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OHIO'S POST-GAULT JUVENILE COURT LAW

by Robert J. Willey*

I. Introduction

OHIO'S ORIGINAL JUVENILE COURT LEGISLATION was enacted around the turn of the century.¹ Credit for the first really effective Juvenile Court legislation should be given to the State of Illinois, which enacted its legislation in 1899;² but the doctrine of *parens patriae* had been used in Ohio to justify commitment of delinquents as early as 1869.³ Ohio replaced its original legislation in 1937 when it adopted the Standard Juvenile Court Act,⁴ and that act (with minor changes)⁵ remained in force until this year, when the legislature made extensive revisions.⁶

The impetus for these 1969 changes was undoubtedly *Kent*⁷ and *Gault*,⁸ although the President's Commission on Law Enforcement and Administration of Justice (*The Challenge of Crime in a Free Society*)⁹ deserves some credit. In fact, *The Challenge* is cited in the Joint Resolution which created the Ohio Crime Commission, whose job it was "to inquire into problems

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¹ Young, *A Synopsis of Ohio Juvenile Court Law*, 31 U. Cin. L. Rev. 131, 135 (1962).

² Laws of Illinois, 1899, P. 131. This act served as a model for the country and the world. By 1917, forty-six states, the District of Columbia, England, Portugal, Belgium, France, Hungary, Germany and Switzerland had followed suit. The Scandinavian countries established administrative boards to accomplish the same thing. See R. Nyquist, *Juvenile Justice* 114 (1960).

³ *Prescott v. State*, 19 Ohio St. 184 (1869). See Whitlatch, *The Juvenile Court—A Court of Law*, 18 West. Res. L. Rev. 1239, 1243 (1967).

⁴ 117 Ohio Laws 268.

⁵ Whitlatch, *supra* note 3, at 1245.

⁶ House Bill No. 320 was introduced March 13, 1969. The Judiciary Committee reported on a substitute bill which, slightly amended, was passed by the House (vote: yeas 91, nays 0) and sent to the Senate. The Senate, with a few of their own amendments added, passed it with a vote of 30 yeas, nays 0. The House concurred in the Senate's amendments, and the Governor signed, the bill becoming effective November 19, 1969.

⁷ *Kent v. United States*, 383 U.S. 541 (1966).

⁸ *In the matter of Gault*, 387 U.S. 1 (1967) [hereinafter cited as *Gault*].

⁹ See, President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, Ch. 3, Juvenile Delinquency and Youth Crime, (1967) [hereinafter cited as *The Challenge*].

of crime and criminal administration" in Ohio.¹⁰ The Corrections Committee¹¹ of the Crime Commission became concerned with the present juvenile law and initiated studies with a view toward substantial revisions.¹² The Committee approached¹³ the Juvenile Judges Association of Ohio and discovered that the Code Revision Committee¹⁴ of that association, under the leadership of Judge Walter Whitlatch, was taking parallel action, and it was agreed that an attempt should be made to coordinate the two efforts.¹⁵ The attempt was made and many ideas were exchanged, but two bills resulted. Substitute House Bill 320 represents the product of the Juvenile Judges, and was enacted.¹⁶ The Crime Commission offering was introduced by State Senator Regula, but was not even printed, and was indefinitely postponed.¹⁷

It is the writer's intention to compare Ohio's new juvenile code with that offered by the Crime Commission, with the Standards for Juvenile and Family Courts,¹⁸ and with the Uniform Juvenile Court Act,¹⁹ which was drafted to meet the con-

¹⁰ Amended House Joint Resolution No. 49, adopted August 24, 1967, and filed in the Office of the Secretary of State, September 8, 1967.

¹¹ Membership: Sen. Ralph S. Regula, Chairman, M. C. Koblenz, William Willis, Ralph B. Kohnen and Rev. H. R. Wiechert.

¹² Ohio Crime Commission, Interim Report, C.C.-1, 5 (June 28, 1968).

¹³ Interim Report, *supra* note 12, Letter of transmittal, page ii, "the committee . . . to consult with experts and those directly involved. . . ."

¹⁴ Judge Walter G. Whitlatch, Chairman, and Judges Frank G. Lavrich, John R. Milligan, Jr., Russell W. Thomas, Donald S. Wargovsky, John W. Winn, Don J. Young and Donald L. Ziegel.

¹⁵ Letter from OCC Program Director, Robert D. Macklin to the writer, dated September 25, 1968. The Juvenile Court Judges, on the cover sheet of the Second Draft of Revisions, dated October 15, 1968, mention their continuing efforts and say, "We have met with representatives of the Ohio Crime Commission and we have agreed with that body to closely cooperate and collaborate in our revision efforts and in the legislative enactment of the end result."

¹⁶ Whitlatch, *The Juvenile Court—A Court of Law*, 18 West. Res. L. Rev. 1239, 1245 (1967). "In the thirty years since its enactment, the 'Juvenile Code' has frequently come under the critical scrutiny of the legislature. It has not always 'found it good' but generally in close collaboration with the Ohio Association of Juvenile Court Judges, the legislature has made salutary amendments aimed at protecting the legal rights of the children and parents who come under the court's jurisdiction."

¹⁷ Senate Bill 393. Ohio Crime Commission, Final Report, Exhibit X (March 14, 1969) [hereinafter cited as OCC].

¹⁸ Standards for Juvenile and Family Courts, U.S. Dept. of Health, Education and Welfare, Children's Bureau, Welfare Administration (1966) [hereinafter cited as The Standards].

