideration of these elements suggests that each child must receive some minimal level of fulfillment of each of these needs. The law of neglect, however, does not reach the suggested conclusion. Neglect, as presently defined,[31] deals only with the parents' failure to provide survival needs.

State intervention to provide survival needs may be direct, as in the case of neglect proceedings, or indirect, as through the provision of welfare subsidies[32] to the family. The latter approach is advantageous to the child in that he is able to enjoy both components of the right to be raised. In the event that a parent fails to properly provide for the child, even after indirect state subsidization, the state, via neglect proceedings, can directly assume the role of provider of survival needs.

When the state directly intervenes, the effect upon the right of the child to be raised is a denial of the child's right to be socialized by his parents.[33] Under a "right to treatment"[34] theory,

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[29]Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *Meyer* struck down a state statute which forbade the teaching of German to school children.

[30]*See* Weiss, *The Emerging Rights of Minors*, 4 U. Tol. L. Rev. 25, 28-29 (1972).

[31]*See* note 7 *supra*.

[32]When subsidization occurs, for example in aid to families of dependent children (AFDC), the state's interest in guaranteeing that the survival needs of the child are met is paramount to the parents' right of privacy. Wyman v. James, 400 U.S. 309 (1971). While subsidization needs may not preclude the fulfillment of the child's socialization needs by his natural parent, the requisite home visits necessary to continued subsidization often result in the filing of a neglect petition. *See* Dembitz, *Welfare Home Visits: Child Versus Parent*, 57 A.B.A.J. 871 (1971). *See also* S. Katz, When Parents Fail: The Law's Response to Family Breakdown 24 (1971).

[33]This right is generally recognized as a paramount consideration in custody proceedings. The following statement by Judge Martin is typical:

> Of the many ties that bind humanity, that which unites the parent and the child is the earliest and the most hallowed . . . and in all civilized countries it is regarded as sacred.

Duckworth v. Duckworth, 203 Ind. 276, 277-78, 179 N.E. 773, 774-75 (1932).

[34]The right to treatment theory is based on the premise that the purpose

when the state takes custody of the child in a neglect proceeding, it must not only provide for the child's survival needs, but also for his socialization needs. If the state attempts to socialize the child, particularly when the child is a member of a cultural minority, the socialization received is apt to be foreign and unfamiliar to the child and unacceptable to the natural parents.[35] Hence, judicial treatment of neglected children through the use of extended wardships may counter-socialize the child, and thereby negatively affect family cohesion.

B. *Standards Governing Children's Rights in Neglect Proceedings*

In determining the rights of children in neglect proceedings, the juvenile court is guided by two familiar principles—the best interest of the child and the *parens patriae* power of the state.[36] The "best interest of the child" test as applied in neglect proceedings[37] originated in the common law. For example, in a 1774 English case, a mother sought custody of her six-year old daughter.[38] The mother alleged that the father was bankrupt and that the child was unlikely to receive a proper education.[39] In deciding the custody issue, Lord Mansfield stated that when "the parties are disagreed the court will do what shall appear best for the child."[40] The "best interest" test as it developed was merely an exercise of the general equitable powers of the court.[41] Accordingly, this test has been applied in habeas corpus actions,[42] divorce

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of a civil commitment is therapeutic rather than reprehensive. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). *See* Weiss, *The Emerging Rights of Minors*, 4 U. TOL. L. REV. 25, 36 (1972); *cf.* Note, *A Right to Treatment for Juveniles?*, 1973 WASH. U.L.Q. 157. As applied to neglect proceedings, the right to treatment means the right to guidance in growing up properly, *i.e.*, the right to socialization.

[35]Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 394 (1972).

[36]Originally state intervention under the doctrine of *parens patriae* arose only upon the death of a tenant *in capite* for the protection of the child's inheritance. *See* Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 895-96 (1966).

[37]*See, e.g.*, IND. CODE §§ 31-5-5-3, 31-5-7-1 (1971).

