August 2015

Juvenile Court and Direct Appeal From Waiver of Jurisdiction in Ohio

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JUVENILE COURT AND DIRECT APPEAL FROM WAIVER OF JURISDICTION IN OHIO

ANY DISCUSSION OF SPECIFIC ASPECTS of juvenile law necessarily requires that at least a brief inquiry be made into the history of its development. This becomes apparent when it is realized that juvenile law is not the product of a neat and orderly background, but rather the result of numerous sociological and economic conditions surrounding not only individual communities but the whole society. It is with this motivation that the statutory creation of juvenile law builds and continues to thrive. And, it is for this reason that this comment concerning the loss of the benefits of the juvenile laws through waiver of jurisdiction, with emphasis on the Ohio waiver statute[1] and its interpretation by the Ohio Supreme Court in *In re Becker*,[2] should begin with a thumbnail sketch of its background.

The first laws in the United States specifically designed to govern the conduct of juveniles were implemented by the Illinois legislature on April 21, 1899.[3] This statute and the ones which were to closely follow in other states,[4] were born in a society surrounded with problems of mass immigration, rapid and haphazard urbanization, and industrialization of unprecedented dimensions. Social and legal reformers sought to offset some of these conditions and remove the children from the rigid, technical, and sometimes harsh justice of the adult criminal court, and place them in the "protective" custody of the parent state.[5] The goals were "to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix blame," and in this light "children were not to be treated as criminals nor dealt with by the process used for criminals."[6] This "rehabilitative spirit" was best described by Julian Mack in 1909:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and What had best be done in his interest and in the interest of the state to save him from a downward career?[7]

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[1] OHIO REV. CODE ANN. §2151.26 (Page Supp. 1973).

[2] 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

[3] Juvenile Court Act, ILL. LAWS, 1899.

[4] Ohio's first juvenile laws were enacted in 1902 and became general with subsequent enactments in 1904 and 1906. *See* Young, *A Synopsis of Ohio Juvenile Court Law*, 31 U. CIN. L. REV. 131, 135 (1962). By 1917, 46 states had enacted similar juvenile legislation. *See* Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152, n.2 (1970), *citing* R. NYQUIST, JUVENILE JUSTICE 114 (1960).

[5] *See generally* A. M. PLATT, THE CHILD SAVERS, 123-34 (1969).

[6] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TASK FORCE REPORT].

[7] Comment, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909).

I. JUVENILES AND THE STATE

The Doctrine of Parens Patriae

The jurisdiction of the state is based primarily on the assumption of the power of *parens patriae*.[8] This doctrine was initially developed in the English court of chancery, where the chancellor acted as the personal representative of the crown exercising this prerogative to aid unfortunate minors. The underlying basis of this jurisdiction is somewhat unclear; but, the execution of this presumed authority generally took form in the assumption of the duties of maintenance and protection which resided in the minor's parents.[9]

In retrospect the derivation of *parens patriae* seems to have been an improper exercise of jurisdiction and this fact has been the subject of comment and criticism.[10] Nevertheless, this doctrine was accepted at an early date by the states and continues as a statutorily sanctioned basis for the exercise of jurisdiction over minors.[11] Through these statutes, each state legislature has devised a separate specialized court and method of procedure for exercising jurisdiction whenever the interest of the state is determined to be better served by governmental interference.

These juvenile courts no longer operated through the principles of chancery or entirely under common law principles, but rather in a semblance of equity by statute. Generally, the procedures instituted in these courts were intended to be as informal and non-adversarial as possible, in keeping with their stated purpose of "saving" rather than punishing the child. Consequently, proceedings involving juveniles were described as "civil not criminal";[12] the juvenile offender was classified as delinquent not criminal;[13] and, the juvenile was entitled only to the basic

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[8] Literally translated as "father of his country." *See* BLACK'S LAW DICTIONARY 1269 (4th rev. ed. 1968).

[9] *See* FLEXNER & OPPENHEIMER, THE LEGAL ASPECT OF THE JUVENILE COURT 7 (1922). *See also* State *ex rel.* Fortini v. Hoffman, 12 Ohio App. 341, 344, 32 Ohio Ct. App. 193, 196 (1920) (offering an excellent historical outline of the development of juvenile law); S. DAVIS, RIGHTS OF JUVENILES 1-5 (1974).

[10] *See, e.g.*, Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 SUP. CT. L. REV. 205 (1971); Cogan, *Juvenile Law Before and After the Entrance of Parens Patriae*, 22 SUP. CT. L. REV. 147 (1970).

[11] In Ohio, *parens patriae* has been used for the purposes of commitment since 1869. *See* Prescott v. State, 19 Ohio St. 184 (1869). *See also* House of Refuge v. Ryan, 37 Ohio St. 197 (1881) (involving a petition in habeas corpus for release of a committed minor, which, on appeal, was upheld under this doctrine).

[12] *See In re* Gault, 387 U.S. 1, 17 (1967); Kent v. United States, 383 U.S. 541, 554 (1966). *See also* Holmes' Appeal, 379 Pa. 599, 601, 109 A.2d 523, 525 (1954) (referring to a juvenile proceeding as a "civil inquiry or action looking to treatment, reformation and rehabilitation of the minor child..."); Cope v. Campbell, 175 Ohio St. 475, 196 N.E.2d 457 (1964); *In re* Benn, 18 Ohio App. 2d 97, 247 N.E.2d 335 (1969); State v. Shardell, 107 Ohio App. 338, 153 N.E.2d 510 (1958).

[13] *See In re* Gault, 387 U.S. 1, 23 (1967). The definition of a "delinquent child" in Ohio is found in OHIO REV. CODE ANN. § 2151.02 (Page Supp. 1973). The juvenile court may also designate a juvenile a Juvenile Traffic Offender—OHIO REV. CODE ANN. § 2151.021 (Page Supp. 1973), Unruly Child—OHIO REV. CODE ANN. §

right of fair treatment in the proceedings.[14] Thus, the courts were given the fullest of control and authority in making decisions as to treatment, while avoiding the substantive and procedural problems found in the criminal law.[15]

It was felt that when the common law doctrine of *parens patriae* was linked with this form of statutory equity the application of constitutional safeguards was unnecessary.

> There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails....[16]

This philosophy, of course, resulted in an enormous amount of power being centered in the juvenile courts, particularly in the individual juvenile judges. One eminent authority, in an observation of the situation as it existed in 1909, made the candid remark that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts...."[17]

It is almost axiomatic that where great discretion exists, abuses of discretion, or at least major inequities, will also exist. The juvenile justice system is no exception. Perhaps emphasis should have been placed upon the phrase "proper administration of the law" in the preceding quotation, for it is a crucial assumption. Generally we think of constitutional procedural safeguards as defining the meaning of this phrase. By excluding them from consideration in juvenile cases it is virtually insured that some inequities will arise. Yet, to introduce them full force into juvenile proceedings would be to transform them into proceedings so closely approximating those of the criminal system that their protective and rehabilitative aspects could be forfeited. While this certainly presents a dilemma of considerable dimension in a vital arena of governmental and

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2151.022 (Page Supp. 1973), Neglected Child—OHIO REV. CODE ANN. § 2151.03 (Page Supp. 1973), or Dependent Child—OHIO REV. CODE ANN. § 2151.04 (Page Supp. 1973). All of the above definitions became effective in 1969.

