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ARKANSAS JUVENILE COURTS: DO LAY JUDGES SATISFY DUE PROCESS IN DELINQUENCY CASES?

Paula J. Casey*

INTRODUCTION

A separate criminal jurisprudence for children was unheard of until the twentieth century. Prior to the creation of juvenile courts at the beginning of this century, children who were charged with crimes were subjected to adult criminal proceedings. The belief that the causes of delinquency could be predicted and treated so as to prevent deviant behavior in children fostered reforms in the application of criminal law to juveniles.¹ These reforms eventually resulted in the creation of juvenile courts.² The first juvenile courts resembled social agencies and were designed to protect and rehabilitate rather than punish juveniles who were charged with crimes. Juvenile proceedings, which were not structured as adversarial proceedings, were often summary and informal with juveniles forfeiting due process safeguards.³ There was little need for a juvenile court judge to be trained in the law. While the pretrial⁴ and disposition⁵ phases of the juvenile process are often informal today, the United States Supreme Court has now mandated that the trial or adjudication of juvenile defendants must meet virtually all of the due process requirements for adult offenders.⁶ As a result there is clearly a need

* Assistant Professor of Law, University of Arkansas at Little Rock School of Law.

1. See S. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (hereinafter cited as Fox); A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969).

2. The first juvenile court was created in Illinois in 1899, Illinois Juvenile Court Act, 1899 Ill. Laws 133.

3. See Rendleman, *Parens Patriae, From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

4. In Arkansas, conferences are held by an intake officer with the juvenile and his or her parents or guardian to discuss the complaint which has been made against the juvenile. Under certain circumstances, a delinquency case may be diverted from court and the juvenile may be placed on an informal type of probation. ARK. STAT. ANN. § 45-411.1. (Supp. 1983).

5. Disposition alternatives in Arkansas include changing custody of the juvenile, treatment and counseling programs, physical, psychological and psychiatric evaluations, probation commitment to juvenile facilities, payment of costs, fines, and restitution, and participation in public service programs. ARK. STAT. ANN. § 45-436 (Supp. 1983).

6. The right to notice of the changes to appointed counsel, to confront and cross-ex-

for juvenile court judges to be trained in the law.

The history of juvenile courts in Arkansas, which is reviewed in the first part of this article, provides a basis for understanding why juvenile jurisdiction was originally vested with lay judges. The second part of the article discusses the problems of the juvenile system today, including both the practices of juvenile courts and the practice of juveniles being charged directly in the adult criminal system. Since many of the problems of the juvenile system are a result of jurisdiction being vested in the county courts with lay judges, the last portion of the article examines the use of lay judges in juvenile courts and concludes that the vesting of jurisdiction with lay judges cannot be justified on the basis of existing United States Supreme Court decisions.

HISTORY OF JUVENILE LAW IN ARKANSAS

At the turn of the century, juvenile law reform was occurring throughout the United States as well as in Arkansas. Prior to 1905, a juvenile convicted of a criminal offense in Arkansas was subject to the same penalties as an adult.⁷ As a result, such children were often confined in the state penitentiary. In 1901 and 1903 the Governor asked the legislature to establish reform schools for juveniles as an alternative to incarcerating them in adult prisons.⁸ Finally in 1905 the legislature approved a bill to establish the first reform school in the state.⁹ For the next few years children who were charged with crimes were tried in adult courts and presumably received the same procedural safeguards as adults in criminal proceedings. Judges had the option of sentencing children who were convicted of crimes either to the reform school or prisons.¹⁰ Remov-

amine witnesses as well as the privilege against self-incrimination were recognized in *In re Gault*, 387 U.S. 1 (1967). The standard of proof in a delinquency case is beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Juveniles are also protected by the double jeopardy clause. *Breed v. Jones*, 421 U.S. 519 (1975); The right to trial by jury has not been extended to juveniles. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

7. At common law, children between the ages of 7 and 14 were presumed to be incapable of discerning between good and evil. By statute, children in Arkansas could not be found guilty of a crime if they were under the age of 12. *GANTT'S DIGEST*, § 1230. Between the ages of 12 and 14, the common law presumption prevailed and the burden was on the state to prove that the child was capable of forming the necessary intent. *Dove v. State*, 37 Ark. 261 (1881).

8. Address of the Governor to the Thirty-Fourth Session of the Legislature, J. OF THE HOUSE OF REP. OF THE STATE OF ARK. 28 at 33, 48 (1903).

9. Act of April 25, 1905, 1905 Ark. Acts 199; for a history of Arkansas' first reform schools see *ARKANSAS AND ITS PEOPLE—A HISTORY*, 449-504 (Thomas ed. 1930).

10. Act of April 25, 1905, 1905 Ark. Acts 199.

ing children from adult prisons was a step forward although some convicted juveniles might have disagreed since the alternatives for the juvenile under the old system were not necessarily prison or reform school but rather prison or freedom. Many courts were understandably reluctant to sentence convicted juveniles to state prisons. Even when a juvenile was sentenced to prison there was an extremely good possibility of a governor's pardon, at least during the terms of one governor.¹¹ Perhaps the real motivation for the reform school legislation was not so much the rehabilitation and reform of juveniles as it was to get the convicted juveniles off the streets and confine them.

In 1907 the Arkansas General Assembly passed an act entitled "An act for the better maintenance and bringing up of certain children."¹² The act was apparently an attempt to prevent delinquency by placing children who met certain criteria¹³ that were considered to be predictive of delinquency in reform school or foster homes. County judges were authorized to commit children to the reform school who had not been convicted of violating any criminal law, but were neglected.¹⁴ No attempt was made to segregate neglected children from children who had committed criminal acts. Regard-

11. In his opening address to the Arkansas legislature in January, 1905, Governor Jeff Davis said, "It has been my policy, in order to bring about a public discussion of this subject and force a public knowledge of the necessity of this institution, to pardon all white boys under the age of 18 confined in the penitentiary, regardless of the crime they had committed During the four years I have been Governor there have been confined in all 115 white boys under the age of 18, some as young as 12 years, for various crimes, from stealing blooded chickens which their owners valued at fabulous prices, to assisting in bank robberies, housebreaking and burglary. During the same period there have been confined 217 negroes under this age. There has also been confined for the same period and pardoned by me about twenty white women charged with various crimes. I have pardoned these people simply because it would be outrageous to confine them in an ordinary penitentiary with the worst element of criminals in our State." J. OF THE HOUSE OF REP. OF THE STATE OF ARK. 28, 31 (1905).