[38]Blissets Case, 98 Eng. Rep. 899 (Ch. 1774).

[39]*Id.* at 899.

[40]*Id.* at 900. Indiana has followed this common law test. Jones v. Darnall, 103 Ind. 569, 2 N.E. 229 (1885).

[41]Rex v. Delaval, 97 Eng. Rep. 913 (Ch. 1763).

[42]Jones v. Darnall, 103 Ind. 569, 2 N.E. 229 (1885).

proceedings,[43] changes of guardianship,[44] and even in a case involving charges of conspiracy to keep a prostitute.[45] Not surprisingly, the "best interest" test was adopted by the Indiana General Assembly as an integral part of the law of neglect.[46]

Unfortunately for the parents and the child the "best interest" test is succeptible to misapplication in neglect proceedings.[47] In a neglect action, the court must make three determinations. First, the court must find the facts. Secondly, the court must decide whether the facts adduced constitute neglect. Finally, if the facts prove neglect, the court must decide whether the child may remain in the custody of his parents.[48] Only after the second question has been answered affirmatively is the application of the "best interest" test proper. In this situation the court is merely inquiring whether the interests of the child require that he be removed from the custody of his parents. If, however, the court applies the test to determine whether the facts constitute neglect, the potential harm is obvious—the court by using the test subjectively may erroneously conclude that the child might be better cared for by the state, although under an objective standard insufficient harm exists to support a finding of neglect.[49] While the "best interest" test is applicable in Indiana only after a finding of neglect has been made,[50] judicial confusion exists because of the vague definition of neglect.[51]

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[43]Wilkinson v. Deming, 80 Ill. 342 (1880).

[44]Bryan v. Lyon, 104 Ind. 227, 3 N.E. 880 (1885).

[45]Rex v. Delaval, 97 Eng. Rep. 913 (Ch. 1763).

[46]*See* note 19 *supra*.

[47]The failure to ascertain the proper point for application of the best interest test in neglect proceedings has confused others as well as the court. *See* Young, *The Problem of Neglect—Legal Aspects*, 4 J. FAM. L. 29, 45 (1964).

[48]*See* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 699 (1966).

[49]*See* Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 472 (1970).

[50]Although this particular issue has not yet been raised in Indiana, substantial precedent exists to suggest the holding. Thus in 1963, Judge Hunter in the case of *In re* Bryant's Adoption, 134 Ind. App. 480, 493-94, 189 N.E.2d 593, 600 (1963) stated:

> [T]he "child's best interest rule" . . . is never an issue for judicial determination in an adversary adoption proceeding until the ultimate fact of "abandonment or desertion" or "failure to support" has first been established by clear, cogent and indubitable evidence.

[51]The Indiana Appellate Court has recognized the vagueness of the statutory definition of neglect. In commenting on the definition of neglected

The second principle obtaining in neglect proceedings is the power of the state as *parens patriae* to exercise a protective interest in the child's welfare.[52] The origins of the *parens patriae* power, like the "best interest" test, are traceable to common law. Sixty years before the adoption of the first neglect statute in Indiana, the supreme court recognized the *parens patriae* power as a distinct basis of equitable jurisdiction allowing the state to "superintend infants, idiots, lunatics and certain charities."[53] With the adoption of the neglect legislation, the *parens patriae* power merged with the philosophy of the Juvenile Court Act to vest enormous discretionary power in the juvenile court. The philosophy of the Juvenile Court Act, summarized in *Herber v. Drake*,[54] is not to punish the child, but rather to reform, discipline, and educate him, and to provide him with a suitable guardian.[55] The right of the state, as *parens patriae* to deny procedural rights to children under the prevailing philosophy of the Juvenile Court Act was diminished in *Gault*.[56] However, the vitality of the *parens patriae* doctrine as a rationale for a state interdiction of family relations via neglect proceedings still obtains.[57] As a result, judicial watchfulness must be maintained so that the state's interest does not preclude a careful consideration of the rights of children and their parents.

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child which allowed a finding of neglect to be made when the child's environment was undesirable, the court said:

> "Environment" is a word of broad significance. Just what the legislature intended by this last clause we do not know. We assume, however, that it did not intend thereby to confer unlimited authority on the court to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens. To determine and declare the general policy of the state on this subject is a legislative function, which cannot be delegated to the courts.

Orr v. State, 70 Ind. App. 242, 245, 124 N.E. 470, 473 (1919). *See generally* Note, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-For-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972).

[52] *See* note 36 *supra*.

[53] McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846).

[54] 68 Ind. App. 448, 118 N.E. 864 (1918).

[55] *Id.* at 451, 118 N.E. at 886.

[56] 387 U.S. 1, 16 (1967).

[57] *In re* Gault, 387 U.S. 1, 76 (1967) (Harlan, J., concurring).

IV. Procedural Rights: Neglect Proceedings in Indiana

A. *Constitutional Parameters*

The preceding discussion implies that both parents and children have substantive rights in neglect proceedings. The sanctity of those rights is dependent upon the proper application of the standard for determining neglect by the juvenile court. Greater precision in legislative definitions may be desirable[58] to provide clearer guidelines for the court. Moreover, if the phrase "substantive rights" is to have meaning in the context of neglect, the parties must be guaranteed the safeguards of procedural due process.[59] These procedures in a neglect proceeding are influenced by the extent to which the parties are "condemned to suffer grievous loss."[60] The possibility of the parents' loss of their child and the child's loss of his parents, even for an indefinite period of time, is undeniably a "grievous loss." In delinquency proceedings, *Gault* held that due process required adequate written notice of the hearing and of the charges, representation by counsel, the option to invoke the privilege against self-incrimination, and the right to confrontation and cross-examination of witnesses.[61] While providing some elements of procedural due process in neglect proceedings,[62] the Indiana General Assembly has not made the procedure coextensive with *Gault*.[63]

B. *Indiana Procedure*

The probation officer or the county department of public welfare institutes a neglect proceeding by filing a petition with the juvenile court.[64] This petition must allege facts constituting neglect.[65] Based on this petition, the court then issues a summons

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[58]*See* Young, *The Problem of Neglect—The Legal Aspects*, 4 J. Fam. Law 29 (1964).

[59]This proposition is basic. In the often quoted words of Judge Eschweiler, "if a man's money shall not be legally taken away from him save by due process of law, much less shall his child." Lacher v. Venus, 177 Wis. 588, 570, 188 N.W. 613, 617 (1922).

[60]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1952) (Frankfurter, J., concurring).

[61]*In re* Gault, 387 U.S. 1 (1967).

[62]*See, e.g.*, Ind. Code § 31-5-7-7 to -15 (1971).

[63]*See* note 2 *supra*.

[64]Ind. Code § 31-5-7-8 (1971).

[65]*Id.*

which contains a summary of the petition and orders the person having custody of the child to appear.[66] Personal service of the petition is required[67] unless the court finds it impracticable.[68] Service given twenty-four hours before the hearing is effective to confer jurisdiction.[69] Significantly, it is doubtful that twenty-four hour notice comports with the *Gault* directive that notice be given "sufficiently in advance of scheduled court proceedings that reasonable opportunity to prepare will be afforded."[70]

A deviation from the foregoing procedure is permitted when the parents' conduct compels immediate state action to protect the child.[71] In this situation, the only notice given to the parent is that which can be inferred from the removal of the child.[72] Clearly, the use of interlocutory orders of wardship in the "battered child"[73] situation is a necessary and desirable exercise of the state's *parens patriae* power. The parents' interest in avoiding the loss of his child is outweighed by the government's and

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[66]*Id.* § 31-5-7-9. If the person having custody is not the child's parent or guardian, the parent or guardian must also be given notice of the hearing.

[67]*Id.* § 31-5-7-10.

[68]*Id.*

[69]*Id.* § 31-5-7-10; *In re* Johnson, 136 Ind. App. 528, 529, 202 N.E.2d 895, 896 (1964). *Johnson* reversed a judgment of delinquency and order of commitment entered by the court below when the proceeding took place without issuance or service of summons.

[70]*In re* Gault, 387 U.S. 1, 33 (1967). *Gault* required that notice be given to the child and his parents. Indiana does not require service upon an infant under the age of fourteen. IND. R. TR. P. 4.2(A).

[71]IND. CODE §§ 31-5-7-9, 31-5-7-12 (1971).

[72]*See id.* § 31-5-7-12 (1971); *cf., id.* § 3-5-7-9. Even if a petition has been filed, a common practice in emergency wardship cases is to issue the summons without a copy of the petition. If no emergency exists, welfare workers and juvenlie court judges should note the warning of Judge Hunter's concurring opinion in Johnson v. State, 136 Ind. App. 528, 546, 202 N.E.2d 895, 904 (1964):

> . . . no matter how strongly the judge or the public may emotionally be impelled, no matter how much the ultimate judgment may be justified upon evidence prematurely and illegally obtained, no matter how impatient the judge may be with the frustration of momentary delays occasioned by compliance with orderly judicial process under the law, our courts at all levels must declare clearly that all of the protective safeguards for their "welfare and best interests" as well as those of "the state" shall be adhered to strictly.

[73]*See generally* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 698-99 (1966).

child's interest in summary action.[74] However, when immediacy of great bodily harm is not present, the utilization of interlocutory orders of wardship infringes upon the parties' constitutional right to notice and hearing.[75] Notwithstanding constitutional rights, caseworkers greatly appreciate the summary nature of obtaining wardship based on interlocutory orders and use this device frequently.[76] An order for emergency wardship enables the caseworker to rescue[77] the child from his present environment,[78] gain temporary custody of the child, and place the burden of requesting a hearing on the child or his parents.[79] Since a wardship based on an interlocutory order is not appealable in Indiana,[80] and since the county department of public welfare has little to gain from an adversary neglect proceeding, inaction by the department in arranging hearings on neglect petitions is not infrequent.[81] If the purpose of the Juvenile Court Act [82] is to be meaningfully served, and the dignity of the court is to be maintained, indiscriminate use of *ex parte* procedures can not be sanctioned.

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[74]The balancing approach is suggested by Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[75]*See* Fuentes v. Shevin, 407 U.S. 67 (1972).

[76]One index of the frequency of use of interlocutory orders is the number of pending neglect cases. *See* Crary, *A Juvenile Court's Responsibility to Neglected and Dependent Children*, 38 IOWA L. REV. 79 (1952).

[77]For a discussion of the "rescue" phenomena, see Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259, 1278-79 (1971).

[78]Removing a child from his present environment involves a judgment as to whether that environment is so unhealthy or immoral as to necessitate immediate removal. The decision to issue an interlocutory order lies, of course, with the court. However, the basis for issuance of the order is the report given to the court by the caseworker or police officer. Since the caseworker and police officer are invariably middle-class, and neglectful parents are frequently in a different socio-economic group, the removal of the child is based on a middle-class value judgment. In other words, the brutality, cleanliness, and morality of the parents' are all measured by middle-class standards, although the parents themselves may have matured in an atmosphere similar to the one now being condemned by the state. *See* Weiss, *The Emerging Right of Minors*, 4 U. TOL. L. REV. 25, 37 (1972).

[79]IND. CODE § 31-5-7-12 (1971).

[80]Appeals can only be taken from final judgments and an interlocutory order is not a final judgment. Vinson v. Rector, 130 Ind. App. 606, 167 N.E.2d 601 (1960).