¹⁹ Uniform Juvenile Court Act, Third Tentative Draft, as printed in the American Bar Association National Institute. Practice Materials entitled, *The Changing World of Juvenile Law*, sponsored by the section of Family Law, May, 1968 [hereinafter cited as UJGA].

stitutional requirements of *Kent* and *Gault*.²⁰ These two cases now force one to reconsider in the juvenile court context the applicability of more formal procedural rules,²¹ as well as the applicability of all the Constitutional Rights contained in the Bill of Rights which have been incorporated (as far as criminal proceedings are concerned) into the Due Process clause of the Fourteenth Amendment.²² It would also seem desirable to measure Ohio's new code against the deficiencies listed by the President's Commission in *The Challenge*²³ and ascertain whether it satisfies the recommendations therein made.

II. Purpose, Definitions and Rules

Ohio's new code, as well as the Crime Commission Bill, contains a purpose section²⁴ similar to the one contained in the Uniform Act. Basically, this section provides for a liberal interpretation of its provisions in the interests of the child so as (A) to provide care for the child, and (B) to remove the consequences and taint of criminality from them; and to offer this supervision, care, and rehabilitation in a (C) family environment whenever possible, and (D) to provide for the use of judicial procedures in which constitutional and other legal rights are recognized and enforced.²⁵ The thrust of this section, especially (D), is quite

²⁰ *Kent's* holding rested on the statute of the District of Columbia, but in *Gault* the Court cited it as a general expression of constitutional law many times. See especially page 12, where Mr. Justice Fortas emphasized that despite the statutory basis of *Kent*, "the basic requirements of due process and fairness" must be met in juvenile proceedings. See also page 30, where *Kent* is cited as follows: ". . . 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." With respect to the waiver by the juvenile court to the adult of jurisdiction over an offense committed by a youth, we said that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." We announced with respect to such a waiver proceeding: "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." UJCA, *supra* note 19 at iv, The Prefatory Note says of *Kent* "(T)he discussion in the opinion is in the context of constitutional requirements."

²¹ *The Challenge* at 85. See the report of a Seminar for Juvenile Court Practice (Oct. 31, 1969) held under the auspices of the Virginia State Bar and the Virginia Bar Association as reported in 6 CrL 2128 (Nov. 12, 1969).

²² Notice of Charges—*Cole v. Arkansas*, 333 U.S. 196 (1948); Public Trial—*In re Oliver*, 333 U.S. 257 (1948), See Comment following Section 24, UJCA; Search and Seizure—*Mapp v. Ohio*, 367 U.S. 643 (1961); Self-Incrimination—*Malloy v. Hogan*, 378 U.S. 1 (1964); Jury Trial—*Duncan v. Louisiana*, 391

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different from that of the former purpose clause,²⁶ whose basic premise was that the child deserves custody, not liberty.

As an additional guide to interpretation, and to further protect juvenile court procedures, the new code acknowledges the potential existence of rules²⁷ promulgated by the Supreme Court of Ohio under the Modern Courts Amendment of 1968.²⁸ These would operate in addition to the usual rules authorized and cre-

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U.S. 145 (1968); Counsel—*Gideon v. Wainwright*, 372 U.S. 335 (1963); Speedy Trial—*Klopfer v. North Carolina*, 386 U.S. 213 (1967); Confrontation—*Pointer v. Texas*, 380 U.S. 400 (1965); Double Jeopardy—*Benton v. Maryland*, 395 U.S. 784 (1969); Impartial Jury—*Parker v. Gladden*, 385 U.S. 363 (1966); Compulsory Process—*Washington v. Texas*, 388 U.S. 14 (1967); Cruel and Unusual Punishment—*Robinson v. California*, 370 U.S. 660 (1962); Grand Jury—*Hurtado v. California*, 110 U.S. 516 (1884); Excessive Bail—See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 960 (1965).

²³ *The Challenge* at 55. See also Seaton, *Amending the Kansas Juvenile Code*, 16 Kan. L. Rev. 277 (1968). But see Young, *Due Process and the Rights of Children*, 18 *Juv. Ct. J.J.* 102, 103 (1967): "Only two members of the Commission, none of its consultants, and only seven of its many advisers in the field of Juvenile Delinquency, have even nominally been juvenile court judges. It is therefore not particularly surprising that the report indicates that the fundamental concepts which are the basis of juvenile court law are unrealistic and impractical. . . ."

²⁴ Ohio Revised Code § 2151.01 (1965); OCC 2151.02; and UJCA, Sec. 1.

²⁵ Ohio Rev. Code § 2151.01: "The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes: (A). To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code; (B). To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation; (C). To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety; (D). To provide judicial procedures through which Chapter 2151. of the Revised Code is executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced."

²⁶ Ohio Rev. Code § 2151.55, Repealed 10/7/63: "The purpose of §§ 2151.01 to 2151.54 inclusive of the Ohio Revised Code, is to secure for each child under the jurisdiction of the juvenile court such care, guidance, and control, preferably in its own home, as will best serve the child's welfare. When such child is removed from its own family, it is the intent to secure for such child custody, care, and discipline as nearly as possible equivalent to what should have been given by its parents. The principle is hereby recognized that children under the jurisdiction of the juvenile court are wards of such court, subject to the discipline and entitled to the protection of such court, which may intervene to safeguard them from neglect or injury, and to enforce legal obligations to them. To this end such sections shall be liberally construed."

²⁷ Draft Ohio Rules of Civil Procedure, Rule 74, Rules for Juvenile Court; 42 O. Bar 341 (No. 10, March 10, 1969).