12. Act of April 30, 1907, 1907 Ark. Acts 237, *repealed by* Act of March 18, 1975, 1975 Ark. Acts 451.

13. Pauperism was a condition that was considered to be predictive of delinquency. See Fox, *supra* note 1, at 119.

14. The Act in its entirety reads, "That the county judges of the various counties in the State of Arkansas be, and they are hereby authorized and required to have brought before them all children between the ages of three and fifteen years, whom they know, and who are reported to them to live in notorious resorts of bad character, or who frequent the company of lewd, wanton, or lascivious persons, or whose parents live in or keep houses of illfame, or habitually frequent the same; and if such judge is satisfied from the proof offered that such child is not being properly cared for, and that its moral, mental or physical welfare is being neglected to that extent that it will probably grow up in pauperism, lewdness and crime, the said judge shall take charge of such child and by proper order commit it to the reform school, if there is a vacancy from his county; or find it a suitable home, as in his judgment

less of the reasons which brought them before the court, all were subjected to the same penalties and dispositions.

No procedures were set out in the act and the county judge had discretion to remove children from their homes subject only to reversal by a higher court. The judicial justification for such a system, that afforded no procedural safeguards, was found in the concept of *parens patriae*.¹⁵ This concept places the state as the ultimate guardian and protector of minor children. Because the state was acting as a superior parent for children whose parents were considered neglectful or unfit, and because the stated purpose of such acts was to provide care for children and not to punish them, no due process safeguards were considered necessary.¹⁶

In the Arkansas system of *parens patriae*, the county judge was the patriarch. The powers of the judge were unique under the Arkansas Constitution of 1874, because the county judge possessed executive, judicial and legislative authority.¹⁷ The county judge not only controlled the purse strings, but was also the local administrator of social welfare. Prior to 1938, the county judge was the judge of the probate court¹⁸ with jurisdiction over guardianships and incompetents.¹⁹ This probate jurisdiction, combined with the jurisdiction over paupers, vagrants, illegitimate children and apprenticeship of minors²⁰ made the county judge the caretaker of the county's most helpless citizens. Viewed from this perspective, it is only logical that the state's first juvenile code²¹ placed jurisdiction of juvenile matters in county court.²²

The Juvenile Court Act of 1911²³ was unquestionably an improvement over the 1907 Act. A petition, notice and hearing were required by the 1911 Act which recognized a right to counsel in delinquency cases.²⁴ An amendment to the 1911 Act required prose-

will be to the best interest of the moral, mental, and physical welfare of such child. Act of April 30, 1907, 1907 Ark. Acts 237, *repealed by* Act of March 18, 1975, 1975 Ark. Acts 451.

15. *Parens patriae* means " 'parent of the country' [and] refers traditionally to [the] role of a state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (rev. 5th ed. 1979).

16. See Fox, *supra* note 1, at 1192-93.

17. ARK. CONST. art. VII §§ 28, 30, 32, 37 (§30 *superseded by* amend. 55, 1974).

18. ARK. CONST. art. VII § 34 (amended 1938).

19. *Id.*

20. ARK. CONST. art. VII § 28.

21. Act of April 25, 1911, 1911 Ark. Acts 215.

22. *Id.* at § 2.

23. Act of April 25, 1911, 1911 Ark. Acts 215.

24. *Id.* at § 11.

cuting attorneys to assist the juvenile courts.²⁵ Despite these provisions which seem to indicate that juvenile court proceedings resembled adult court proceedings, the criminal procedures that children had been subjected to in adult courts were actually abandoned. The nature of the juvenile court hearing is perhaps best illustrated by the language of the 1921 amendment to the 1911 act: ". . . said proceedings shall at no time assume the form of an adversary suit, or a legal combat between lawyers . . ."²⁶

The philosophy that juvenile courts were social welfare institutions which demanded summary informal proceedings continued for several decades. In the late 1960's and early 1970's, however, the United States Supreme Court decided several cases which substantially altered juvenile court procedures in delinquency cases. The Supreme Court has never declared that delinquency adjudications must conform to all the requirements of an adult criminal trial.²⁷ However, the recognition of the right to adequate and timely notice of charges,²⁸ appointed counsel,²⁹ confrontation and cross-examination of witnesses,³⁰ protection against self-incrimination,³¹ protection against double-jeopardy,³² and proof beyond a reasonable doubt³³ have changed once informal delinquency hearings into adversary proceedings.

The Supreme Court's recognition of procedural due process in juvenile hearings prompted a revision of Arkansas law.³⁴ In 1975, a new juvenile code³⁵ was adopted which repealed the prior juvenile acts.³⁶ The juvenile code of 1975 made some changes in juvenile law³⁷ but jurisdiction of juvenile matters remained with the county judge,³⁸ who is not required to be law trained.³⁹

25. Act of March 25, 1921, 1921 Ark. Acts 404.

26. *Id.* at § 4.

27. *In re Gault*, 387 U.S. 1 (1967).

28. *Id.* at 31-34.

29. *Id.* at 34-42.

30. *Id.* at 42-57.

31. *Id.*

32. *Breed v. Jones*, 421 U.S. 519 (1975).

33. *In re Winship*, 397 U.S. 358 (1970).

34. G. PASVOGEL, ARKANSAS JUVENILE LAW AND PROCEDURES, 4 (1976).

35. Act of March 18, 1975, 1975 Ark. Acts. 451.

36. Act of April 30, 1907, 1907 Ark. Acts 237; Act of April 25, 1911, 1911 Ark. Acts 215 (repealed by Act of March 18, 1975, 1975 Ark. Acts 451).

37. One of the most significant changes was the requirement that newly appointed juvenile referees be licensed attorneys. ARK. STAT. ANN. § 45-409 (1977).