[81]*See* note 76 *supra.*

[82]*See* note 19 *supra.*

C. *Right to Counsel*

While the legislatures of some states[83] have followed the *Gault* directive in granting the child[84] the right to counsel in neglect proceedings, Indiana has not. A possible basis for Indiana's failure to extend the right to counsel to neglect proceedings lies in the fact that *Gault* involved criminal charges while neglect proceedings are "civil."[85] Yet, in recognizing the necessity of counsel for fair treatment of juveniles in delinquency proceedings, the Supreme Court in *Gault* deemphasized the nature or title of the proceeding.[86] The primary concern of the Court was the possible outcome of the proceeding.[87] Thus, the Court reasoned that when the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years, the juvenile proceeding is comparable in seriousness to a felony prosecution.[88] Consequently, the Court held that the juvenile was entitled to counsel, who would be appointed if necessary.[89]

The importance of counsel's presence in neglect proceedings is forcefully illustrated by the findings of a study conducted in New York[90] When parents were not provided counsel in neglect proceedings, only 7.9 per cent of the neglect petitions were dismissed; of those remaining, seventy-five per cent resulted in an ultimate finding of neglect.[91] When counsel was present at the

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[83]*See, e.g.*, N.Y. FAMILY COURT ACT § 249 (McKinney 1963); ILL. REV. STAT. ch. 37, § 704-5 (1971).

[84]As noted above, although the focus of juvenile proceedings is upon the child, a finding of neglect affects the rights of the parents or guardian of the child. It is thus arguable that parents should be represented in neglect proceedings. *See* Note, *Indigent Parents in Juvenile Proceedings: The Right to Appointed Counsel*, 1969 L. & SOC. ORD. 467. For the proposition that the interests of juveniles may in some cases demand representation by counsel other than that of their parents, see Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389 (1972).

[85]Board of Children's Guardians v. Gioscio, 210 Ind. 581, 4 N.E.2d 199 (1936).

[86]387 U.S. 1, 49-50 (1967).

[87]*Id.* at 36.

[88]*Id.*

[89]*Id.* at 41.

[90]Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROB. 230, 236-38 (1968).

[91]*Id.*

hearing, however, twenty-five per cent of the petitions were dismissed and only 62.5 per cent resulted in a determination of neglect.[92]

The analogy to *Gault* is appealing in neglect actions and has frequently been urged.[93] It is convenient to phrase the issue in neglect proceedings according to the *Gault* formula, *i.e.*, as a proceeding in which the child may be found to be neglected and thus subjected to the loss of his liberty. Whether the Indiana courts are likely to adopt the logic of *Gault* as a vehicle for creating a right to counsel in neglect proceedings may best be determined after an examination of several cases in which *Gault* has been before the Indiana courts.

In *Haskett v. State,*[94] the Indiana Supreme Court found the *Gault* reasoning persuasive and provided for the privilege against self-incrimination in a criminal sexual psycopath hearing.[95] A possible outcome of the hearing was an involuntary civil commitment.[96] Significantly, the court had earlier rejected the reasoning of *Gault* in *Bible v. State,*[97] and denied juveniles the right to a trial by jury in delinquency proceedings.[98] In arriving at the decision in *Bible,* the court relied upon narrow language in *Gault*[99] and concluded that no wholesale incorporation of the rights of adults in criminal actions into juvenile actions was thereby intended.[100] Despite the holding in *Bible,*[101] the court adopted a new

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[92]*Id.*

[93]*See* Note, *Child Neglect: Due Process for the Parent,* 70 COLUM. L. REV. 465, 475-79 (1970). *See generally* Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259, 1285 (1971).

[94]255 Ind. 206, 263 N.E.2d 529 (1970).

[95]*Id.*

[96]*Id.* at 210-11, 263 N.E.2d at 532.

[97]253 Ind. 373, 254 N.E.2d 319 (1970).

[98]*Id.*

[99]387 U.S. 1, 13 (1967). The language quoted from the *Gault* opinion was a statement that the Court would not consider the impact of constitutional provisions upon the totality of the relationship of the juvenile and the state. Within the context of this statement, the Supreme Court seems merely to have been limiting its decision in *Gault* to the facts of the case, and not commenting on the extension of the Bill of Rights to any juvenile proceeding.