14 *See* Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959). This case established a due process standard for determining which constitutional guarantees were applicable to juveniles. This standard was later modified and used by the Supreme Court in *Gault.*

15 *See, e.g., In re* Gault, 387 U.S. 1, 14-26 (1967). *See also* F. A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 50-61 (1964).

16 Commonwealth v. Fisher, 213 Pa. 48, 56-57, 62 A. 198, 201 (1905). *Contra, In re* Gault, 387 U.S. 1, 13 (1967): "... neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *See generally* Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547 (1957) (suggesting that constitutional rights which are in conflict with parens patriae must give way).

17 R. Pound, *Foreword to* P. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY (1952). *See also In re* Gault, 387 U.S. 1, 18 (1967), also citing the text accompanying this note.

societal concern,[18] it is far from insoluble. An examination of the approach utilized by the Supreme Court in several major juvenile cases is not only instructive but earmarks a path to the potential solution.

II. GATEWAY TO CONSTITUTIONAL RECOGNITION: THE SUPREME COURT

Kent v. United States and Due Process

In *Kent v. United States*,[19] the Supreme Court decided the first in a progression of cases that would define a number of the bounds of juvenile rights. Morris Kent, Jr., was arrested in 1961 at 16 years of age on charges of housebreaking, robbery, and rape in the District of Columbia.[20] Because of his age, he was subject to the exclusive jurisdiction of the juvenile court. Without a hearing and over protestations of counsel, who had offered to show that Kent was suffering from a mental disorder and that he would be a suitable subject for rehabilitation if given proper treatment, the juvenile court judge waived jurisdiction and ordered the youth bound over to the regular procedure of the District of Columbia. He made no findings and did not recite any reason for the waiver.[21]

Kent was subsequently convicted of all of the offenses mentioned above, excluding rape. On appeal based on the allegedly improper waiver,[22] the court of appeals expressed the opinion that the exclusive method of reviewing the juvenile court's waiver order was a motion to dismiss the indictment in the district court, and affirmed Kent's conviction.

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[18] The foremost items inducing such concern seem to be the increased rates of crime and recidivism recently evident in the juvenile population. *See* Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 393 (1972), *citing* F. A. ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE 43-50 (1964); Leonard, *LEAA and Federal Delinquency Control Programs*, 23 JUVENILE JUSTICE 7, 8 (Aug. 1972). As noted by Senator Birch Bayh: "... [O]ur juvenile justice system is too often a revolving door which for many ultimately leads to the adult criminal justice system and a lifetime of criminal behavior." Bayh, *Juveniles v. Justice*, 4 COLUM. HUMAN RIGHTS L. REV. 309, 313 (1972). The total number of cases handled by the Ohio juvenile courts has steadily been on the increase at a rate which is not necessarily correlative to the total number of persons comprising the juvenile population. For further numerical data *see* OHIO DEPT. OF MENTAL HYGIENE AND CONVICTION, OHIO JUVENILE COURT STATISTICS, which is published annually. *See also* Note, *A Proposal for the More Effective Treatment of the "Unruly" Child in Ohio: The Youth Services Bureau*, 39 U. CIN. L. REV. 275, 275-81 (1970).

[19] 383 U.S. 541 (1966).

[20] The history of this case is offered by the Court at 383 U.S. at 542-50. It is there noted that Kent was on probation at the time of his arrest and indictment from charges stemming from housebreakings and attempted purse snatchings in 1959, when he was 14 years old.

[21] 383 U.S. at 546. The juvenile judge apparently felt that as interpreted in Wilhite v. United States, 281 F.2d 642 (D.C. Cir. 1960), the District of Columbia waiver statute required only a "full investigation" and not a hearing on the matter of waiver. He recited in the order that after "full investigation, I do hereby waive [jurisdiction]."

[22] Kent v. Reid, 316 F.2d 331 (D.C. Cir. 1963), *rev'd sub nom.* Kent v. United States, 383 U.S. 541 (1966).

The Supreme Court reversed the conviction and remanded the case for a new hearing on the waiver order in juvenile court. In rendering its decision, the Court found that "the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile [and thus the waiver hearing] . . . must measure up to the essentials of due process and fair treatment."[23] This guarantee of due process was found to afford certain procedural protections, namely: the right to a hearing; the right to counsel at the hearing; that the attorney be granted access to all records relating to the juvenile, and the right to a statement by the court of the reasons for the decision.[24] The Court in so doing rejected the view that *parens patriae* and the "civil v. criminal" rationale was sufficient reason to disregard all constitutional rights. The Court did not express the view that this meant a total application of all the requirements of a criminal trial or even an administrative hearing.

Although *Kent* has been interpreted by some courts as having been decided purely on the grounds of a statutory interpretation of the District of Columbia code, rather than constitutional due process grounds,[25] the opinion did set out eight basic criteria that can be used by the juvenile judge when considering a waiver of jurisdiction. These have been written into many of the state statutes in whole or in part to satisfy the "essentials of due process and fair treatment." They are:

(1) the seriousness of the alleged offense against the community and whether the protection of the community requires waiver;

(2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(3) whether the alleged offense was against persons or property;

(4) the prospective merit of the complaint;

(5) the desirability of trial and disposition in one court where the juvenile's associates in the commission of the offense are adults;

(6) the maturity of the juvenile as determined by consideration of criteria such as his home life, environmental situation, emotional attitude, and pattern of living;

(7) the record and previous history of the juvenile; and,

(8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation.[26]

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[23] 383 U.S. at 556, 562.

[24] *Id.* at 557.

[25] *See* State v. Steinhauer, 216 So. 2d 214 (Fla. 1968); People v. Jiles, 43 Ill. 2d 145, 251 N.E.2d 529 (1969); Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967). *Contra, In re* Gault, 387 U.S. 1 (1967); United States *ex rel.* Turner v. Rundle, 438 F.2d 839, 841 (3d Cir. 1971): "[I]t is our view that Kent, particularly in light of the Supreme Court's subsequent opinion in In re Gault . . . sets forth certain principles of constitutional dimension." *See also* State v. Yoss, 10 Ohio App. 2d 47, 225, N.E.2d 275 (1967).

[26] 383 U.S. at 566-67, an appendix to the majority opinion by Justice Fortas. *See, e.g.*, OHIO REV. CODE ANN. § 2151.26 (Page Supp. 1973) and OHIO R. JUV. P. 30; ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd Supp. 1974).

In speaking for the majority, Justice Fortas viewed the situation from a realistic point of view and questioned whether the system worked at all: ". . . There is evidence in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[27]

The Gault Decision[28]

In 1964, Gerald Gault, 15 years of age, was picked up by the Sheriff of Gila County, Arizona, on a verbal complaint alleging he had made a lewd and obscene phone call to a neighbor. No notice that Gerald was being taken into custody was conveyed to his mother or even left at his home by the authorities. The youth was subsequently brought before the appropriate juvenile court having jurisdiction over him by reason of his age. A hearing was held. However, neither Gerald nor his mother was ever given advance notice of the charges against him. Neither the youth nor his parent was ever informed of any constitutional rights which he might have possessed. In fact, the complaining neighbor who had allegedly received the phone call never appeared in court, nor did she ever talk to the juvenile judge regarding her complaint.[29] The judge found Gerald to be delinquent by reason of his violation of an Arizona misdemeanor statute prohibiting the use of obscene language over the telephone and committed him to the State Industrial School "for the period of his minority . . ." a six-year sentence.[30]

A petition of habeas corpus was brought in the state courts challenging the constitutionality of the delinquency proceedings. After a hearing on the petition, the Superior Court dismissed the writ and the appellants sought review in the Arizona Supreme Court, which also dismissed the writ, finding that the requisite constitutional due process requirements had been met.[31]

The Supreme Court of the United States reversed, ruling that the due process clause applied in juvenile court proceedings when a determination is to be made as to "whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution."[32] The Court thus limited its finding to the adjudicatory stage of proceedings which present a possibility of

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[27] 383 U.S. at 556. Justice Fortas is certainly not alone in these convictions as can readily be found throughout TASK FORCE REPORT, *supra* note 6. *See generally* Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 392-93 (1972); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DEL. 97, 102-03 (1967).

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

[29] *Id.* at 7.

[30] *Id.* at 7-9. The penalty actually prescribed by the Arizona misdemeanor statute was a fine of $5 to $50, or imprisonment for not more than two months.

[31] *In re* Gault, 99 Ariz. 181, 407 P.2d 760 (1965), *rev'd* 387 U.S. 1 (1967).

[32] 387 U.S. at 13.

incarceration. The Court also found that a juvenile is entitled to certain specific due process rights, namely: the right to notice which complies with constitutional due process requirements;[33] the right to counsel;[34] the constitutional privilege against self-incrimination;[35] and, absent a valid confession adequate to support a delinquency adjudication, the right to confrontation and cross-examination of witnesses.[36]

One of the most important and relevant portions of the opinion is found in the reaffirmation of its position in *Kent* toward the relationship between *parens patriae* and constitutional guarantees:

> In *Kent v. United States, supra,* we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." . . . We announced with respect to such waiver proceedings that . . ."the hearing must measure up to the essentials of due process and fair treatment." We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.[37]

As Justice Harlan perceived it, the stress should be placed on determining the forms of procedural protection necessary to guarantee the "fundamental fairness" of juvenile proceedings.[38] This opinion seems to suggest the desirability of a delicate balance of supplying rehabilitation and reformation while not denying constitutional procedures guaranteeing "fundamental fairness" and replacing the same with the arbitrary imbalance of a non-adversarial and completely informal proceeding.

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[33] *Id.* at 23-24, described in other terms as that which would be "constitutionally adequate in a civil or criminal proceeding." *See, e.g.,* Cole v. Arkansas, 333 U.S. 196 (1948) (criminal notice); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (civil notice).

[34] 387 U.S. at 41. For a recent expression of the constitutional right to counsel in adult criminal cases involving the possibility of even minimal incarceration, *see* Argersinger v. Hamlin, 407 U.S. 25 (1972). Although this article will not deal with the right of the juvenile defendant to defend himself in the action against him by the state, the circuit courts appear to be in disagreement as to the propriety of such a situation in adult criminal proceedings. *Compare* United States v. Pike, 439 F.2d 695 (9th Cir. 1971) (holding that the defendant does have a right of pro se representation) *with* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1973) (holding that there is no right to pro se representation in criminal actions even though a majority of state constitutions appear to guarantee this right).

[35] 387 U.S. at 47, at which is found the following language: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."

[36] 387 U.S. at 56.

[37] *Id.* at 30.

[38] 387 U.S. 1, 74-75 (Harlan, J., concurring opinion).

Winship and McKeiver[39]

In re Winship[40] involved a youth who had been found delinquent on a standard of proof lower than "proof beyond a reasonable doubt," which is required in adult criminal proceedings.[41] The state juvenile court there relied on the New York statute dealing with the subject of delinquency proceedings,[42] which not only authorized, but mandated the standard of proof of "a preponderance of the evidence" for such proceedings.

The Supreme Court determined that in procedures involving a juvenile who is charged with an offense which would be a crime if committed by an adult, "the same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child."[43] Justice Brennan, who delivered the majority opinion, did examine the historical significance and importance of the reasonable doubt standard in the operation of the criminal law.[44] It should be noted however, that *Winship* was also carefully limited to the adjudicatory stage of proceedings in which the juvenile could be deprived of his freedom.[45]

Thus, the majority opinion in *Winship* emphasizes the narrowness of the application of the reasonable doubt standard, intimating "no view concerning the constitutionality of procedures governing children 'in need of supervision.' "[46] The procedures involving the unruly or ungovernable, dependent, or neglected child are not affected.[47] Furthermore, the Court insisted that it did not see how the application of the safeguard of the reasonable doubt standard would compel the states to abandon or displace any of the substantive benefits of the juvenile process,[48] which were described as: the non-criminal nature of the proceeding; the informality, flexibility and speed of the hearing; the discretion in the use of treatment techniques; and, the prehearing intake procedures.[49]

The Court seemed to indicate, at least by implication, that a balancing process based on the standard of "fair treatment"[50] would not

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[39] McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970).

[40] 397 U.S. 358 (1970).

[41] *In re* Winship, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969), *rev'd* 397 U.S. 358 (1970).

[42] NEW YORK FAMILY COURT ACT § 744(b) (McKinney 1962).

[43] 397 U.S. at 365.

[44] *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 & n.7 (1954); Brinegar v. United States, 338 U.S. 160, 174 (1949). *See also* 22 CASE W. RES. L. REV. 115, 116 (1970).

[45] 397 U.S. at 358, 366.

[46] *Id.* at 359.

[47] *See* note 13 *supra*.

[48] 397 U.S. at 367. *But see* 397 U.S. 358, 376 (Burger, C.J., dissenting opinion) (asserting what the Chief Justice considered a conflict between the majority decision in *Winship* and the intentions of the several legislatures to create benevolent and less formal institutions).

[49] 397 U.S. at 366-67.

[50] *See* note 14 *supra* and accompanying text.

automatically result in the application of all the guarantees in the Bill of Rights to juvenile procedures.

McKeiver v. Pennsylvania[51] seems to uphold the view of the majority in *Winship* that the total incorporation of the Bill of Rights into the juvenile system is not the ultimate destiny of *Kent, Gault, Winship* and its progeny. It seems clear, as the result of *McKeiver,* that the Court will use a theory of "selective incorporation" when dealing with the Bill of Rights as applied to the states through the due process clause of the fourteenth amendment,[52] or with other fundamentally recognized rights.

The sole issue presented for determination in *McKeiver* was, "whether there is a constitutional right to a jury trial in juvenile court."[53] The Pennsylvania Supreme Court affirmed McKeiver's conviction by the single juvenile judge, concluding that the addition of a trial by jury "might well destroy the traditional character of juvenile proceedings," and further expressed the opinion "that a properly structured and fairly administered juvenile court system can serve our present societal needs without infringing on individual freedoms."[54]

In 1971, the Supreme Court of the United States affirmed the decision[55] and held that there is no guarantee of the right to trial by jury in juvenile courts even in cases where the offense charged would be a felony if committed by an adult or where the juvenile's loss of freedom is possibly at stake.[56]

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[51] 403 U.S. 528 (1971).

[52] This seems to be holding true not only in juvenile law, but in other areas of the law as well. *See, e.g.,* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). *Compare* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972) *with* Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1 (1973), for an excellent review of the subject, although containing differing predictions for future standards of review and use of the fourteenth amendment. *See also* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071 (1974).

[53] *In re* Terry, 438 Pa. 339, 342, 265 A.2d 350, 352 (1970), *aff'd sub nom. In re* McKeiver, 403 U.S. 528 (1971). Joseph McKeiver, then age 16, was charged under PA. STAT. ANN. tit. 18, § 4704, § 4807, and §4917 (1963), with robbery, larceny, and receiving stolen goods in 1968, all of which were felonies. He was subsequently convicted before a single juvenile judge, his counsel's motion for a jury trial having been denied. The Superior Court of Pennsylvania affirmed without opinion at 215 Pa. Super. 760, 255 A.2d 921 (1969).

[54] 438 Pa. at 350, 265 A.2d at 355-56.

[55] 403 U.S. at 551.

[56] *See In re* Alger, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969) (construing OHIO REV. CODE ANN. § 2151.35 (Page 1968) as constitutional even though providing no right to a trial by jury). OHIO REV. CODE ANN. § 2151.35 was amended effective November 19, 1969, although the statute still reads: "The court shall hear and determine all cases of children without a jury." OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1973). *Accord, In re* Baker, 18 Ohio App. 2d 276, 248 N.E.2d 620 (1969). *But see* State v. Fisher, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969) (concerning repealed OHIO REV. CODE ANN. § 2151.35(E) (Page 1968), which specifically prescribed commitment to the Ohio State Reformatory, an adult penal institution).

In its consideration, the Court found that the requirement of a jury trial: (1) would remake the juvenile proceeding into a fully adversary process putting an end to the idealistic prospect of an intimate, informal protective proceeding;[57] (2) would not remedy the defects of the system;[58] (3) would disallow any further experimentation by the states to seek new ways to solve the problems of the young;[59] and, (4) would bring with it into that system the traditional delay, formality, and clamor of the adversary system, and possibly, the public trial.[60] Thus, the decision rested on the Court's finding from the totality of the circumstances that a regressive effect would result from constitutionally guaranteeing the right to a jury trial with the consequence actually being a "[loss of] what has been gained, and tending once again to place the juvenile squarely in the routine of the criminal process."[61]

The effect of the Supreme Court decisions in *Kent, Gault,* and *Winship* has been to offer new insight into the workings of the juvenile system. *McKeiver* should not be read as retarding the progress of this viewpoint. It should be interpreted as a *meaningful limitation* placed on the application of constitutional principles to the juvenile field evidencing the Court's desire to continue with a rehabilitative outlook.

While the consolidation of the aforementioned cases does not establish what might be termed a firm constitutional test capable of uniform and determinative application, four principles seem to emerge as prospective guidelines: (1) procedures essential to "fundamental fairness" are not to be disposed of merely because of rehabilitative and benevolent aims; (2) that these procedures which are essential will not distract from those original benevolent and rehabilitative aims; (3) the Court is not prepared to dispose of the juvenile system by totally incorporating guarantees of the Bill of Rights which would, in reality, defeat these aims of rehabilitation and add little to "fundamental fairness"; and, (4) the Court will concern itself only with the adjudicatory phase of the proceedings, all other phases seemingly too close to real treatment and rehabilitation, and subject only to fair treatment as defined by the state.

Any set of guidelines which may reasonably be drawn from the consideration of these four major Supreme Court decisions must of necessity be somewhat broad. However, it seems fair to assert that these decisions reflect a recognition on the part of the Court of the continued value of the maintenance of separate juvenile justice systems based upon protective and rehabilitative, rather than punitive, ideals. It seems clear that the guidelines spelled out in these cases are meant to complement rather than displace the "special rights" afforded children in juvenile

[57] 403 U.S. at 545.
[58] *Id.* at 547.
[59] *Id.*
[60] *Id.* at 550.
[61] *Id.* at 547.

court proceedings. It is with these guidelines in mind that we should proceed to an analysis and evaluation of Ohio juvenile procedure and its system of waiving juvenile court jurisdiction.

III. DIRECT APPEAL FROM WAIVER OF JURISDICTION IN OHIO

Statutory Rights of Juveniles in Ohio

The "special rights" of children under Ohio's juvenile justice system are readily apparent upon examination of the basic procedure involved in bringing a child within the exclusive jurisdiction of the juvenile court, the ultimate dispositions made by the juvenile court, and the manner in which an order waiving the court's jurisdiction is carried out as controlled by statute in Ohio.[62] The Juvenile Code provides that "any person" may swear out and file a complaint against a juvenile in the county in which the child resides or where the offense was committed.[63] Section 2151.27 states that although the complaint may be based on information and belief, it must allege the particular facts upon which the allegation of delinquency, traffic offender, unruliness, neglect or dependency is based.

A juvenile can also be taken into *custody* by police in all cases in which the police could arrest an adult for the same offense.[64] After custody, however, the proceedings regarding juveniles in custody are to be initially held in the juvenile court.[65]

When a child is thus brought before the juvenile court, an intake officer must initially make an investigation. Following this investigation, the officer must release the child unless detention seems warranted or required under Section 2151.31.[66] If the juvenile is so detained under Section 2151.314, a complaint is filed[67] and a hearing must be had within 72 hours to determine if the detention is necessary or required.[68] Under

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[62] OHIO REV. CODE ANN. § 2151.01-.41 (Page 1968 and Page Supp. 1973). *See particularly* OHIO REV. CODE ANN. § 2151.23 (Page Supp. 1973), which is the jurisdictional section of the Ohio Juvenile Court Code. *See* Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152 (1970).

[63] OHIO REV. CODE ANN. § 2151.27 (Page Supp. 1973).

[64] OHIO REV. CODE ANN. § 2151.31 (Page Supp. 1973). This section provides that such action is not deemed to be an arrest except for the purpose of determining its constitutional validity: "A child may be taken into *custody:* (B) Pursuant to the laws of arrest; . . ." (emphasis added). *See also* OHIO R. JUV. P.7.

[65] OHIO REV. CODE ANN. § 2151.25 (Page Supp. 1973). Provision is also made in this section for the discontinuance of proceedings and the transfer of the case to juvenile court if the child is taken before another competent court of the state.

[66] OHIO REV. CODE ANN. § 2151.314 (Page Supp. 1973). OHIO REV. CODE ANN. § 2151.31 (Page Supp. 1973) reads in pertinent part: ". . . A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the complaint unless his detention or care is required to protect the person or property of others or those of the child, or because the child may abscond or be removed from the jurisdiction of the court, . . . or because an order for his detention or shelter care has been made by the court pursuant to this chapter."

[67] *See* OHIO REV. CODE ANN. § 2151.27 (Page Supp. 1973).

[68] According to OHIO R. JUV. P. 7(F)(3) the juvenile court may hear any evidence without regard to the formal rules of evidence at this preliminary hearing.

Section 2151.314, reasonable notice must be given to the parents, guardian, or custodian of the juvenile, as well as to the juvenile himself; and, the parties must be informed of their right to counsel at this preliminary hearing on temporary commitment. If the parties are unable to afford counsel, one will be appointed by the court.[69]

Although there is no explicit statutory right to be shielded from publicity, the general purpose of the juvenile statutes, as outlined in Section 2151.01, would seem to demand this.[70] The pressures on both the juvenile and the officers of the court, which are necessarily coincidental to public display, can hardly be termed conducive to rehabilitation in the hope of checking his downward career.

The juvenile may not be kept or jailed in a facility intended primarily to house adult offenders, except where almost quarantine-like surroundings are provided which allow the juvenile to neither see, hear, nor come into contact with an adult offender.[71] Likewise, he may not be fingerprinted or photographed (a common procedure for adults) except for identification purposes, or with the permission of the juvenile judge.[72] If fingerprints or photographs are taken, they are to be transferred to the juvenile court where they become a part of the youth's confidential file.[73]

As previously stated, a juvenile taken into *custody* by police pursuant to the laws of arrest is not considered under *arrest*, except for the purpose of testing the constitutional validity of that custody.[74] Thus, a juvenile would not compile an "arrest record" unless the juvenile court waives its jurisdiction. Although a juvenile may acquire an official record, which would include the actual adjudicatory measures and procedures and an

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69 *See* OHIO REV. CODE ANN. § 2151.314, § 2151.352 (Page Supp. 1973); OHIO R. JUV. P. 7(F)(1), (2), and (3). *See generally* Lehman, *A Juvenile's Right to Counsel in a Delinquency Hearing*, 17 JUV. CT. JUDGE'S J. 53 (1966); Riederer, *The Role of Counsel in the Juvenile Court*, 2 J. FAM. LAW 16 (1962) (each dealing extensively with the juvenile's right to counsel in the pre-*Gault* era).

70 *See* Allstate Ins. Co. v. Cook, 324 F.2d 752 (6th Cir. 1963).

71 OHIO REV. CODE ANN. § 2151.34 (Page Supp. 1973):

> *Treatment of children in custody; detention home.* No child under 18 years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime . . ."

See OHIO R. JUV. P. 7(H).

72 OHIO REV. CODE ANN. § 2151.313 (Page Supp. 1973). However, fingerprints may be taken by law enforcement officers investigating an act which would be a felony if committed by an adult where there is probable cause to believe the youth is involved. *See generally* Ferster and Courtless, *The Beginning of Juvenile Justice, Police Practices and the Juvenile Offender*, 22 VAND. L. REV. 567 (1969) (criticizing the maintenance of fingerprint files by the police and the personnel having access to the same).

73 OHIO REV. CODE ANN. § 2151.313 (Page Supp. 1973).

74 OHIO REV. CODE ANN. § 2151.31(D) (Page Supp. 1973), which reads in part: "Taking a child into custody *shall not be deemed an arrest* except for the purpose of determining its validity under the constitution of this state or of the United States." (Emphasis added). *See* text accompanying note 64, *supra*. *See generally* S. DAVIS, RIGHTS OF JUVENILES 38-54 (1974).

unofficial record, which would include the reports and tests made by intake officers and other court officials, these juvenile records are all subject to expungement upon application by the person to the court or upon the court's own motion following a period of two years after the termination of an order of the court or the child's release from a state treatment facility.[75]

In addition, any orders made by the court prescribing commitment can continue only until the child reaches the age of 21 years.[76] The wide discrepancy in the possible commitment period between the juvenile laws and incarceration under the criminal code is generally evidenced by the sentence initially imposed in *Kent*. If Kent had been adjudicated under the juvenile code of the District of Columbia his maximum commitment would have been for five years or until 21 years of age; whereas, he was in fact sentenced to 30 to 90 years under the criminal code after waiver was ordered and the jurisdiction of the juvenile court relinquished.[77]

In *In re Whittington*, the Fifth District Court of Appeals of Ohio concluded "that the Juvenile Code was established to afford valuable rights to juveniles."[78] The juvenile rights as set out in the Ohio Revised Code are indeed valuable as tools in tailoring informal and flexible juvenile procedures, this presumably being the original intention of the legislature in creating a separate system to deal with juveniles. The approach is both realistic and practicable, dictating an avoidance of the stigma attaching to criminal procedure which is so detrimental in attempts to foster an atmosphere conducive to effective rehabilitation.

Waiver of Jurisdiction

While critically important, these rights are not absolute. Prior to the adjudicatory, fact-finding stage, the process begins which will ultimately determine whether an order to relinquish the juvenile court's jurisdiction for the purpose of criminal prosecution should issue from the court.[79]

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[75] OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973). However, the right here is not automatic and in reality operates only for those with sufficient interest, understanding of its consequences, and money to proceed under the statute. Whatever stigmatizing effect a juvenile record might have, it is inconsequential when compared to a criminal arrest record after the juvenile court waives jurisdiction. *See, e.g.*, Menard v. Mitchell, 430 F.2d 486, 490 (D.C. Cir. 1970) (the mere fact of arrest limits opportunity for schooling, employment, and professional licenses). *See generally* J. Coffee, *Privacy v. Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 CORNELL L. REV. 571, 591-94 (1972) (dealing with the realistic effect on prospective employers and employment agencies); Comment, *Juvenile Police Record-Keeping*, 4 COLUM. HUMAN RIGHTS L. REV. 461 (1972) (statutory assurances of confidentiality are illusory because of the nature of the treatment given to juvenile records); TASK FORCE REPORT, *supra* note 6, at 92-93.

[76] OHIO REV. CODE ANN. § 2151.38 (Page Supp. 1973).

[77] *See* Kent v. United States, 383 U.S. 541, 550 (1966). *But see* note 30, *supra*, and accompanying text.

[78] 17 Ohio App. 2d 164, 177, 245 N.E.2d 364, 372 (1969).

[79] *See* OHIO REV. CODE ANN. § 2151.26(A) (Page Supp. 1973):

> After a complaint has been filed alleging that a child is delinquent by reason of having committed an act which would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to

When a juvenile is so transferred to the criminal court for adjudication as an adult, the jurisdiction of the juvenile court is "abated"[80] and each and every one of the aforementioned statutory rights is forfeited. Rights which are, as indicated by the *Whittington* court, so valuable and important to the juvenile process, should be jealously guarded by society, and every attempt should be made to protect them from being lost through an arbitrary or even an unintentionally inappropriate order. Section 2151.26, which deals with the waiver process, attempts to preclude such a result, and shows the effect of *Gault* and *Kent* in requiring a hearing, notice thereof at least three days prior to the hearing,[81] counsel,[82] and a written finding of facts which includes a statement of reasons for transfer if one is actually made.[83] These due process requirements meet those set up in *Kent* and *Gault* for determining the " 'critically important' question of whether a child will be deprived of the special protections and provisions of the Juvenile Court Act."[84]

Section 2151.26 also prescribes the criteria that are to be used in deciding whether to transfer the case. These criteria essentially represent the Ohio legislature's recognition that rehabilitation and treatment are not suitable for some juveniles. Before issuing the transfer order, the court must find that: (1) the act would be a felony if committed by an adult; (2) the child is 15 years of age or older; (3) there is probable cause to believe that the juvenile committed the act;[85] and, (4) after investigation, there are reasonable grounds to believe that the juvenile

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the appropriate court having jurisdiction of the offense, after making the following determinations:

(1) The child was 15 or more years of age at the time of the conduct charged;
(2) There is probable cause to believe that the child committed the act alleged;
(3) After an investigation including a mental and physical examination ... that there are reasonable grounds to believe that:
  (a) He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
  (b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority ..."

See OHIO R. JUV. P. 30.

80 OHIO REV. CODE ANN. § 2151.26(E) (Page Supp. 1973), which states: "Such transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint."

81 OHIO REV. CODE ANN. § 2151.26(C) (Page Supp. 1973): "Notice in writing of the time, place and purpose of such hearing shall be given to his parents, guardian, or other custodian and his counsel at least three days prior to the hearing."

82 OHIO REV. CODE ANN. § 2151.352 (Page Supp. 1973): "A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have the court provide counsel for him ..."

83 OHIO REV. CODE ANN. § 2151.26(E) (Page Supp. 1973); OHIO R. JUV. P. 30(E).

84 Kent v. United States, 383 U.S. 541, 553 (1966).

85 *See In re* Jackson, 21 Ohio St. 2d 215, 257 N.E.2d 74 (1970) (finding that a standard of probable cause is sufficient in a waiver proceeding). *See generally* Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (defining probable cause).

is not amenable to rehabilitation or that the safety of the community may require legal restraint beyond his majority.[86]

In a determination that there are reasonable grounds to believe that the child is not amenable to rehabilitation, the Ohio Rules of Juvenile Procedure provide the procedural guidelines.[87] However, these guidelines, as set down in Juvenile Rule 30, do not totally encompass all the criteria which are listed in the appendix to the *Kent* decision. A considerable amount of latitude and discretion is still afforded the presiding juvenile judge.[88] If the waiver order does issue, the juvenile is turned over for criminal prosecution, under the terms and conditions set by the juvenile court pursuant to Juvenile Rule 30(F).[89]

In re Becker and Direct Appeal of Waiver Orders in Ohio

On July 10, 1974, the Supreme Court of Ohio spoke to this issue in *In re Becker*.[90] This decision unfortunately places in question the effective availability of statutory juvenile rights to juveniles eligible for an order waiving the jurisdiction of the juvenile court. The specific question before the court was whether a transfer order, pursuant to Ohio Revised Code Section 2151.26, was a final appealable order.

A complaint was filed in the Summit County, Ohio, Juvenile Court against Richard Becker charging him with delinquency by reason of first degree murder. After a proper probable cause hearing, as required by the juvenile code and rules of procedure, the juvenile court relinquished jurisdiction and transferred Becker to common pleas court for criminal prosecution as an adult. Prior to his trial in common pleas court, Becker appealed the waiver order to the Ninth District Court of Appeals of Ohio, which court found that a transfer order was a final appealable order.[91] In so doing, the court overruled a motion by the State of Ohio

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[86] OHIO REV. CODE ANN. § 2151.26(A)(3) (Page Supp. 1973).

[87] OHIO R. JUV. P. 30(C):

> *Determination of amenability to rehabilitation.* In determining whether the child is amenable to treatment or rehabilitative processes available to the juvenile court, the court shall consider:
> (1) The child's age and his mental and physical health;
> (2) The child's prior juvenile record;
> (3) Efforts previously made to treat or rehabilitate the child;
> (4) The child's family environment; and
> (5) School record.

[88] *See* State v. Carmichael, 35 Ohio St. 2d 1, 298 N.E.2d 568 (1973) (the scope of "reasonable grounds" is left to discretion of court). *But see* People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972) (finding a statute similar to Ohio's waiver statute unconstitutional because it lacked suitable and ascertainable standards). *See generally* S. DAVIS, RIGHTS OF JUVENILES 116-121 (1974), for a good overview on the general vagueness of juvenile statutory standards involved in waiver proceedings.

[89] OHIO R. JUV. P. 30(F), reads as follows: "*Release of transferred child.* The juvenile court shall set terms and conditions for the release of the transferred child in accordance with Criminal Rule 46."

[90] 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

[91] *In re* Becker, C.A. No. 7353 (9th Jud. Dist. Ohio App., Jan. 22, 1974). In its journal entry, the court stated: "We hold that a transfer order under Juv. R. 30 is a

for dismissal and ordered a stay of proceedings in common pleas court pending the final outcome of the appeal.

The Supreme Court of Ohio reversed the court of appeals,[92] basing its decision primarily on the fact that a dispositional finding of delinquency was not made in juvenile court. The court also relied heavily on an Illinois case, *People v. Jiles*,[93] finding that such an appeal would provide for unnecessary delay in the disposition of Becker's innocence or guilt regarding the alleged offense.

Prior to November 19, 1969, a transfer order pursuant to Ohio Revised Code Section 2151.26 required the juvenile court to find the juvenile delinquent before relinquishing jurisdiction.[94] *State v. Yoss*,[95] a leading case on point, had found that such a transfer order was a final appealable order based on Ohio Revised Code Sections 2501.02 and 2505.02, which deal with the jurisdiction of the Courts of Appeal and the definition of "final" in the context of "final appealable order."[96] Subsequent to November 19, 1969, Ohio Revised Code Section 2151.26 was amended and the requirement of a finding of delinquency prior to transfer was removed and thus is no longer needed.[97]

The decision in *Becker*, then, effectively construes the right of appeal as being based on the dispositional adjudication of delinquency rather than on the finality of the juvenile court action in substantially affecting the statutory rights of juveniles. In favoring the former rationale rather than the latter, the abatement of the juvenile court's "exclusive" jurisdiction is given less weight than the importance of a speedy determination

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final appealable order, because it terminates the Court's jurisdiction and prevents that minor from being adjudged a delinquent and treated as a minor in the rehabilitative process."

92 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

93 43 Ill. 2d 145, 251 N.E.2d 529 (1969).

94 *See* State v. Carter, 27 Ohio St. 2d 135, 272 N.E.2d 119 (1971) (recognizing that specific language is not required for a finding of delinquency and requiring that a finding of delinquency is necessary to waive jurisdiction); *In re* Mack, 22 Ohio App. 2d 201, 260 N.E.2d 619 (1970) (the waiver order is conditioned on a finding of delinquency). Please note that in both *Carter* and *Mack*, the waiver order was made prior to the November 19, 1969, amendments to the Juvenile Code.

95 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967).

96 OHIO REV. CODE ANN. § 2501.02 (Page Supp. 1973), reads in pertinent part:

> [T]he court of appeals shall have jurisdiction: (A) Upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or *final orders of courts of record* inferior to the court of appeals... *including* the finding, order or judgment of a juvenile court that a child is delinquent, neglected, or dependent... (emphasis added).

OHIO REV. CODE ANN. § 2505.02 (Page 1954), reads in pertinent part: *"Final Order.* An order affecting a *substantial right* in an action which in effect determines the action and *prevents a judgment*..." (emphasis added). Neither statute has been amended since the determination in State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967).

97 OHIO REV. CODE ANN. § 2151.26(A) (Page Supp. 1973). *Accord, In re* Becker, 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

of innocence or guilt. This seems to be directly in conflict with the issue described in *State v. Yoss* as being one of jurisdiction.[98]

The *Becker* court's reliance on the Illinois case of *People v. Jiles*[99] for support in its concern for speedy disposition seems somewhat shaded since the statute relied on in *Jiles* was amended subsequent to that court's decision.[100] Under the previous Illinois statute, which was used in *Jiles*, the state prosecutor made the decision whether to proceed criminally or not. The juvenile judge's participation was limited to noting an objection to the prosecutor's decision which brought about a hearing before the chief judge of the circuit.[101] Although this method of determination is a relatively unique situation, it logically implies that there is nothing to appeal other than the prosecutor's discretion and the first "real decision" made by a court is that of guilt or innocence at the criminal trial. Under this particular set of circumstances, the Illinois court's concern for speed in obtaining the *first judicial determination, i.e.*, the guilt or innocence of the juvenile, can readily be justified.

The Illinois statute, as amended prior to the *Becker* action, appreciably limits the prosecutor's discretion in removal matters by requiring a hearing and investigation by the juvenile court to determine its propriety under set criteria,[102] before a waiver order is granted. Now, the first judicial determination effectively limiting substantial juvenile rights is made by the juvenile court in the "critically important" waiver proceeding.

In considering one aspect of appealability, a Supreme Court determination construing "finality," as applied in 28 U.S.C. Section 1291,[103] is found to be helpful. In *Cohen v. Beneficial Indus. Loan Corp.*,[104] the Court considered the finality of a denial of an indemnity bond in stockholder litigation and stated: "The effect of the statute [Section 1291] is to disallow appeal from any decision which is tentative,

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98 10 Ohio App. 2d 47, 49, 225 N.E.2d 275, 276 (1967).

99 43 Ill. 2d 145, 251 N.E.2d 529 (1969).

100 ILL. ANN. STAT. ch. 37, § 702-7(3) (1965) *as amended* P.A. 77-2096 § 1 (Jan. 1973), P.A. 78-341, § 1 (Oct. 1973) (Smith-Hurd Supp. 1974).

101 *Id. See also* Note, *Due Process and Juvenile Court Removal Procedures*, 67 Nw. U.L. REV. 673 (1972).

102 ILL. ANN. STAT. ch. 37, § 702-7(3)(a) (Smith-Hurd Supp. 1974) reads:

> In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody . . . beyond his minority.

103 Judiciary and Judicial Procedure Act, 28 U.S.C. § 1291 (1958), reads: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

104 337 U.S. 541 (1949).

informal or incomplete.... [S]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."[105]

Cohen also speaks of giving the provision of finality a *practical* rather than technical construction. The adoption of this point of view would seem to fit the benevolent role of the state in rehabilitation and treatment. In addition, the waiver order relinquishing the "exclusive jurisdiction" of the juvenile court leaves nothing open, unfinished or incomplete as to the relinquishment, although it cannot be denied that his guilt or innocence has not yet been determined.

In *Lantsberry v. Tilley Lamp Co.*,[106] the Supreme Court of Ohio spoke of the concept of final orders being based upon the rationale that a court which makes an order which is not final retains jurisdiction for further proceedings. In definition, the court stated in substance that a final order is one disposing of the whole case or some separate and distinct branch.[107] The waiver order is separate from the determination of guilt in that it only determines which court will hear the case on the basis of distinct criteria as set out in the juvenile code.

But, a determination of finality in an order or its effect on substantial rights does not in and of itself grant the right to an appeal.[108] The Supreme Court has never held that states must afford citizens the right of appellate review as an element of due process,[109] and thus such a right must rest upon statute. The applicable jurisdictional statute in Ohio is Ohio Revised Code Section 2501.02 with Ohio Revised Code Section 2505.02 lending itself to the definition of "final order."[110] It is upon the interpretation of these two statutes that the right to an appeal will ultimately depend.

The *Becker* court made an interpretation which limits Ohio Revised Code Section 2501.02 to a technical and literal reading. This in turn led to a conclusion which excluded juvenile appeals not involving a specific dispositional finding of delinquency, neglect, or dependency.[111]

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[105] *Id.* at 546.

[106] 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971) (speaking particularly to final orders in OHIO REV. CODE ANN. § 2505.02 [Page 1954]).

[107] 27 Ohio St. 2d 303, 306, 272 N.E.2d 127, 129 (1971). *Accord* Roach v. Roach, 164 Ohio St. 587, 132 N.E.2d 742 (1956) (an order is final and appealable if it divests a party of the right to have the court making the order place him in his original position); Schindler v. Standard Oil Co., 165 Ohio St. 76, 133 N.E.2d 336 (1956) (finding that the sustaining of a general demurrer on grounds of misjoinder where no petition amendment is possible is a final appealable order since it effectively terminates a substantial right).

[108] *See* State v. Thomas, 175 Ohio St. 563, 197 N.E.2d 197 (1964). *But see* Malone v. Malone, 119 Ohio App. 503, 199 N.E.2d 405 (1963) (a final order from which an appeal may be taken is an order which affects a substantial right). *But Cf.* State v. Lenhart, 116 Ohio App. 55, 186 N.E.2d 497 (1961).

[109] *In re* Gault, 387 U.S. 1, 58 (1967), *citing* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[110] *See* notes 95 and 96 *supra* and accompanying text.

[111] *See In re* Bolden, 37 Ohio App. 2d 7, 306 N.E.2d 497 (1973), which construed a temporary commitment order under OHIO REV. CODE § 2151.355 as not a final

IV. CONCLUSION

An order waiving the jurisdiction of the juvenile court is "critically important" as determined by the Supreme Court in *Kent v. United States.*[112] The core issue in a waiver hearing is the question concerning which court shall have jurisdiction of the juvenile and the case. However, much more is determined than merely the court and location in which the action will be prosecuted, for a number of important collateral issues surround this question of jurisdiction and necessarily depend upon the outcome of that finding by the juvenile court.

While Ohio can surely be seen as having a valid state objective in limiting delay for the purpose of the administration of criminal justice, it must initially be recognized that, although the ultimate objective of the court to which the juvenile court relinquishes jurisdiction will be a determination of the guilt or innocence of party, the primary objective at a waiver hearing is a determination of proper jurisdiction. For the purposes of finality and appealability then, the abatement of the jurisdiction of the juvenile court, where no other judicial determination can possibly follow therein, and the irreparable loss of substantial statutory juvenile rights should weigh more heavily in the balance than a speedy determination of guilt or innocence which is not in issue at the waiver hearing.

The criteria for deciding whether a waiver order should issue are set out by Ohio statute in what appear to be definitive terms.[113] Yet these are, in reality, merely guidelines to be used by the juvenile judge. The weight and interpretation that is to be given these criteria is dependent upon the posture and attitude of each individual judge and thus may vary considerably throughout the state.

Many factors can influence a juvenile judge's opinion, not the least of which is his background, development, and understanding of not only the law in general, but juveniles and juvenile law in particular. Indeed, it was found in a 1969 poll of Ohio juvenile judges[114] that in response to the question, "[d]oes public feeling concerning the offense influence your decision?" 17% of the judges answering indicated an affirmative reaction. The problems of the size of the caseload being handled by the court and the financing available with which to operate might possibly enter the

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appealable order although it affected a substantial right—the freedom of the juvenile. But, in *Bolden,* the juvenile court still had a determination to make following the temporary commitment order and retained jurisdiction in contrast to the abatement of jurisdiction in waiver orders.

[112] 383 U.S. at 556. *See* text accompanying notes 23-25 *supra.*

[113] OHIO REV. CODE ANN. § 2151.26(A) (Page Supp. 1973); OHIO R. JUV. P. 30. *See also* S. DAVIS, RIGHTS OF JUVENILES (1974).

[114] Comment, *Waiver of Jurisdiction in Juvenile Courts,* 30 OHIO ST. L.J. 132, 137-138 (1969). The national survey indicated a slightly lower percentage of 14% in TASK FORCE REPORT, *supra* note 6, at 78.

picture, as well as the political outlook of the elected juvenile judge in dealing with an offense which might be touchy in the public eye.

Through the decision in *Becker*, the Ohio Supreme Court has taken a place among a minority of states which deny a direct appeal from a waiver order.[115] While the statements in the preceding paragraphs were not intended to be critical of any individual juvenile judge in Ohio, for they are often the quickest to recognize and push for a needed reform when it presents itself, they do bring to light some of the reasons which may in fact underlie a waiver decision, and the resulting variables which weigh heavily in the determination.

By not providing direct appeal from orders of waiver, Ohio has, in a sense, left the door open to the possibility that a decision on waiver, which is arbitrary or even due to mistake, will not be corrected until the juvenile has been exposed to the criminal system. By that time, it doesn't matter to the juvenile that the decision was unintentionally arbitrary, or due to an oversight or mistake, for he has already been subjected to that which the juvenile court was instituted to protect him from in the interest of rehabilitation and reformation.

Thus, a motion to dismiss in criminal court and the possible appeal from the ruling on that motion following the course of the trial, are in fact, truly "... hollow remed[ies] which cannot possibly give complete relief, because by that time the juvenile will already irretrievably have lost his right[s] ..."[116] with all the safeguards accorded a minor gone. It is from this point of view that the waiver order should be measured, always keeping in mind the balance between a speedy determination and the possible 50 or 60 years of life which remain to the juvenile, at least part of which will see the juvenile back in the mainstream of society.*

THOMAS F. HASKINS, JR.

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[115] For some of the states *allowing direct appeals* from orders of waiver, *see, e.g.*, P.H. v. State, 504 P.2d 837 (Alaska 1972); Graham v. Ridge, 107 Ariz. 387, 489 P.2d 24 (1971); *In re* Doe I, 50 Hawaii 537, 444 P.2d 459 (1968); *In re* Templeton, 202 Kan. 89, 447 P.2d 158 (1968); *In re* Trader, 20 Md. App. 1, 315 A.2d 528 (1974); Juvenile Dept. v. Johnson, 86 N.M. 37, 519, P.2d 133 (1974). For some of the states which *do not allow direct appeals* from orders of waiver, *see, e.g.*, People v. Jiles, 43 Ill. 2d 145, 251 N.E.2d 529 (1969); *In re* T.J.H., 479 S.W.2d 433 (Mo. 1972); Commonwealth v. Croft, 445 Pa. 592, 285 A.2d 118 (1971); State v. McArdle, 194 S.E. 2d 174 (W. Va. 1973).

[116] *In re* T.J.H., 479 S.W.2d 433, 437 (Mo. 1972) (Seiler, J., dissenting).

* Richard D. Becker was found guilty of First Degree Murder in Summit County, Ohio, Common Pleas Court, following the remand by the Supreme Court of Ohio. On October 2, 1974, his motion for a new trial was overruled and he was subsequently sentenced to the Ohio State Penitentiary for the remainder of his natural life. An appeal was taken by Becker challenging not only his conviction but also the juvenile court waiver order. While the case has been argued by counsel for both parties, no decision had been rendered as of the date of printing. *See* State v. Becker, C.P. No. 73-12-1265 (Summit County, Ohio C.P. Sept. 18, 1974), *appeal docketed*, C.A. No. 7616, 9th Jud. Dist. Ohio App., Dec. 12, 1974.