38. ARK. STAT. ANN. § 45-408 (1977).

39. A county judge is required to be at least twenty-five years of age, be a United States

The committee that drafted the juvenile code of 1975, like others before them⁴⁰ and after them,⁴¹ "recognized the critical need for vesting jurisdiction over juvenile matters in judicial courts presided over by legally trained judicial officers"⁴² However, because of a decision of the Arkansas Supreme Court in 1919⁴³ which upheld the vesting of jurisdiction of juvenile matters in county courts, the Committee decided to leave jurisdiction unchanged.⁴⁴

citizen, possess upright character and a good business education and be a resident of the county and the state. ARK. CONST. art. VII § 29.

40. O. Fendler, *The Arkansas Judicial System at the Crossroads*, 17 ARK. L. REV. 259, 271 (1963).

41. D. Shackleford, Arkansas Bar Association, Testimony on the Position of the Arkansas Bar Association on Juvenile Courts before the Subcomm. on the Juvenile Court System (Sept. 16, 1983).

42. G. PASVOGEL, *ARKANSAS JUVENILE LAW AND PROCEDURES*, 11 (1976).

43. *Ex Parte King*, 141 Ark. 213, 217 S.W. 465 (1919). In *King* the Arkansas Supreme Court found the Juvenile Court Act of 1911 to be constitutional. The Court first determined that the intention of the General Assembly was to place subject matter jurisdiction of the disposition of minors in county court, not to create a new court which would clearly be prohibited by the Arkansas law. ARK. CONST. art. VII § 1. Whether county court's jurisdiction over delinquency proceedings is constitutional today is at least questionable. In *King* the court applied the doctrine of *ejusdem generis* to construe Article VII, Section 28 of the Arkansas Constitution. The doctrine of *ejusdem generis* is "that when general words follow an enumeration of particular things such words must be held to include only such things . . . as those specifically enumerated." *King*, 141 Ark. at 224, 217 S.W. at 468-69. The court determined that the general words, "in every other case that may be necessary . . . to the local concerns of the respective counties," which followed the specific enumeration of the county courts' jurisdiction over paupers, bastardy, vagrants and the apprenticeship of minors provided the specific authority for placing jurisdiction of dependent, neglected and delinquent juveniles in county court. Thus the court found that dependent, neglected and delinquent juveniles were of the same character as paupers, bastards, vagrants and apprenticeship of minors. Before reaching that conclusion the court noted that the General Assembly did not intend to confer upon the county courts the power to institute criminal proceedings or punish juveniles for alleged violations of law. Rather, the purpose of the act was to reclaim, reform and protect minor children. *Id.* at 220, 217 S.W. at 467. See also *Ward School Bus Mfg., Inc. v. Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977). The United States Supreme Court held in *In re Gault*, 387 U.S. 1 (1967), that delinquency proceedings which may lead to commitment in a state institution must be regarded as criminal proceedings for some purposes. 387 U.S. at 49. Under current Arkansas law, a juvenile can only be adjudicated as a delinquent for violation of a criminal law. ARK. STAT. ANN. § 45-403(2) (Supp. 1983). The General Assembly has declared that one of the purposes of the Juvenile Code is to "correct" children. ARK. STAT. ANN. § 45-402.1 (Supp. 1983). A delinquency adjudication may result in commitment to a state institution as well as a jail term. ARK. STAT. ANN. § 45-436(3)(b)(i)&(iv) (Supp. 1983) and See *infra* note 115 and accompanying text.

County courts have never been vested with criminal jurisdiction of any type. If delinquency proceedings are criminal proceedings, or perhaps even quasi-criminal proceedings, and an adjudication of delinquency can result in punishment, then vesting jurisdiction in county court can no longer be justified on the basis of the *King* decision.

44. G. PASVOGEL, *Arkansas Juvenile Law and Procedures*, 11 (1976).

Since juvenile courts were first created in this state, juvenile law has changed and the functions of the county judges and county courts have changed but the structure of juvenile courts has not. Due process safeguards have been super-imposed upon the informal proceedings which were once accepted as the juvenile version of justice. The judicial authority of the county judge has been diminished by the transfer of probate jurisdiction to chancellors.⁴⁵ The structure of county government was reorganized by a constitutional amendment adopted in 1974,⁴⁶ creating hope that the county judge would be completely divested of judicial authority.⁴⁷ These changes in juvenile law and county government have not yet affected the structure of juvenile courts. Thus, the history of juvenile courts in Arkansas essentially ends where it began.

Arkansas Juvenile Courts Today

Juvenile courts exist today in each of the state's seventy-five counties.⁴⁸ County judges are actually presiding over juvenile courts in approximately one-fourth of the counties.⁴⁹ Referees, who are appointed by the county judges and serve at their pleasure,⁵⁰ are presiding over juvenile courts in the remainder of the counties.⁵¹ All referees appointed after 1975 must be licensed attorneys.⁵² Lay referees, appointed prior to 1975, continue to hold juvenile courts in at least two counties.⁵³

It is difficult to monitor juvenile court procedures and the process which allows juveniles to be charged in adult courts rather than juvenile courts. Juvenile court proceedings have traditionally been

45. ARK. CONST. amend. 24.

46. ARK. CONST. amend. 55.

47. Amendment 55 to the Arkansas Constitution was approved by the voters in November, 1974. The wording of the amendment was pulled from the proposed constitution of 1970. There was some thought that the amendment would actually remove all judicial jurisdiction from the county court. If the entire constitutional proposal had been adopted, that would have been the case since the jurisdiction of county courts would have been vested in "County Trial Courts." Proposed ARK. CONST. of 1970, art. 5, § 7. However, Amendment 55 does not directly abolish the judicial functions of the county judge and in fact would seem to leave Article 7, Section 28 of the 1874 Constitution intact. See Comment, *County Government Reorganization in Arkansas*, 28 ARK. L. REV. 226 (1974).

48. 1982 JUDICIAL DEPT. OF ARK. ANN. REP. 124.