[100]Bible v. State, 253 Ind. 373, 381, 254 N.E.2d 319, 326 (1970).

[101]*See* Note, *Right to Jury Trial: Indiana's Misapplication of Due Process Standards in Delinquency Hearings,* 45 IND. L.J. 579 (1970).

standard[102] for determining the scope of procedural rights necessary for fair treatment of juveniles in a given proceeding. In applying this standard, the court balanced the elements of procedural protection necessary to achieve justice for the child against the impairment, resulting from the exercise of these safeguards, of the "distinctive values"[103] of the juvenile court.[104] With the *Gault* rights[105] fully applicable in delinquency proceedings, the court in *Bible* concluded that that the benefit accruing to the juvenile through the additional element of a jury trial did not outweigh the detrimental restriction of the *parens patriae* power of the court to deal less formally with the child.[106] Hence, there is no right to a jury trial in delinquency proceedings.[107]

Applying this standard to neglect proceedings, the balance tips in favor of extending the right of counsel to juveniles. Certainly, the child deserves protection by the state from abusive parents. However, the right of the child to be raised by his family demands protection from unwarranted state interference.[108] Moreover, justice requires an assurance that the state, in removing the child from his natural parents, will not allow him to become a commodity in the foster care market.[109] It is submitted that both of these functions may best be satisfied by the appointment of counsel for the child.[110] The cost to the court in terms of infringement upon the unique powers of the juvenile court appears to be minimal. On the one hand, the presence of counsel would require the state to prove, by a preponderance of the evidence,[111] facts constituting neglect before interfering with the rights of the child. On the

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[102]The standard adopted was suggested by the Commission on Law Enforcement and Administration of Justice in its *Task Force Report, Juvenile Delinquency and Youth Crime* (1967).

[103]"Distinctive values" is the phrase chosen by the court to embody the *parens patriae* concept of dealing with juveniles. *See* note 36 *supra* & accompanying text.

[104]Bible v. State, 253 Ind. 373, 390, 254 N.E.2d 319, 327 (1970).

[105]*See* note 2 *supra.*

[106]Bible v. State, 253 Ind. 373, 390, 254 N.E.2d 319, 327 (1970).

[107]*Id.*

[108]*See* note 30 *supra* & accompanying text.

[109]*See* Dandridge v. Williams, 397 U.S. 471, 477 (1970).

[110]The appointment of counsel for the parents may in some cases be necessary. *See* note 93 *supra.*

[111]*Cf. In re* Winship, 397 U.S. 358 (1970).

other hand, the presence of counsel would provide additional direction to the court in effecting a disposition of the neglected child. Indeed, the presence of counsel in neglect proceedings would, in most cases, increase the likelihood of the juvenile court fulfilling the purposes for which it was created.

V. Conclusion

In focusing upon the immediate welfare of the child, the juvenile court in neglect proceedings has often overlooked the rights of both the parents and the child. The right of the parents to bring up children and the right of the children to have a family, fundamental propositions in other areas of the law, have not received adequate consideration in the context of neglect. The power of the state as *parens patriae* to conduct juvenile proceedings loosely and without minimum due process standards has been curtailed in delinquency matters. The fundamental rights at stake in neglect proceedings call for rigid scrutiny of the *parens patriae* power in these proceedings. The right to counsel as a principal check upon that power is one of the necessary accouterments of neglect proceedings. Absent any legislative proviso for counsel, there exists an adequate basis for the judicial creation of the right in Indiana. The best interests of the child must no longer serve as a rhetorical cloud to cover procedural abuse of neglected children and their parents by social agents, the courts, and the legislature of the state. The best interests of the child, the parents, and the state must be fairly and objectively determined in neglect proceedings. To require less is to make a mockery of the lofty purposes of child protection.

Michael S. Fischer