²⁸ Modern Courts Amendment, Section 5(B), effective May 7, 1968.

ated by a juvenile court to govern its routine daily problems.²⁹ While the new Ohio Rules are supposed to take effect July 1, 1970, it is thought that they might not be ready by then.³⁰

The Definitions section³¹ discloses that the Juvenile Court now enjoys the status of a Common Pleas court.³² It defines a "child" as one who is under eighteen years of age or who was under eighteen at the time of the delinquent act.³³ It provides that in the event release to parental custody is not acceptable,³⁴ "Shelter" as well as "Detention" facilities are or should be available to the court.³⁵ To prevent confusion, the new act divides custody and guardianship problems along lines recommended by The Standards.³⁶ The term "Legal Custody,"³⁷ for instance, pre-

²⁹ Ohio Rev. Code § 2151.17; OCC 2151.08.

³⁰ Ohio Rules of Civil Procedure, Rule 74, as finally submitted to the General Assembly reads as follows: "These Rules of Civil Procedure shall apply in Civil Juvenile proceedings except to the extent that specific procedure is otherwise provided by law or to the extent that by their nature these rules would be clearly inapplicable." 43 O. Bar 46 (No. 2, January 12, 1970).

³¹ Ohio Rev. Code § 2151.011; OCC 2151.01(A).

³² Ohio Rev. Code § 2151.011: "(A) As used in the Revised Code: (1) 'Juvenile court' means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under Chapter 2151. of the Revised Code. (2) 'Juvenile judge' means a judge of a court having jurisdiction under Chapter 2151. of the Revised Code." 2151.07. OCC 2151.04-.07.

³³ Ohio Rev. Code § 2151.011: "(B) As used in sections 2151.01 to 2151.99, inclusive, of the Revised Code: (1) 'Child' means a person who is under the age of eighteen years, with the exception that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a 'child' irrespective of his age at the time the complaint is filed or hearing had thereon. (2) 'Adult' means an individual eighteen years of age or older." This terminology will prevent waiting until the child is past 18 and then treating him as an adult. OCC 2151.01(A) (2) and (18). See Comment, UJCA, Sec. 2.

³⁴ Ohio Rev. Code § 2151.314 (1965).

³⁵ Ohio Rev. Code § 2151.011(B): "(3) 'Detention' means the temporary care of children in restricted facilities pending court adjudication or disposition. (4) 'Shelter' means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition." See ORC 2151.312(B) which provides that neglected or dependent children shall not be detained in facilities used for delinquents "unless upon order of the court."

³⁶ The Standards, *supra* note 18, at 16.

³⁷ Ohio Rev. Code § 2151.011(B): "(10) 'Legal custody' means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court."

serves the "Residual Parental Rights,"³⁸ while "Permanent Custody"³⁹ clearly divests them. These categories, as well as "Probation"⁴⁰ and "Protective Supervision"⁴¹ give the court a satisfactory series of terms, so that it can "commit"⁴² a child and precisely explain to the parents the extent of their remaining rights and responsibilities. This clarification also prevents the agency given custody from assuming "unwarranted powers over the child to the improper exclusion of the powers of the parents."⁴³ These revisions seem as adequate as those proposed by the Crime Commission⁴⁴ and more sophisticated than those of the Uniform Act.⁴⁵ However, the same cannot be said of Ohio's new sections defining jurisdiction.

III. Jurisdiction

The term "jurisdiction"⁴⁶ is used in two separate and distinct ways. First, one thinks of such jurisdictional facts as place and type of act, or age and residence of the child. The court of the county in which the "traffic offense, delinquency, unruliness,

³⁸ Ohio Rev. Code § 2151.011(B): "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support."

³⁹ Ohio Rev. Code § 2151.011(B): "(12) 'Permanent custody' means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county welfare board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations. (13) 'Temporary custody' means legal custody as defined in division (B)(10) of this section which may be terminated at any time at the discretion of the court."

⁴⁰ Ohio Rev. Code § 2151.011 (B)(15): "'Probation' means a legal status created by court order following an adjudication that a child is delinquent, a juvenile traffic offender, or unruly whereby the child is permitted to remain in the parent's, guardian's, or custodian's home subject to supervision, or under the supervision of any agency designated by the court and returned to the court for violation of probation at any time during the period of probation."

⁴¹ Ohio Rev. Code § 2151.011(B)(16): "'Protective supervision' means a legal status created by court order whereby the child is permitted to remain in the parent's, guardian's, or custodian's home under supervision and subject to return to the court during the period of protective supervision."

⁴² Ohio Rev. Code § 2151.011(B)(14): "'Commit' means to vest custody as ordered by the court."

⁴³ The Standards, *supra* note 18, at 16.

⁴⁴ OCC 2151.01.

⁴⁵ UJCA section 2(1), (6), (7) and (8).

⁴⁶ The Standards, *supra* note 18, at 32.

neglect, or dependency" occurred has jurisdiction to hear the matter,⁴⁷ as does the court of the county in which the child has a residence or legal settlement.⁴⁸ The county of legal residence is preferred, however, and it is provided⁴⁹ that the original court may transfer the proceedings to such county. It is further provided that any proceeding may be transferred if the residence of the child changes.

The act gives the juvenile court exclusive original jurisdiction⁵⁰ over any "child" who is alleged to have committed any crime, even those of the most serious nature.⁵¹ Of course, the

⁴⁷ Ohio Rev. Code § 2151.27; OCC 2151.23; UJCA, Section 11.

⁴⁸ Ohio Rev. Code § 2151.06; OCC 2151.03.

⁴⁹ Ohio Rev. Code § 2151.271. This section also allows the court of the county of residence to transfer the case back to the county where the complaint was filed. UJCA, Section 3. OCC 2151.24 allows a similar transfer, but only after a hearing at which the facts alleged in the petition have been proven by clear and convincing evidence.

⁵⁰ Ohio Rev. Code § 2151.23: "(A) The juvenile court has exclusive original jurisdiction under the Revised Code: (1) Concerning any child who on or about the date specified in the complaint is alleged to be a juvenile traffic offender, delinquent, unruly, neglected, or dependent; (2) To determine the custody of any child not a ward of another court of this state; (3) To hear and determine any application for a writ of habeas corpus involving the custody of a child; (4) For the adoption of any child pursuant to sections 3107.01 to 3107.14, inclusive, of the Revised Code, who is otherwise within the jurisdiction of the court; (5) To exercise the powers and jurisdiction given the probate division of the court of common pleas in Chapters 5122. and 5125. of the Revised Code, if a child otherwise within the jurisdiction of the court is mentally ill, as defined in section 5122.01 of the Revised Code, or mentally retarded as defined in § 5125.011 [5121.01.1] of the Revised Code; (6) To hear and determine all criminal cases charging adults with the violation of any section of Chapter 2151. of the Revised Code; (7) Under the Interstate compact on juveniles in § 2151.56 of the Revised Code; (8) To hear and determine applications for consent to marry pursuant to § 3101.04 of the Revised Code. See also OCC 2151.18.

⁵¹ Ohio Rev. Code § 2151.25: "When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, proceedings regarding such child shall be initially in the juvenile court in accordance with this chapter. If the child is taken before a judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas other than a juvenile court, such judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court, whereupon proceedings shall be in accordance with this chapter. Upon such transfer all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of a county court, mayor, police or municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive jurisdiction of the juvenile court." See also Standards, *supra* note 13, at 34: "No exception should be made to the court's original exclusive jurisdiction on account of the serious nature of an offense committed by a child. To take from the jurisdiction of the specialized court, as is done in some states, cases in which children have committed offenses punishable by death or life imprisonment is to deny the basic philosophy of the specialized court." *State v. Monahan et al.*, 15 N.J. 34, 104 A. 2d 21 (1954). *In re Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932).

juvenile court retains the power to transfer felony cases to the regular criminal court,⁵² but only after it has made many more findings of fact than were previously necessary.⁵³ Neither the Uniform Act nor The Standards give the court jurisdiction over Dependent Children in the absence of some element of neglect; but Ohio's new code, the Crime Commission Bill, and the old code contain clauses continuing such jurisdiction in the juvenile court.⁵⁴

The second use of the term "jurisdiction" involves a consideration of the definitions of "delinquent," "unruly," "juvenile traffic offender," and "neglected and dependent children." Sussman⁵⁵ points out that most legislative definitions of delinquency include any violation of local, state or federal law, and also include "frequent truancy," "beyond control of parents," "growing up in idleness," "uses vile language," and approximately thirty other such illusive definitional concepts.⁵⁶ Paulsen says, "The statutes defining juvenile delinquency, in states where that term is used, embrace a bewildering variety of kinds of conduct."⁵⁷ The principal objections to this type of legislation are that these sections proscribe noncriminal behavior and that they are so vague⁵⁸ as to deny the potential of adequate notice.⁵⁹

⁵² Ohio Rev. Code § 2151.26 *infra*, notes 132 through 139. See also OCC 2151.54 (Sixteen years of age); UJCA section 34 (Sixteen); Standards at 34.

⁵³ Repealed § 2151.26: "In any case involving a delinquent child under §§ 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after 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 such sections in disposing of such case." *Kent v. United States*, 383 U.S. 541 (1966).

⁵⁴ UJCA, Section 2, Comment after (5) where it says that "Such children should be cared for by other resources of the community." The Standards, *supra* note 18, at 34, point out that "Unless there is an element of neglect involved," the court should not become involved. ORC 2151.04. OCC 2151.01 (B) (19). See *The Challenge* at 85.

⁵⁵ F. Sussman, *Juvenile Delinquency* 20 (1950).

⁵⁶ See Repealed § 2151.02 Ohio Rev. Code (1965).

⁵⁷ M. Paulsen, *The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court*, Justice for the Child 49 (Rosenheim ed. 1962).

⁵⁸ See H. Bloch and F. Flynn, *Delinquency, The Juvenile Offender in America Today* 3-18 (1956), in particular on page 8, where it is said, ". . . (S)ince delinquency lacks substantive legal meaning, a delinquent child might be adjudged to be any child over whom a children's court may exercise juris-

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*The Challenge*⁶⁰ notes that it was originally considered desirable to use these "all-encompassing formulations," but that experience has shown that this only serves "to facilitate gratuitous coercive intrusions into the lives of children and families." It recommends: "(T)he movement for narrowing the juvenile court's jurisdiction should be continued." Further, it suggests that the "conduct-illegal-only-for-children category . . . be substantially circumscribed so that it ceases to include such acts as smoking, swearing, and disobedience to parents;" and only includes such things as "repeatedly" becoming pregnant out of wedlock, and being "habitually" truant from school,⁶¹ with the emphasis being on a pattern of conduct rather than on a single act.

The Task Force⁶² offers the explanation that it was hoped that the juvenile court could engage in preventative law through use of the social sciences, but that the results of our society's experimentation have not supported the original purpose. The same authority points out: that the disposition of juveniles and criminals has been equally unsuccessful even though the promise was that society would provide more beneficial treatment for juveniles; that both referrals and recidivism are increasing; and that the stigma of labeling is substantial. Since most authorities now believe that recidivism is increased by our juvenile justice system, "reconsideration of the juvenile court's jurisdiction is in order."⁶³

Gault also has a bearing on this problem, for as a consequence of this decision, the full panoply of procedural and constitutional rights may now be applicable in any case where "commitment" is possible.⁶⁴ Just as the label "civil" did not prevent

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diction."; Tappan, *United Nations, Comparative Survey of Juvenile Delinquency*, Part 1, North America 1-7 (1958).

⁵⁹ Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 *Fam. L. Quar.* 1, 13 (No. 4, December, 1967).

⁶⁰ *The Challenge* at 84.

⁶¹ *Id.* at 85, where it is said that the continuity of the behavior shows a "real risk of long range harm to the child." It also says, "Serious consideration, at the least, should be given to complete elimination of the court's power over children for noncriminal conduct."

⁶² Task Force Report: *Juvenile Delinquency and Youth Crime*, The President's Commission on Law Enforcement and Administration of Justice 23 (1967).

⁶³ *Id.* On the same page, "A further source of concern about court intervention is based on the assertion of many who have observed adjudicated

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the imposition of trial procedures more commonly used in the "criminal" arena,⁶⁵ in *Gault* the label of "delinquent" was found to be as odious as "criminal."⁶⁶ Moreover, Justice Fortas added that substitution of the label PINS (or unruly child) for "delinquent child" is nothing more than an alteration of terminology.⁶⁷ Thus, a new code cannot evade the requirements of *Gault* by labeling some "delinquents" "unruly." The key in determining the contents of due process will depend on the potential of "stigma," and on whether "commitment" is allowed for those within a new category such as "unruly child."⁶⁸ Consequently, in any reconsideration of juvenile court jurisdiction, the dispositional sections that are appropriate to each category of children must also be considered.

Ohio's new code accepts the suggestion of the Uniform Act and defines a "delinquent child" as one who violates a law which would be a crime if committed by an adult.⁶⁹ However, it adds

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and adjudicated delinquents that, with or without intervention, most of them if given time and leeway will simply grow out of their trying ways. They will find a girl or a paying job or just fall prey to the sedateness of adulthood and become bored with adolescent highjinks."

⁶⁴ *Gault*, 387 U.S. 1, 13 (1966): "We consider only problems presented to us by this case. These relate to the proceedings by which a determination is 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." See Dorsen and Rezneck, *supra* note 59 at 7; *In re Winship*, No. 778 argued 1/20/70, 6 CrL 4130, 4131 (1/28/70), where Miss Rena K. Uviller, arguing for the juvenile, argued that the standard "beyond a reasonable doubt" should be applied to both delinquents and Pins because in both cases misconduct is charged.

⁶⁵ *Gault* at 17.

⁶⁶ *Gault* at 22.

⁶⁷ *Gault* at 24 n. 31, ". . . (T)he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision,' usually shortened to 'pins.'"

⁶⁸ Task Force, *supra* note 62, at 26. Avoiding stigma is the first reason suggested for the modern move to retain jurisdiction over noncriminal behavior while using a label other than delinquency. The second reason is to restrict court powers. It is noted that, "an alleged delinquent, but not an alleged PINS, may be detained . . . may be committed." The Task Force admits that stigma is attaching to the new label. *Herzford v. Parker*, 396 F. 2d 393 (10th Cir. 1968); The court emphasized that the likelihood of involuntary incarceration was the key, and said the labels, civil or criminal, are immaterial, just as are the labels mental incompetents or delinquent. Commitment commands observance of due process concepts.

⁶⁹ Ohio Rev. Code § 2151.02: "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'delinquent child' includes any child: (A) who violates any law of this state, the United States, or any ordinance or regulation of a political subdivision of the state, which would be a crime if committed by an adult, except as provided in section 2151.021 of the Revised Code; . . ." See also OCC 2151.01(A) (17) (a); UJCA section 2(2).

an open-ended boiler plate clause⁷⁰ (as does the Crime Commission Bill) which extends jurisdiction as far as any court might want.⁷¹ The Uniform Act does not contain such a broad provision. However, The Standards⁷² approach the defect by allowing similar dispositions for both delinquent and unruly children. Such a grant of power is clearly contrary to the recommendations of *The Challenge*.⁷³

Possible dispositions of delinquents⁷⁴ include commitment to the Ohio Youth Commission⁷⁵ and (for males sixteen or over who have committed a felony) to any maximum security insti-

⁷⁰ Ohio Rev. Code § 2151.02(B): "Who violates any lawful order of the court made under this chapter." See OCC 2151.01(A) (17) (b and c).

⁷¹ Repealed § 2151.02 was as restricted in that the legislature established only five basic categories of delinquency. It did not give the judiciary carte blanche, as the new code does, to redefine delinquency with regard to each child who appears before it. *Gault* at 18 says, "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Certainly, Dean Pounds comment, "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . ." is specifically appropriate to this section of our new code. See Hall, *General Principles of Criminal Law* at 48 n. 60 (2nd ed. 1960), where he quotes the German Legislation of June 28, 1935: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act."

⁷² The Standards at 85-86.

⁷³ *Supra* text accompanying notes 55-63.

⁷⁴ Ohio Rev. Code § 2151.355: "If the child is found to be a delinquent child, the court may make any of the following orders of disposition: (A) Any order which is authorized by section 2151.353 of the Revised Code; (B) Place the child on probation under such conditions as the court prescribes; (C) Commit the child to the temporary custody of any school, camp, institution or other facility for delinquent children operated for the care of such children by the county or by a private agency or organization, within or without the state, which is authorized and qualified to provide the care, treatment, or placement required; (D) Commit the child to the legal custody of the Ohio Youth Commission; (E) Commit a male child sixteen years of age or over who has committed an act which if committed by an adult would be a felony to a maximum security institution operated by the Department of Mental Hygiene and Correction, for the training and rehabilitation of such delinquent children; (F) Impose a fine not to exceed fifty dollars; (G) Suspend or revoke the operator's or chauffeur's license issued to such child, or suspend or revoke the registration of all motor vehicles registered in the name of such child; (H) Make such disposition as authorized by section 2947.25 of the Revised Code, if the child would come within the purview of such section if he were an adult; (I) Make such further disposition as the court finds proper.

⁷⁵ Ohio Rev. Code §§ 5139.01 through 5139.99 (1965).

tution in the state.⁷⁶ This latter section appears to be invalid.⁷⁷ In addition to some less serious dispositional possibilities, section (A) allows any disposition authorized for neglected or dependent children.⁷⁸ Neglected or dependent children can be taken from their parents, who are divested of all legal rights due from them, and given to the permanent custody of the County Department of Welfare for the purposes of adoption or whatever.⁷⁹ The Uniform Act limits termination of parental rights to situations of abandonment and neglect,⁸⁰ and does not permit the same in the case of delinquent or unruly children. Also, it does not include dependency under its coverage at all, reasoning that since dependency is no more than an economic problem, other welfare agencies should handle it.⁸¹ One hopes that this dispositional possibility (termination of parental rights in delinquency cases) is merely the result of a mistake⁸² in draftsmanship.

Another category of children over which the court is given jurisdiction is "juvenile traffic offender."⁸³ Opinion varies as to

⁷⁶ Repealed § 2151.35(E) limited such commitment to the Ohio State reformatory. See *Cope v. Campbell*, 175 Ohio St. 475, 196 N.E. 2d 457 (1964); *In Re Agler*, 15 Ohio App. 2d 240 (1968).

⁷⁷ See *State v. Fisher*, 17 Ohio App. 2d 183, 245 N.E. 2d 358 (1969); *In Re Baker*, 20 Ohio St. 2d 142, 254 N.E. 2d 363 (1969); *Gault* at 22, n. 30. See also Ketcham and Paulsen, *Juvenile Courts* 137 (1967); UJCA Section 31, and Comment after Section 33; The Standards at 86 which says, "No direct commitments to penal institutions for persons convicted of crimes should be permitted through the noncriminal proceedings of the specialized court."

⁷⁸ Ohio Rev. Code § 2151.353. OCC 2151.39 allows transfer of legal custody for purpose of adoption, but provides that it can be done only if the parent cannot or will not exercise parental responsibilities.

⁷⁹ Ohio Rev. Code § 2151.353 (second paragraph of D): "No order for permanent custody shall be made at the hearing wherein the child is adjudicated neglected or dependent except and unless the complaint alleging the neglect or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights."

⁸⁰ UJCA section 47. A dependent child, under our code, is not the same as an abandoned one.

⁸¹ UJCA Comment after Section (5).

⁸² See Repealed Ohio Rev. Code § 2151.35 (B).

⁸³ Ohio Rev. Code § 2151.021: "A child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or of any political subdivision of this state, shall be designated as a 'juvenile traffic offender.'" ORC 2151.356: "If the child is found to be a juvenile traffic offender the court may make any of the following orders of disposition: (A) Impose a fine not to exceed fifty dollars; (B) Suspend the child's operator's or chauffeur's license or the registration of all motor vehicles registered in the name of such child for such period as the court prescribes; (C) Revoke the child's operator's or chauffeur's license or the registration of all motor vehicles registered in the name of such child; (D) Place the child on probation; (E) Require the child to make restitution for all damages caused by his traffic violation or any part thereof."

whether a traffic court might not handle this problem better.⁸⁴ The Uniform Act authorizes regular delinquency treatment for some of the more serious traffic offenders; but The Standards suggest that legislation should not permit the same type of disposition of juvenile traffic transgressors as is allowed for other types of delinquents.⁸⁵ Both Ohio's new code and the Crime Commission Bill prohibit commitment of juvenile traffic offenders. However, the former provides that a child who (1) fails to comply with the orders of the court, and (2) continues to drive dangerously can be treated as a delinquent;⁸⁶ while the latter defines a delinquent as one who has "habitually violated an order of the court" made in connection with a prior traffic offender determination.⁸⁷ In view of this potential delinquency disposition, with commitment until the youth attains the age of twenty-one allowable, it would seem that *Gault* might apply,⁸⁸ even as to the original proceedings which resulted in the juvenile traffic offender finding.

Ohio's new code establishes a new category called "unruly child,"⁸⁹ and uses it as a catch-all "to bring within the court's

⁸⁴ UJCA section 44. The Standards at 37. OCC 2151.19 and 2151.42. The Uniform Act excludes serious traffic offenses such as traffic homicide, driving while intoxicated, and the like from this category thus allowing such violations of law to remain a part of "delinquency." In addition, the juvenile judge, if he finds it advisable, may place others of the less serious violations on the delinquency calendar.

⁸⁵ The Standards at 38.

⁸⁶ Ohio Rev. Code § 2151.356 (E) continued: "If after making such disposition the court finds upon further hearing that the child has failed to comply with the orders of the court and his operation of a motor vehicle constitutes him a danger to himself and to others, the court may make any disposition authorized by section 2151.355 of the Revised Code." See also, § 2151.02 (B) (Delinquent defined): "Who violates any lawful order of the court made under this chapter." See also, text corresponding to footnotes 78 through 82.

⁸⁷ OCC 2151.01 (A) (17) (C). OCC 2151.42.

⁸⁸ *Supra* note 64.

⁸⁹ Ohio Rev. Code § 2151.022: "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'Unruly child' includes any child: (A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient; (B) Who is an habitual truant from home or school; (C) Who so deports himself as to injure or endanger the health or morals of himself or others; (D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodians, legal guardian, or other legal authority; (E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons; (F) Who engages in an occupation prohibited by law or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others; (G) Who has violated a law applicable only to a child." See also OCC 2151.01 (A) (18).

jurisdiction virtually every child in need of help.”⁹⁰ It includes those who were previously defined as delinquent but who are now outside the definition⁹¹ as well as some who previously were called neglected.⁹² The Uniform Act⁹³ uses the category, but restricts its definition to those who are “habitually” truant, “habitually” disobedient,⁹⁴ or who have violated a law applicable to a child. These three Uniform Act categories are contained in Sections (A), (B) and (G) of the new code, which similarly requires “habitual” behavior. Section (D) prohibits a marriage without consent, and (C), (E), and (F) are memorials to all that inspired the original juvenile court reform movement.⁹⁵ Section (D) appears unnecessary in that its contents are also covered by Section (G) of the code, and the remaining three sections are without definable limits understandable to a child, attorney, or judge.

Disposition of unruly children⁹⁶ poses the same “permanent custody” problem mentioned earlier, in connection with delinquent children.⁹⁷ Probation is allowable under such conditions as the court prescribes;⁹⁸ and, in addition, the court is given authority to treat the child as a delinquent if they find that “the child is not amenable to treatment or rehabilitation” under their prior order.⁹⁹ In view of the fact that § 2151.02 (B) covers any child who has violated a court order, this section must be intend-

⁹⁰ *The Challenge* at 84.

⁹¹ See Repealed Ohio Rev. Code § 2151.02 (B), (C), (D) and (E).

⁹² See Repealed Ohio Rev. Code § 2151.03 (E) and (F).

⁹³ UJCA Section 2(4). See OCC 2151.01 (A) (18).

⁹⁴ *The Challenge* at 85, *supra* note 61.

⁹⁵ See text corresponding to footnotes 54 through 68.

⁹⁶ Ohio Rev. Code § 2151.354: “If the child is adjudged unruly the court may: (A) Make any of the dispositions authorized under section 2151.353 of the Revised Code; (B) Place the child on probation under such conditions as the court prescribes; (C) Suspend or revoke the operator’s or chauffeur’s license issued to such child; suspend or revoke the registration of all motor vehicles registered in the name of such child. If after making such disposition the court finds, upon further hearing, that the child is not amenable to treatment or rehabilitation under such disposition, the court may make a disposition otherwise authorized under section 2151.355 of the Revised Code.” See also OCC 2151.40.

⁹⁷ See text corresponding to footnotes 78 through 82.

⁹⁸ UJCA, section 31, says in the comment: “The court may restrict the use of an automobile and impound the license plates as one of the conditions” of probation.

⁹⁹ Ohio Rev. Code § 2151.354 (c). OCC 2151.40(4) (B) specifically prevents commitment of unruly children to institutions or facilities designed for delinquents.

ed to escalate an unruly child who does not violate a court order up into delinquency status. Since we may not even know what an "unruly child" is,¹⁰⁰ it seems a shame to treat him as a delinquent for something he has not done.

Ohio's new sections defining "neglected"¹⁰¹ and "dependent" children¹⁰² are basically the same as the corresponding old sections. However, some paragraphs are transposed from the old "dependent children" section to the new "neglected children" section; and some paragraphs formerly found in the "neglected children" section are included in the new "unruly child" category.¹⁰³

One paragraph has been added to the "neglected children" section, which (among other things) relieves the juvenile judge of responsibility for ordering a blood transfusion for a child whose doctors recommend the same but whose parents object for religious reasons.¹⁰⁴ If the main thrust of the new code is really "the interests of the child," then it would seem that the legislation should not relieve the judge of this responsibility. This decision probably involves weighing the child's right to live on one hand, against the religious freedom of the parent on the other.¹⁰⁵

¹⁰⁰ See text corresponding to footnotes 54 through 68.

¹⁰¹ Ohio Rev. Code § 2151.03: "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'neglected child' includes any child: (A) Who is abandoned by his parents, guardian, or custodian; (B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian; (C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being; (D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition; (E) Whose parents, legal guardian, or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code. A child who in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion, is not a neglected child for this reason alone." See also OCC 2151.01 (A) (19).

¹⁰² Ohio Rev. Code § 2151.04: "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child: (A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian; (B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian; (C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

¹⁰³ (D) of Repealed 2151.04 (dependent child) is now (E) of new 2151.03 (neglected child), and (E) and (F) of Repealed 2151.03 (neglected child) are now (E) and (F) of new 2151.022 (unruly child).

¹⁰⁴ Ohio Rev. Code § 2151.03 (last paragraph), *supra* n. 101.

¹⁰⁵ *In re Clark*, 90 Abs. 21, 185 N.E. 2d 128 (1962); See also *State v. Perricone*, 37 N.E. 463, 181 A. 2d 751 (1962).

This is different from honoring the religious principle of the parent when it is his own life at risk.¹⁰⁶

The "dependent child" section remains in the code even though The Standards exclude it and have since 1933.¹⁰⁷ It is said in The Standards: "Unless there is an element of neglect involved, the court's jurisdiction should not be exercised" for economic reasons alone.¹⁰⁸

Disposition of both neglected and dependent children includes the potential of a change of permanent custody and a permanent divestment of parental rights.¹⁰⁹ It is submitted that this represents an unwarranted grant of power. This is one of the areas in which the present jurisdiction of the court should be restricted.

It is fair to conclude that Ohio's 1969 code revision did not eliminate vague definitions, did not reduce juvenile court jurisdiction over non-criminal matters, and did not restrict disposition potential at all. If Pound was right in 1937, he is right today.¹¹⁰

¹⁰⁶ See *Application of President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000 (D.C. Cir. 1964).

¹⁰⁷ The Standards at 34, especially n. 60. UJCA Section 2, (5) Comment.

¹⁰⁸ The Standards at 34.

¹⁰⁹ Ohio Rev. Code § 2151.353: "If the child is adjudged a neglected or dependent child, the court may make any of the following orders of disposition: (A) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child; (B) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission or the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state or a probation officer for placement in a certified foster home; (C) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires; (D) Commit the child permanently to the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them. No order for permanent custody shall be made at the hearing wherein the child is adjudicated neglected or dependent except and unless the complaint alleging the neglect or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights." See also OCC 2151.39.

¹¹⁰ The Standards at 5. *Gault* at 18.

IV. Complaint, Pre-Hearing Procedure and Detention

A child may find himself involved with a juvenile court for any of the reasons listed in the jurisdictional section of the code.¹¹¹ If he is arrested¹¹² as if he were an adult and is taken before some other court, it is provided that his case shall be transferred to the exclusive jurisdiction of the juvenile court.¹¹³ The code also provides that he can be taken into custody because he appears neglected, is in immediate danger from his surround-

¹¹¹ Ohio Rev. Code § 2151.23 (A) *supra* n. 50. "(B) The juvenile court has original jurisdiction under the Revised Code: (1) To hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance; (2) To determine the paternity of any child alleged to have been born out of wedlock pursuant to Chapter 3111. of the Revised Code; (3) Under the uniform support of dependents act in Chapter 3115. of the Revised Code. (C) The juvenile court, except as to juvenile courts which are a separate division of the court of common pleas, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children filed in the court of common pleas and certified by the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court except as to awards for alimony or support due and unpaid at the time of certification, over which the court has no jurisdiction. (D) The juvenile court has jurisdiction to hear and determine all matters as to custody and support of children duly certified by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the common pleas court as the same relate to the custody and support of children. (E) The juvenile court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction if such child comes within the jurisdiction of the court as defined by this section." See also OCC 2151.18.

¹¹² Ohio Rev. Code § 2151.31: "A child may be taken into custody: (A) Pursuant to an order of the court under this chapter; (B) Pursuant to the laws of arrest; (C) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, as defined in section 2151.03 of the Revised Code, or is in immediate danger from his surroundings, and that his removal is necessary; (D) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian. 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. 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 and property of others of those of the child, or because the child may abscond or be removed from the jurisdiction of the court, or because he has no parents, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required, or because an order for his detention or shelter care has been made by the court pursuant to this chapter." See also OCC 2151.25.

¹¹³ Ohio Rev. Code § 2151.25, *supra* note 51. OCC 2151.26.

ings, or has run away.¹¹⁴ Also, if a complaint has been filed, a youth may be seized upon an order of the court.¹¹⁵ However, it is made clear that his seizure shall not be considered an arrest except for purposes of testing its constitutional validity.¹¹⁶

Immediately after being arrested or taken into custody, the child must be returned and released to his parents;¹¹⁷ or when that is not possible, delivered to the court or designated place of detention along with a written notice as to the reasons therefor.¹¹⁸ At this initial intake stage the intake officer must make an investigation¹¹⁹ and release the child to his parents if possible.¹²⁰ If not, a complaint must be filed and an informal detention hearing held promptly, or at least within seventy-two hours. Of course, proper notice of this hearing must be given and the parties must be informed of their right to counsel. Counsel must be appointed if they are indigent.¹²¹ Section 2151.314 also re-

¹¹⁴ Ohio Rev. Code § 2151.31 (C) and (D), *supra* note 112. OCC 2151.26.

¹¹⁵ Ohio Rev. Code § 2151.31 (A), *supra* note 112. OCC 2151.26(A).

¹¹⁶ Ohio Rev. Code § 2151.31 (D), *supra* note 112. See OCC 2151.26 and UJCA, section 13, which contains similar provisions.

¹¹⁷ Ohio Rev. Code § 2151.311: "(A) A person taking a child into custody shall, with all reasonable speed and without first taking the child elsewhere, either: (1) Release the child to his parents, guardian, or other custodian upon their written promise to bring the child before the court when requested by the court, unless his detention or shelter care appears to be warranted or required as provided in § 2151.31 of the Revised Code."

¹¹⁸ Ohio Rev. Code § 2151.311 (A): "(2) Bring the child to the court or deliver him to a place of detention or shelter care designated by the court and promptly give written notice thereof, together with a statement of the reason for taking the child into custody, to a parent, guardian, or other custodian and to the court. