WAIVER OF JURISDICTION IN JUVENILE COURTS

The juvenile court system was created in an effort to alleviate some of the harshness of the early criminal law in its treatment of juvenile offenders. At common law only children under seven years of age were considered incapable of possessing criminal intent; however, under the new scheme no criminal stigma was to attach to persons under a certain age (usually from 16-18) for their actions. Instead, the state was to provide the child with the requisite guidance to enable him to become a good citizen.

The power of the state to step in and take the child in hand is justified by the doctrine of parens patriae. The phrase stems from chancery practice, where it was used to describe the state's power to act as a parent in protecting the juvenile's property interests and person. The doctrine is not to be found, however, in the history of criminal jurisprudence. Under the parens patriae doctrine, the state had the unquestioned right to deny to the child many procedural rights available to adults. The rationale was that a child has a right "not to liberty but to custody," and that if the child's parents do not properly perform their custodial functions, as evidenced by a court's finding of delinquency, the state may then intervene and provide the child with the custodial supervision to which he is entitled.

In the exercise of this power, Ohio established the juvenile court system. The purpose of the system is to save minors from the stigma attaching to criminal convictions, to protect them from themselves and other bad influences upon them, and, most importantly, to provide the child with the necessary guidance to enable him to become a good citizen. Juvenile delinquency is not a crime, and the juvenile court law is not criminal or penal in nature, but an administrative police regulation of a corrective character.

But it seems apparent that the system has somewhere failed. A cursory reading of Justice Fortas' indignant and even at times outraged opinion in In re Gault points to some of the difficulties which beset the juvenile court system. The fact that the system has not done much in effecting rehabilitation, as evidenced by the high rate

2 In re Gault, 387 U.S. 1, 16 (1967).
3 Id. at 17.
5 387 U.S. 1 (1967).
of "repeaters," indicates one of the primary problems. The juvenile classified as a delinquent finds himself possessing almost as much stigma as is attached to a label of criminality. He may find himself confined for many years to a building charitably called an "industrial school" which in fact is little more than a prison. Until Gault, this confinement could be effected without the observance of due process standards applicable to the treatment of adults.

While Gault has made some necessary changes in a limited area—namely the delinquency-determination proceeding itself—it seems that the juvenile court system merits a still closer look in other areas. As stated by Wheeler and Cottrell, "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and industrial routines." Therefore it seems that many of the actual workings of the system should be investigated and considered in connection with the legislative aims.

This paper does not deal with aggravated violations of due process as found in Gault or Kent v. United States, which certainly do occur but are not examples of the system as it typically functions. Its object is to investigate the theoretical conception of the juvenile court judge as he actually functions, unburdened in many areas by procedural requirements and free to do what is best in providing for the juvenile offender's welfare. In short, the paper takes a close look at how the Ohio Juvenile Court System works as a day to day matter. In order to deal with a manageable topic, only a single section of the Ohio Revised Code is considered, section 2151.26, which provides:

In any case involving a delinquent child under Chapter 2151 of the Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after a full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the Court of Common Pleas at the next term thereof, for such disposition as the Court of Common Pleas is authorized to make for a like act committed.


by an adult, or the judge may exercise the other powers conferred in Chapter 2151 of the Code in disposing of such case.

This section was selected because it in many ways mirrors the whole system. It is apparent that the statute leaves much to the discretion of the juvenile judge, providing no set standards the judge is to use in reaching a decision. This is in accord with the conception of the juvenile judge acting in the place of the parent, free to do that which will best meet the needs of the child while at the same time looking to the protection and interests of society. The practical effect of allowing the judge to freely exercise his discretion in such matters is to place upon him a tremendous burden. The question which then naturally occurs is whether or not the burden is met. In order to answer this question one must know what really happens in matters arising under section 2151.26.

Because the statute provides no standards to guide the juvenile judge in deciding whether or not the juvenile is to be treated as an adult offender, the problem was to discover what criteria the judges utilize in the exercise of their discretion. An investigation of the case law found references to the statute always clothed in vague, general language. Ordinarily, the cases said that the judge was to look to the child's own good and the best interests of the state, and nothing more. Because of the dearth of case law and the already mentioned lack of statutory guidelines, there was nowhere to go but to the judges themselves. For this reason a survey was taken, the audience selected being composed of Ohio Juvenile Court Judges.

The purpose of the survey was not to berate the evils of a statute without specific guidelines, and indeed there might at times be advantages to such a statute. In speaking of a similar statute, it has been said, that the criteria for decision should be formulated by an agency deemed best informed and best suited for that task, the juvenile court. The purpose of the paper was instead to demonstrate, by focusing upon a statute in which much is left to the discretion of the judge, just how the judicial mind in the juvenile court area uses its discretion. A starting point was found in Kent v. United States, which set out certain criteria and principles concerning waiver of jurisdiction believed consistent with the aims and purposes of juvenile courts. These criteria, as well as others which it was

11 383 U.S. at 565.
believed the judges might in fact consider, were used in the ques-
tionnaire. The judges were asked to indicate which factors they
utilized in arriving at a decision on the question of waiver, and
their answers were considered in connection with the general aims
of the juvenile court system.

A fundamental and preliminary question is the precise nature
of the aims of the juvenile court in connection with the question of
waiver. Ohio's position in general terms is expressed in In re Lind-
berg Heist. The case stated that no matter how serious the offense,
the judge is not justified in transferring a case to the criminal courts
unless the child's own good and the best interests of the state can not
be attained by the Juvenile Court's retention of jurisdiction. The
Court of Appeals for the District of Columbia, in speaking of a
statute much like Ohio's, stated, "[I]t is implicit in the [Juvenile
Court] scheme that noncriminal treatment is to be the rule—and
that adult criminal treatment, the exception which must be governed
by the particular factors of individual cases." Thus it seems that
insofar as the juvenile courts are vested with the "original and
exclusive jurisdiction" of the child, and that rehabilitative goals
are sought to be effected by the juvenile court system, only in ex-
ceptional cases should the juvenile court relinquish its jurisdiction
over the child.

Before getting into the actual body of the questionnaire, certain
legal questions concerning the waiver of jurisdiction must be
answered. Gault spoke of one critically important aspect of the
juvenile court process, the delinquency determination hearing. A
case recently decided by the United States Supreme Court, In re
Whittington, which originated in Ohio, considers whether a pre-
ponderance of evidence test is sufficient to warrant a determination
that a juvenile is a delinquent when the acts charged are those
which would constitute a felony if committed by an adult and
proved beyond a reasonable doubt. Whittington thus deals in part
with section 2151.26. After being adjudged delinquent by a pre-
ponderance of the evidence, the next step could be to transfer the
juvenile to the grand jury for indictment. Thus, the fear of the

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13 Id.
16 391 U.S. 341 (1968) Vacating and Remanding per curiam, 13 Ohio App. 2d 11,
233 N.E.2d 333 (1967), finding of delinquency to be reconsidered in light of Gault.
defense in *Whittington* is that the juvenile will be found to be delinquent by the civil preponderance of the evidence test, and then since the acts charged would be a felony if committed by an adult (i.e. homicide), the juvenile court could waive jurisdiction and the boy would be tried as an adult. Thus, the juvenile court would waive its original and exclusive jurisdiction on a finding that it is more likely than not that the boy is a delinquent. It is true that rules of criminal procedure applicable to adults would then attach, but arguably this does not comport with the purpose of Ohio's Juvenile Court Law as a whole, especially the “original and exclusive” jurisdiction section.\(^{17}\)

It seems evident that the waiver of jurisdiction stage, as the delinquency determination hearing itself, is a critically important action involving vital rights of the juvenile. It is also clear that the *Gault* decision does not extend to this area of the juvenile process. This indicates the importance of what the judge does at the time the question of waiver of jurisdiction arises, and when the absence of any meaningful statutory or judicial guidelines is considered, it can readily be seen that there is a vital need to know exactly what the judge looks to in the exercise of his discretion.

The response to the questionnaire was reasonably good. Out of 95 questionnaires sent out, 50 were completed and returned. This figure is surprisingly good insofar as the list of judges was two years old, and consequently a certain percentage of those whose responses were sought were undoubtedly dead or no longer in office. However, in spite of this fact 53 percent of the questionnaires were completed and returned. From this percentage it is hoped a fairly representative picture may be obtained.

In the survey itself, Question 21 indicated one of the most disappointing aspects of the statute. The question read, "Approximately what percentage of those delinquent children who have committed acts which could constitute felonies if committed by adults are tried as adults in your jurisdiction?" The results indicated a tremendous variance in the treatment of those juveniles falling in this area. Of the 48 judges responding to the question 31 indicated that from 0-3 percent were tried as adults; the remaining 17 indicated that from 5 to over 50 percent were so tried. In fact, five judges indicated that in their respective jurisdictions over half of the juveniles coming within the purview of section 2151.26 were tried as adults. This

\(^{17}\) *Ohio Rev. Code Ann.* § 2151.23 (Page 1954).
would seem to indicate that whether one is to be treated as a juvenile or an adult depends largely upon the particular judge.

Two arguments might be made against this conclusion. First, it might be said that regardless of the judge, in certain counties the juveniles who committed the offenses spoken of in section 2151.26 were incapable of being helped by the juvenile process, that the offenders in certain counties were just more criminal than juveniles in other areas. This on its face seems unlikely however. A second more plausible argument could be that few juveniles fall in this area, that the number of juveniles committing offenses which would be felonies if committed by adults simply is not large enough to yield meaningful data. However, in view of the ever-increasing rate of juvenile offenses this also seems unlikely. The unhappy conclusion necessarily must be that the county in which a juvenile resides will to a large extent determine the subsequent disposition of his case.

A rather surprising answer was given to the first question on the questionnaire. The question read: "Does the desirability of having a single trial, where the juvenile's associates in the alleged offense are adults, enter into the decision of whether to try him as an adult?" A full 26 percent of those responding admitted that it did. In other words, more than one out of four Ohio Juvenile Court Judges responding indicated that in deciding whether a juvenile is to be treated as an adult or a juvenile, he bases his decision at least in part on the expediency of having a single trial. Just how the utilization of this criteria fits into the general mandate to the juvenile court to retain jurisdiction unless such action would not be for the child's own good and the best interests of the state it is difficult to understand. A single trial dealing with multiple defendants may be desirable for certain reasons, but when some of the parties involved are juveniles there is a definite legislative purpose that juveniles come under the jurisdiction of the Juvenile Court. It seems that in utilizing such a factor the judge is thwarting the purpose of the juvenile court system, yet because of a lack of standards, section 2151.26 allows such decisions to be made. With definite guidelines in the statute, it seems clear this problem would be considerably lessened. Of course, it would still be possible for the judge to decide the question for the wrong reason, but a general assumption must be made that judges follow the law, at least until it is proved otherwise.

Another example of an unacceptable factor influencing exercise of the judge's discretion is indicated by the response to Question
Six. It read: “Does public feeling concerning the offense influence your decision?” 17 percent of those polled said that it did. Yet the rationale which underlies the juvenile system is that juveniles are not to be subjected to criminal laws, where retribution and vengeance are considered proper aims. For public feeling to be considered, the judge must necessarily disregard the juvenile court’s aims and look instead to pacifying the community. With the increasing rate of juvenile delinquency the community might understandably want a more effective mode of curbing crime than the juvenile courts seemingly provide, however, a legislative scheme which allows judges to respond to the wishes of the community in an effort to insure their re-election is in obvious need of serious re-evaluation in light of the stated objectives of the juvenile court system.

Question Seven asked the judges whether or not they felt that some juveniles coming before them were incapable of rehabilitation by juvenile facilities now available. To this question 90 percent answered in the affirmative. The following question asked what percentage of juveniles coming before the bench were, in their opinion, incapable of rehabilitation regardless of the available facilities. Here the answers varied considerably. Of the 39 judges who responded, 13 felt that at least 20 percent of the juveniles coming before them fell into the latter category. The answers individually varied from those who felt less than 1 percent were incapable of rehabilitation to answers indicating that some judges felt that from 60-99 percent of those juveniles coming before them could not be rehabilitated.

This data reflects more than a difference of opinion by judges in the efficacy of modern day rehabilitation processes. When one out of three judges feels that 20 percent or more of those juveniles that come before them cannot be rehabilitated, a widespread and disturbing pessimism concerning the juvenile program as a whole is revealed. The fact that such a large percentage of the responding judges question one of the basic assumptions of the juvenile court system, the assumption that deviant behavior may be modified by the intervention of the state through the juvenile courts, is both surprising and disturbing.

Question 11 asked: “Are juveniles sometimes considered beyond rehabilitation in light of the procedures and facilities presently available, and for this reason tried as adults?” Of the 46 judges responding, 59 percent answered in the affirmative. Question 22
asked: “Are juvenile facilities in your jurisdiction overcrowded?” Sixty percent of those polled stated that the facilities were overcrowded, and six percent stated that there were no facilities. It seems likely that this would result in a greater likelihood that a juvenile would be tried as an adult, as a lack of adequate facilities might cause the judge to deem the juvenile unsuitable for the rehabilitative process of the court. Since the judge’s decision will in part be determined by whether or not the juvenile will be aided by the juvenile court’s scheme of treatment, the more inadequate the facilities, the more likely it will be that the juvenile court will waive jurisdiction. While most judges indicated by their responses to question 23 that the presence of overcrowded facilities would not influence their decision, this seems unlikely in view of the aforementioned consideration.

Question 15 asked: “Do you feel the statute (section 2151.26) should specify criteria to be used by the juvenile judge, or do you think it is adequate?” Of the 47 answers received, 13 (28 percent) felt the statute should be changed. The fact a sizeable minority desired a change in the statute may be explained to some extent by the responses to the previous question, wherein 58 percent of those responding indicated that they felt very hesitant about having a person under 18 years of age stigmatized as a criminal, regardless of the alleged offense. When the responses to questions 14 and 15 are read together, one may deduce that a sizeable minority of the juvenile judges would prefer to have the statute spell out certain legislative standards to aid them in the exercise of their discretion, where their decision may be the first step in burdening the individual with a criminal record.

Another surprising fact brought to light by the survey was presented by question 18. It asked: “Do you believe the recent Supreme Court decision In re Gault will tend to promote justice?” A surprising 39 percent stated that it would not. The question merely asked whether Gault would tend to promote justice, not whether it would in all cases, and the number of the judges not in agreement with the case indicates a desire on the part of some to maintain a large degree of discretion in dealing with juveniles. However, the fact remains that “Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”

The picture of the state acting as a benevolent parent in these cases certainly has been soiled by reports of what does in fact happen.

18 387 U.S. at 18.
in the absence of procedural rules, and it seems evident that to do away with these abuses it will be necessary to impose certain limitations on the discretion exercised by the juvenile judge.

It seems apparent that too much is left to the discretion of the juvenile judge with respect to the operation of section 2151.26. The variance in treatment which results from the judges' exercise of their unfettered discretion, as shown by the response to the questionnaire, points to an inherent flaw in the statute. Although it is conceded that judges cannot effectively decide cases in a void, it is submitted that they are not adequately skilled in the areas of sociology, psychology, and related fields to be competent, without guidelines, to decide what is in the best interest of the child.

A question arises as to possible challenges which may be made to the statute. The obvious injustice of the statute is its unequal treatment, insofar as the judge's attitude toward the question of waiver of jurisdiction will basically determine how the juvenile is to be treated. However, this may be analogized to the sentencing process, wherein a sentence within the statutory minimum and maximum will ordinarily not be struck down. Just as a particular judge may be overly harsh with certain types of offenders, so may a particular judge be overly harsh with a particular juvenile. As long as there is no flagrant discrimination, it seems unlikely that this ground of review will prove successful.

Another possible argument that could be made against the statute is that it constitutes an invalid delegation of power to an administrative body. The investigation called for by section 2151.26 is an administrative process within the juvenile court, therefore, it would appear that the area of review available in an appellate court in determining the validity of the waiver would be the area of review applicable to special tribunals and administrative agencies. In other words, the scope of review would be limited to a determination of whether the decision had a rational basis in fact and was not arbitrary or capricious. The absence of criteria or standards in and of itself would not be sufficient to justify a finding of arbitrariness or capriciousness.

Because of the great number of things which may be held to constitute delinquency and hence trigger the application of the

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22 Id.
23 Id.
statute, it would appear that the statute is unduly vague and hence constitutionally proscribed.\(^2\) However, if a case arose where a juvenile offender had been bound over and subsequently convicted in an adult court, the conviction would be based on a felony, therefore, the elements of the offense would have been adequately set out in the criminal code and not susceptible to the vagueness infirmity.

A very important question concerns possible changes. The language of the Ohio statute is not at all unique.\(^2\) In Massachusetts, the applicable language reads, "If the court is of the opinion the interests of the public require . . ."\(^2\) The Tennessee provision reads, "Who shall be found by the court to be incorrigible and incapable of reformation or dangerous to the welfare of the community."\(^2\)

It seems evident that if change is to be accomplished in Ohio, it must come from the legislature. The first possibility would be to have the statute list certain criteria to be used by the judge. Although this would provide express guidance, an argument against it would be that judges would simply continue deciding cases as they always have, ignoring the established criteria in some cases. Thus the legislative change would do little in achieving its objective of providing for more uniform treatment.

A more effective proposal would be for the statute to establish a presumption that the offender be tried as a juvenile. This would follow the general objectives of the legislature in establishing the juvenile court system with "exclusive and original" jurisdiction over the juvenile. Along with the establishment of the presumption, the statute could also require that the judge state affirmatively and with particularity his reasons for waiving jurisdiction.

By such an amendment the basic legislative purpose in establishing a separate court to assume jurisdiction over juvenile offenders would be achieved, and at the same time those juveniles whose behavior indicates they cannot be aided by the rehabilitative methods available in the juvenile system could be removed from a system which cannot either help them or meet the needs of society. The haphazard effects of the present statute would be avoided, uniformity would be achieved, and the judge would retain the degree of discretion needed to fairly and justiciably decide the question of waiver of jurisdiction.

\(\text{Harry B. Keith}\)

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APPENDIX

RESULTS OF QUESTIONNAIRE CONCERNING THE OHIO JUVENILE COURT SYSTEM

Most of the following questions relate to Ohio Rev. Code § 2151.26, which concerns a delinquent child who has committed an act which could be a felony if committed by an adult.

1. Does the desirability of having a single trial, where the juvenile's associates in the alleged offense are adults, enter into the decision of whether to try him as an adult?  
   11 Yes 32 No

2. Is this factor ever determinative?  
   7 Yes 41 No

3. Does an offense against persons rather than against property indicate a greater likelihood that the juvenile will be tried as an adult under the criminal laws?  
   36 Yes 14 No

4. Does the fact that a case has prosecutive merit and is of an aggravated or heinous character influence your decision?  
   35 Yes 14 No

5. Is this in itself ever determinative?  
   11 Yes 39 No

6. Does public feeling concerning the offense influence your decision?  
   8 Yes 39 No

7. Do you feel that some juveniles coming before you are not capable of rehabilitation by juvenile facilities as they exist?  
   45 Yes 5 No

8. If so, approximately what percentage?  

9. To what extent are reports of psychiatrists, psychologists, social workers, etc. used by you as judge, in reaching a decision as to whether the juvenile is to be tried as an adult or treated as a juvenile?  
   Determinative 1; Great weight 19; Considered with the rest of the evidence 26; Little weight 2.

10. Are juveniles sometimes considered beyond rehabilitation in light of the procedures and facilities presently available, and for this reason tried as adults?  
    27 Yes 19 No

11. In evaluating the juvenile's sophistication and maturity, to what extent is a previous juvenile record taken into account?  
    Weighted very heavily 7; Taken into account with other factors 32; Depends on case 8.

12. Is the parent's attitude taken into account?  
    38 Yes 11 No
14. Do you hesitate to have stigmatized as criminal a person under 18 years of age, regardless of the alleged offense?
   Feel very hesitant 28; Feel he should suffer the consequences of his actions 7; Other 13.

15. Do you feel the statute (O.R.C. § 2151.26) should specify criteria to be used by the juvenile judge, or do you think it is adequate?
   Feel is adequate 34; Desire a change 13.

16. Is your jurisdiction predominantly rural or urban in nature?
   Predominantly rural 29; Predominantly urban 15; Mixed 6.

18. Do you believe the recent Supreme Court decision In re Gault will tend to promote justice?
   Yes 26; No 17

19. Do you believe the rate of juvenile delinquency is increasing in the United States?
   Yes 40; No 6; Unknown 3

20. If your answer to above is yes, do you feel there is a disintegration of the family as a unit which is responsible?
   Yes 43; No 1

21. Approximately what percentage of those delinquent children who have committed acts which could constitute felonies if committed by adults are tried as adults in your jurisdiction?
   %

22. Are juvenile facilities in your jurisdiction overcrowded?
   Yes 26; No 17

23. If the answer to the above is yes, does this affect your decision as to whether the delinquent is to be tried as an adult?
   Yes 2; No 31

24. Do you believe the interests of justice are best served by the presence of attorneys in juvenile courts?
   Yes 40; No 7