49. Fifty-six counties reported the appointment of juvenile referees in 1982. *Id.* at 123.

50. ARK. STAT. ANN. § 45-408 (1977).

51. See *supra* note 50 and accompanying text.

52. ARK. STAT. ANN. § 45-409 (1977).

53. Cross, Prairie and Sebastian Counties have lay juvenile referees. 1982 JUDICIAL DEPT. OF ARK. ANN. REP. 123. ARKANSAS LEGAL DIRECTORY (1982).

closed to the public in order to protect children from adverse publicity.⁵⁴ The clerks of the county courts⁵⁵ are required to submit reports to the Judicial Department⁵⁶ but the reports seem to consist of little more than the numbers of cases filed and terminated in any given year.⁵⁷ The Division of Youth Services gathers more detailed information through its Arkansas Statewide Juvenile Information System. However, reporting through that system is done voluntarily by the courts and focuses on characteristics of the offenders, types of offenses, and dispositions rather than on court procedures.⁵⁸

A recently published study⁵⁹ reveals glimpses of court practices which should have been abandoned years ago.⁶⁰ The study compares the practices of referees to county judges in advising juveniles of their right to counsel and right to remain silent. Juveniles who appeared without counsel were advised more often by referees than county judges that they had a right to counsel.⁶¹ The right to be represented by counsel is a meaningless right for most juveniles unless counsel is appointed by the court. County judges advised juveniles of the right to appointed counsel⁶² more often than did referees.⁶³ The right against self-incrimination is applicable to juveniles.⁶⁴ Although juveniles were almost routinely advised of the right to remain silent by both county judges⁶⁵ and by referees⁶⁶ juveniles were *required* to testify in approximately four out of every

54. *In re Gault*, 387 U.S. at 24; ARK. STAT. ANN. § 45-442 (1977) (juvenile hearings in Arkansas may be opened at the discretion of the court).

55. The county clerk is the clerk of the juvenile court. ARK. STAT. ANN. § 45-405 (1977).

56. ARK. STAT. ANN. § 45-447 (1977).

57. *See, e.g.*, 1982 JUDICIAL DEPT. OF ARK. ANN. REP. 124.

58. *See* 1981 DIVISION OF YOUTH SERVICES ANN. REP.

59. Ark. Advocates for Children and Families, *Due Process Rights and Legal Procedures in Arkansas Juvenile Courts* (1983) [hereinafter cited as *Study*].

60. The study, which was undertaken to evaluate the judicial practices of the juvenile courts in Arkansas, is based on the observation by trained volunteers of 492 delinquency and juvenile in need of supervision cases in 46 counties. Two juvenile courts refused to participate; 26 courts had too few cases during the observation period to be included in the survey. *Study, supra* note 59, at 1.

61. Referees advised juveniles of right to counsel in 84.4% of the 191 cases surveyed, county judges in only 66.1%. *Study, supra* note 59, at 36.

62. ARK. STAT. ANN. § 45-413 (Supp. 1983).

63. County judges advised juveniles of right to appointed counsel in 44.9% of the 198 cases surveyed, referees in only 26.2% of cases. *Study, supra* note 59, at 36, Table 1.

64. *In re Gault*, 387 U.S. at 55.

65. Eighty seven and eight tenths percent (87.8%) of 272 hearings. *Study, supra* note 59, at 38, Table 3.

66. Seventy-one and three tenths percent (71.3%) of 272 hearings. *Study, supra* note 59, at 38, Table 3.

ten hearings. County judges required juveniles to testify almost twice as often as did referees.⁶⁷

The State's evidence against juveniles was not presented by prosecuting attorneys in the majority of the cases surveyed. Despite the statutory obligation for prosecuting attorneys to present evidence in juvenile courts when requested by the court⁶⁸ juvenile probation officers presented the State's case almost twice as often as did prosecutors.⁶⁹ The more disturbing finding is that in over 17% of the total cases surveyed, the county judge or referee—that "fair and impartial trier of fact"—actually presented the state's case.⁷⁰

The study paints a dismal picture of juvenile courts in Arkansas. Juveniles are told that they may remain silent and are then required to testify. A presumption of innocence is ignored and juveniles are required to prove their innocence before the state even presents its case.⁷¹ More often than not, the state's case is presented by someone other than a prosecutor and too frequently that other someone is the judge. Witnesses are allowed to testify without being sworn.⁷² Defendants are not allowed to cross examine the witnesses against them in some cases.⁷³ The history of informal, nonadversarial juvenile proceedings is not history in Arkansas, it is current practice. These judicial practices exist despite the fact that the United States Supreme Court has held that the fourteenth amendment and the Bill of Rights applies to juveniles.⁷⁴

Although due process safeguards have been extended to juveniles, the safeguards have been nullified by actual Arkansas court practices. Arkansas' first juvenile code provided for appoint-

67. County judges required testimony of juveniles in 61.9% of cases surveyed, referees in 33.6%. *Study, supra* note 59, at 40, Table 4.

68. ARK. STAT. ANN. § 45-412 (1977).

69. Probation officers presented the state's case in 39.6% of the cases surveyed, prosecutors in 20.2%. This table includes delinquency and JINS plea hearings, adjudication hearings, and hearings in which either or both are a component. *Study, supra* note 59, at 42, Table 5.

70. The State's case was presented by representatives of Social Services, police officers, guardians-ad-litem, etc., in the other 23% of the total cases. *Study, supra* note 59, at 42, Table 5.

71. Although the state presented its case first in 94% of the total cases, in cases where the county judge was the presiding officer, the state presented its case first only 68.4% of the time. *Study, supra* note 59, at 44, Table 6.

72. Witnesses were not sworn in 27.6% of the total cases surveyed. *Study, supra* note 59, at 54, Table 12.

73. Defense not allowed to question in 27.1% of hearings; county judges presided in 45.9%, referees in 24% of hearings where defense not allowed to question. *Study supra* n. 59 at 54, Table 12.

74. *In re Gault*, 387 U.S. at 12.

ment of defense counsel in delinquency cases,⁷⁵ as does the current juvenile code.⁷⁶ The prosecuting attorney has a duty to assist in juvenile court when requested by the court,⁷⁷ but his appearance in juvenile court is infrequent. The practice of law in state courts by lay persons is, of course, prohibited by law.⁷⁸ Yet, probation officers are representing the state in the majority of the cases surveyed. Solving the problems of juvenile court practices will obviously require more than simply changing laws. Some juvenile courts, for whatever reasons, are ignoring existing laws.

Another study reveals an additional failing of Arkansas' juvenile justice system which does not lie directly in the juvenile court proceedings, but rather in the procedures which allow juveniles to be routinely charged and tried in the adult court system. Juveniles who are fifteen, sixteen, and seventeen years of age may be tried for criminal offenses in either juvenile or adult court. Adult courts also have concurrent jurisdiction with juvenile courts over juveniles who are at least fourteen years of age and are charged with first degree murder, second degree murder or rape.⁷⁹ The prosecuting attorney has discretion to determine where juveniles arrested without warrants are to be tried.⁸⁰ A survey⁸¹ of juvenile cases in fifty-eight Arkansas counties showed that approximately 47% of the cases involving juvenile defendants were processed through adult courts in 1981.⁸² Twenty-four of the counties surveyed processed more juveniles through adult courts than through juvenile courts.⁸³ The offenses with which juveniles were charged in adult courts ranged in seriousness from violations to felonies. However, the vast majority of the offenses were drug and alcohol related or crimes against property.⁸⁴ Despite a prosecutorial policy in Pulaski County of only re-

75. Act of April 25, 1911, 1911 Ark. Acts 215.

76. ARK. STAT. ANN. § 45-413 (Supp. 1983).

77. ARK. STAT. ANN. § 45-412 (1977).

78. ARK. STAT. ANN. § 25-101-106 (1962 & Supp. 1983).

79. ARK. STAT. ANN. § 41-617 (Supp. 1983).

80. ARK. STAT. ANN. § 45-418 (Supp. 1983). Juveniles arrested with warrants are to be taken before the court which issued the warrants. ARK. STAT. ANN. § 45-417 (Supp. 1983).

81. Division of Youth Services, Arkansas Youth in Municipal, Circuit and Juvenile Courts (1981) (hereinafter cited as *Survey*).

82. In the 58 counties surveyed there were 4,587 cases processed through circuit and municipal courts and 5,054 cases in juvenile courts. *Survey*, *supra* note 81, at 4.

83. *Survey*, *supra* note 81, at 16.

84. Of the 4,587 juvenile cases surveyed in adult court, only 332 or 7.2% were crimes against people, i.e. murder (11), rape (24), aggravated robbery, (58), robbery (17), kidnapping (4), aggravated assault (15), sexual abuse (2), terroristic threats (19), assault/battery (182). *Survey*, *supra* note 81, at 9.

ferring violent crimes by juvenile offenders to adult courts,⁸⁵ 64.6% of the juveniles who were old enough to be charged in adult courts in Pulaski County were tried in adult courts.⁸⁶ Only 12.6% of the 64.6% of juveniles sent to adult courts were charged with violent crimes.⁸⁷ The wide range of disposition alternatives, designed to provide treatment and rehabilitation not only to juveniles but also to their families, are not utilized by adult courts.⁸⁸ Juveniles convicted in adult courts may be incarcerated in adult facilities or the record of conviction may increase the possibility of incarceration for subsequent offenses.⁸⁹ The State's policy of treating juveniles as misdirected, misguided youths rather than criminals⁹⁰ obviously fails when juveniles are diverted from the juvenile system into the adult criminal courts.

There are several possible explanations for the high number of juveniles tried in the adult system but it is difficult to support conclusions on the basis of available information. The lack of clearly defined procedures for juvenile courts may discourage attempts to process juveniles through that system. Prosecuting attorneys may be reluctant to refer juveniles to juvenile courts because prosecuting attorneys do not participate in a majority of the juvenile courts' cases. It is also possible that prosecuting attorneys, who were given the discretion to decide whether to charge juveniles in adult courts because of the prosecuting attorneys' legal training,⁹¹ are allowing law enforcement officers to make the charging decisions.⁹² A critical examination of juvenile court structure, including the vesting of subject matter jurisdiction with lay judges, may provide not only the

85. Statement of D. Bentley, Prosecuting Attorney for the Sixth Judicial District, Hearing Before the Subcomm. on Juvenile Court System, 7 (minutes of Aug. 3, 1983).

86. Dept. of Human Services, Division of Youth Services (unpublished raw data collected for *Survey*, *supra* note 81).

87. Of the 905 juveniles charged in adult court in Pulaski County in 1981, 5 were charged with murder, 5 with rape, 27 with aggravated robbery, 12 with robbery, 1 with kidnapping, 6 with aggravated assault, 2 with sexual abuse, 16 with terroristic threatening, and 40 with assault/battery. Dept. of Human Services, Division of Youth Services (unpublished raw data collected for *Survey*, *supra* note 81).

88. See Arkansas Advocates for Children and Families, ARREST AND DISPOSITION OF JUVENILES IN ARKANSAS CIRCUIT COURTS: SUMMARY (1983).

89. See ARK. STAT. ANN. § 43-2328 (1977).

90. ARK. STAT. ANN. § 45-402 (1977).

91. G. PASVOGEL, ARKANSAS JUVENILE LAW AND PROCEDURES, 18 (1976).

92. B. Jones, Chief of Police of Fayetteville, Arkansas, Minutes of the Hearing Before the Subcomm. on Juvenile Court System, 9 (Aug. 3, 1983) (Chief Jones testified that 90% of the time the officer decides whether to charge juveniles in adult or juvenile courts.)

solution to some of the problems but also the means to implement the solution.

Challenging Lay Judges in Juvenile Courts

Educational qualifications for the judiciary can vary between courts and from state to state. The vast majority of all states require by Constitutional or statutory provisions that judges of appellate courts or courts of general criminal jurisdiction be lawyers.⁹³ However, the qualifications for judges of inferior courts vary drastically from state to state⁹⁴ and sometimes even within a state.⁹⁵ A number of challenges to the use of lay judges has resulted in some courts abolishing the use of lay judges⁹⁶ while other courts have upheld lay judge systems.⁹⁷

Challenges to lay judge systems have been based on either a criminal defendant's sixth amendment right to counsel or fourteenth amendment right to a fair trial. Since the accused has a right to the assistance of counsel in criminal prosecutions,⁹⁸ and the right extends to all defendants who face the possibility of incarceration,⁹⁹ the denial of counsel in a criminal proceeding is a denial of due process. The assistance of counsel is rendered meaningless if the judge is incapable of understanding the arguments of counsel. The second argument is based on the premise that the failure to provide a competent judicial officer is a denial of a fair trial.

The California Supreme Court followed this reasoning in *Gordon v. Justice Court*,¹⁰⁰ holding that the denial of a law-trained judge to a defendant in a criminal proceeding where imprisonment

93. The exceptions are Massachusetts, New Hampshire, and North Carolina.

94. *E.g.*, lay judges allowed, ARIZ. CONST. art. VI, §§ 22, 32; ARK. CONST. art VII, §§ 6, 7, 16, 29, 40, 41; lay judges not allowed in criminal trial, MO. CONST. art. V, § 25.

95. *E.g.*, In New Hampshire, inferior courts must have lawyer-judges when lawyers are available to serve. N.H. REV. STAT. ANN. § 502-A:3 (Repl. 1983).

96. *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779 (Tenn. 1980); *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975); *State v. Dunkerley*, 134 Vt. 523, 365 A.2d 131 (1976).

97. *Masquette v. State*, 579 S.W.2d 478 (Tex. 1979) *appeal dismissed*, 444 U.S. 986 (1979); *Shoemaker v. Delaware*, 375 A.2d 43 (Del. 1977); *State ex rel. Reece v. Gies*, 156 W. Va. 729, 198 S.E.2d 211 (1973); *Decatur v. Kushmer*, 43 Ill. 2d 334, 253 N.E.2d 425 (1969); *Crouch v. Justice of the Peace Court*, 7 Ariz. App. 460, 440 P.2d 1000 (1968); *Kumar v. Marion County Common Pleas Court, Div. of Dom. Rel.*, 704 F.2d 908 (6th Cir. 1983).

98. U.S. CONST. amend VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

99. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

100. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974) *cert. denied*, 420 U.S. 938 (1975). *See Comment, Gordon v. Justice Court: Defendant's Right to a Competent Tribunal*, 2 HASTINGS CONST. L. Q. 1177 (1975).

is a possible punishment is a denial of due process. The opposing and majority view is probably best articulated in *Ditty v. Hampton*¹⁰¹ where the court rejected the notion that "a right to be tried by a lawyer judge grows out of the right to be defended by a lawyer."¹⁰² The court reasoned that since a judge does not perform the role of an attorney in court, that is he neither prosecutes nor defends, there is no need for him to be an attorney.¹⁰³

The United States Supreme Court considered the issue of lay judges in *North v. Russell*.¹⁰⁴ In *North*, the Court upheld Kentucky's use of lay judges in some inferior courts. Kentucky has a two-tier court system with appeals from the first tier, the police courts, tried de novo in the second-tier, circuit courts. Judges in all circuit courts are required to be lawyers. Police court judges in larger cities are also required to be lawyers but lay persons may serve as police court judges in smaller cities.¹⁰⁵ The defendant in *North*, who was convicted of driving while intoxicated by a lay judge in a police court,¹⁰⁶ did not appeal for a trial *de novo* but filed a writ of habeas corpus in circuit court.

The defendant in *North* claimed that "when confinement is a possible penalty, a law trained judge is required by the due process clause of the Fourteenth Amendment whether or not a trial de novo before a lawyer-judge is available."¹⁰⁷ The Court disposed of the due process argument by finding that under the Kentucky system, a law trained judge is provided in the appeal which is tried de novo. Thus, a defendant is not convicted and imprisoned after a proceeding which includes only a trial by a lay judge.¹⁰⁸

Several jurisdictions have relied on *North* to justify the continuing use of lay judges in inferior courts.¹⁰⁹ Only one court has con-

101. 490 S.W.2d 772 (Ky. 1972).

102. *Id.* at 774.

103. See Comment, *The Constitutionality of Nonattorney Judge Statutes*, B.U.L. REV. 827 (1976).

104. 427 U.S. 328 (1976).

105. *Id.* at 330.

106. *Id.* at 329-30. Defendant was fined \$150.00, his driver's license was revoked and he was sentenced to 30 days in jail, despite the fact that no imprisonment was authorized for a first offender.

107. *Id.* at 333.

108. *Id.* at 334. The Court left unanswered the question of whether a system which does not provide for a trial de novo before a law trained judge after a conviction by a lay judge is constitutionally permissible. Since Arkansas provides a trial de novo for appeals from juvenile courts, that question will not be explored in this article.

109. *Young v. Konz*, 88 Wash. 2d 276, 558 P.2d 791 (1977); *Jenkins v. Canaan Municipal Court*, 116 N.H. 616, 366 A.2d 208 (1976).

sidered the use of lay judges in felony cases and only one court has considered the use of lay judges in juvenile courts. In *State v. Dunkerley*,¹¹⁰ the Supreme Court of Vermont held that lay judges may not participate in rulings on questions of law in criminal cases because Vermont does not provide a trial de novo.¹¹¹ The Tennessee Supreme Court, in *State ex rel. Anglin v. Mitchell*,¹¹² distinguished the *North* case to hold that a lay judge may not deprive a juvenile of his liberty despite the availability of a trial de novo.¹¹³

The Use of Lay Judges in the Arkansas Juvenile Court after North

The first and most obvious distinction between the *North* case and the Arkansas juvenile system is the difference between the subject matter jurisdiction of a police court and a juvenile court. In *North* the court noted that the process requires scrutiny if confinement is an available penalty,¹¹⁴ but in doing so the court said

[T]here is a wide gap between the functions of a judge of court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical 'drunk' driver case or other traffic violations¹¹⁵

The "gap" between the functions of a judge of general jurisdiction and a juvenile court judge in Arkansas is not nearly so wide. In fact, since a juvenile may be charged with felonies, misdemeanors or violations¹¹⁶ the jurisdiction of a juvenile judge actually encompasses the jurisdiction of both a circuit judge and an inferior court judge in this state.¹¹⁷

110. 134 Vt. 423, 365 A.2d 131 (1976).

111. A panel of three judges, one of whom is law trained, preside over Vermont's superior courts, which have jurisdiction over felony cases. See Note, *Do All Judges Have to be Lawyers? Side Judges in Vermont: The Case of State v. Dunkerley*, 3 VT. L. REV. 147 (1978).

112. 596 S.W.2d 779 (Tenn. 1980).

113. See Le Clercq, *The Constitutional Policy That Judges Be Learned in the Law*, 47 TENN. L. REV. 689 (1980).

114. The penalties which can be imposed by a juvenile judge after a juvenile is found guilty may not be so harsh as those available in adult courts for serious offenses, but a juvenile may certainly be deprived of his liberty. A juvenile may be committed to the Division of Youth Services (training school) or to a secure detention facility. ARK. STAT. ANN. § 45-436 (Supp. 1983). The Juvenile Code also provides for commitment to any other juvenile facility, presumably a jail with adequate provisions for detaining juveniles. ARK. STAT. ANN. § 45-451 (Supp. 1983).

115. 427 U.S. at 334.

116. A delinquent juvenile is defined as any juvenile who has committed an offense excluding traffic offenses which, if committed by an adult, would subject such adult to prosecution for a felony, misdemeanor, or violation. ARK. STAT. ANN. § 45-403(2) (1977 & Supp. 1983).

117. In 1981, the Division of Youth Services reported that the ten most frequent reasons

The Supreme Court in *North* noted that courts of limited jurisdiction are courts of convenience, designed to deliver speedy and inexpensive resolutions to minor offenses.¹¹⁸ Having previously recognized that, "[a] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution,"¹¹⁹ it seems highly unlikely that the United States Supreme Court would apply such reasoning to juvenile proceedings.

In *Powell v. Alabama*¹²⁰ the Supreme Court stated that a legally competent tribunal is one of the basic elements of the constitutional requirement of due process. There is likewise implied in the court's holding in *North* that a defendant, at some point in the process, is entitled to be heard by a law trained judge. The court points out that in the Kentucky system, the defendant may actually have the case tried by a law trained judge in the first instance by pleading guilty in the inferior court and appealing immediately.¹²¹ A defendant who failed to appeal would, in essence, be waiving the right to trial by a law trained judge.

The Arkansas juvenile code also provides for a trial de novo before a law trained judge¹²² but the similarities between the *North* case and the Arkansas system stop there. A juvenile who pleads guilty in juvenile court may well foreclose any possibility of appealing his case on the merits. Prior to 1945, Arkansas followed the rule that an appeal of a guilty plea in an inferior court would lie only if the circuit court allowed the defendant to withdraw the guilty plea.¹²³ In 1945, an act¹²⁴ was passed to allow a defendant to appeal a misdemeanor conviction to circuit court for a trial de novo even

for commitment to training school ranged from burglary, a felony, to disorderly conduct, a misdemeanor, and included several offenses, theft of property, criminal mischief, theft by receiving, which could have been either felony or misdemeanor, depending on the value of the property involved. 1981 Division of Youth Services Ann Rep. 119.

118. 427 U.S. at 336. (quoting *Colten v. Kentucky*, 407 U.S. 104, 118-119 (1972)).

119. *In re Gault*, 387 U.S. at 36.

120. 287 U.S. at 68.

121. 427 U.S. at 334. An appeal vacates the conviction in the inferior court, *See* KY. REV. STAT. ANN. § 23.032 (Baldwin 1971); KY. R. CRIM. P. 12.06.

122. Appeals from juvenile court are tried before a circuit judge, ARK. STAT. ANN. § 45-440 (1977), who is required to be "learned in the law" with six years of experience. ARK. CONST. art. VII, § 16.

123. *City of Fayetteville v. Bell*, 205 Ark. 672, 170 S.W.2d 666 (1943); *Dudney v. State*, 136 Ark. 453, 206 S.W. 898 (1918); *Duncan v. State*, 125 Ark. 4, 187 S.W. 906 (1916); *Stokes v. State*, 122 Ark. 56, 182 S.W. 521 (1916).

124. Act of March 7, 1945, 1945 Ark. Acts 197; ARK. STAT. ANN. § 44-502 (1977).

when the conviction was entered upon a plea of guilty.¹²⁵ However, the Act provides for such appeals to be taken from municipal, justice of the peace, and mayor's courts. No provision is made for appeals of guilty pleas from juvenile courts. The implication, clearly, is that no appeal of a guilty plea may be taken from juvenile court unless the circuit judge, in his discretion, allows the guilty plea to be withdrawn.¹²⁶ Juveniles in Arkansas do not have the option of being tried in the first instance by a law trained judge since the juvenile court action cannot be bypassed with a guilty plea. A conviction is a shocking price to pay for a trial before a competent tribunal. Juveniles cannot, under current law, be assured of a competent judge in the first instance even if they are willing to pay that price.

Providing a trial de novo with the full panoply of constitutional safeguards would be scant comfort to a defendant who had already served his sentence. The defendant in *North* was entitled to bail while awaiting his trial de novo,¹²⁷ one of the factors which led to the Court's holding that a defendant could not be convicted and imprisoned after a proceeding in which the only available trial was conducted by a lay judge. Juveniles in Arkansas are entitled to post appeal bonds¹²⁸ but two facts must be considered before concluding that an appeal bond is a satisfactory safeguard in this context. First, the amount and conditions of the appeal bond are set by the juvenile judge.¹²⁹ The result is that a deprivation of juvenile's liberty after a conviction by a lay judge may continue pending an appeal of the appeal bond itself. Second, the distinction between adults and juveniles is significant in this situation. Juveniles usually have no money and their ability to post bond is completely dependent upon the willingness and ability of parents and guardians to post bond for them.¹³⁰ An appeal bond for even a paltry sum may operate as a

125. Act 197 of 1945 was actually an amendment to Act 125 of 1943 which provided in part "That hereafter, when a plea of guilty has been entered before a municipal, justice or mayor's court in any misdemeanor case, the Circuit Judge of the county may in his discretion, for cause shown, and in the interest of justice grant an appeal to the Circuit Court from the judgment of the lower court."

126. "*Expressio unius est exclusio alterius*," means the expression of one is the exclusion of the other. See *Hackney v. Southwest Hotels, Inc.*, 210 Ark. 234, 195 S.W.2d 55 (1946).

127. 427 U.S. at 335.

128. ARK. STAT. ANN. § 45-440 (1977).

129. ARK. STAT. ANN. § 45-440 (1977) provides in part: "Every juvenile shall have the right to post an appeal bond in such amount and under such conditions as the juvenile judge shall, in his discretion, determine."

130. There is some recognition of the problem of money bail for juveniles in the Juvenile Code. A juvenile judge may only set money bail pending trial after a determination that no

continuing deprivation of a juvenile's liberty.

The De Novo Review

The availability of an appeal de novo provided the basis for the Court's holding in *North* that due process was satisfied.¹³¹ In an appeal de novo, the defendant receives a new trial in the reviewing court. This process allows the defendant the possible advantage of using the first trial as a discovery device. As the Court pointed out in *Colten v. Kentucky*,¹³² "Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own."¹³³

The disadvantages of a trial de novo far outweigh the advantages a defendant may have to discover the prosecution's case. It is obvious that two trials cost more than one. These costs are borne not only by the defendant, in the form of attorney's fees, but also by the state which pays for judges, prosecutors, and other court personnel and services. In addition, if the defendant is indigent, the state must pay twice for the defendant to be represented. Victims and witnesses, as well as the defendant and the attorneys must make multiple court appearances. The lower court cannot be reversed for error when no review of the proceedings is available.¹³⁴ Therefore the only relief available to a defendant whose rights have been violated in the lower court is a second trial. A defendant who requests a second trial risks receiving a harsher penalty if found guilty again.¹³⁵

Arkansas provides an appeal de novo from juvenile courts to circuit court. This appeal process has failed to protect juveniles from judicial practices which are clearly prohibited by law.¹³⁶ It is impossible to determine to what extent juvenile cases are being appealed de novo to circuit courts since the Arkansas Judicial Department does not gather the information. Obviously, no appeal process can protect a defendant's rights unless utilized. The circuit judge of one judicial district recently reported to a legislative subcommittee

other conditions will reasonably insure the juvenile's appearance in court. ARK. STAT. ANN. § 45-421(h) (Supp. 1983).

131. 427 U.S. at 334.

132. 407 U.S. 104 (1972).

133. *Id.* at 118.

134. See *Ark. Cotton Growers' Cooperative Ass'n. v. Brown* 179 Ark. 338, 16 S.W.2d 177 (1929).

135. *Colten v. Kentucky*, 407 U.S. 104 (1972); See also *Strickbine v. State*, 201 Ark. 1031, 148 S.W.2d 180 (1941).

136. See *supra* notes 59-78 and accompanying text.

that he has heard only four appeals from juvenile court in a twelve year period.¹³⁷ The mere possibility of an appeal on a record would impart an air of accountability to juvenile proceedings.¹³⁸

Although the Court in *North* never reached the question of whether training of lay judges might be required under some circumstances, it noted that mandatory or voluntary training programs are provided in many states for lay judges.¹³⁹ The contrast between Arkansas and one of the states mentioned by the Court is drastic. Florida provides an extensive training program estimated to equal 79% of the hours required for a law degree¹⁴⁰ for its non lawyer county judges. Upon completion of the training program the county judges can sentence defendants convicted of misdemeanors. Arkansas requires no training for lay judges in juvenile courts and very little training is offered. In 1981 the Division of Youth Services sponsored state-wide training sessions for all juvenile court personnel. The purpose of the training was to provide information about extensive amendments to the juvenile code which were adopted in 1981. Six county judges attended.¹⁴¹

The Requirement of Judicial Neutrality

The Supreme Court has consistently recognized that due process requires an impartial and disinterested tribunal.¹⁴² An adversary proceeding fails of its essential purpose without a neutral and detached judge to weigh the facts presented. The neutrality of a lay judge, who may tend to rely on a prosecutor's advice,¹⁴³ is suspect. Consider then the "neutrality" of a judge who presents the state's case in a delinquency proceeding. If "justice must satisfy the appearance of justice"¹⁴⁴ and the mere supervision of the prosecution creates an appearance of unfairness¹⁴⁵ then a judge must surely be prohibited from assuming the role of prosecutor. Not only are

137. R. Williams, Circuit Judge, Judicial District 11, West, Minutes of the Hearing Before the Subcomm. on Juvenile Court System, 5 (Aug. 3, 1983).

138. See *In re Gault*, 387 U.S. at 58.

139. 427 U.S. at 333 n. 4.

140. *Treiman v. State ex rel. Miner*, 343 So.2d 819, 825 (Fla. 1977).

141. Only those county judges who were actually presiding over juvenile court at that time were invited to attend. Telephone conversation with Linda Dickerson, Division of Youth Services (June 6, 1983).

142. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

143. In *North*, Judge Russell conceded that he relied on the city attorney for legal advice. 427 U.S. at 344 n.4 (dissent). See also Ryan & Guterman, *Lawyer versus Nonlawyer Town Justices: An Empirical Footnote to North v. Russell*, 60 JUDICATURE 272 (1977).

144. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

145. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 44 (1949).

judges acting as prosecutors in Arkansas juvenile courts, probation officers, who are supervised by the juvenile judges, present the state's case more frequently than any other person.¹⁴⁶ Since a trial de novo does not correct procedural errors, the practices go unchecked.

CONCLUSION

An adversary juvenile justice system with due process safeguards has replaced the image of a fatherly judge administering benevolent justice to wayward children. Yet jurisdiction over juveniles in Arkansas remains in the hands of lay judges. Whether the use of lay judges in delinquency adjudications is a denial of due process to juveniles is a question which can only be answered by the courts. A reform of the juvenile system would obviate the need to ask the question. Vesting jurisdiction of juvenile matters in a court of record with a law-trained judge would help to alleviate the arbitrary charging of juveniles in the adult system and the unconstitutional practices which are occurring in juvenile courts in Arkansas today.

146. See *supra* note 69 and accompanying text.

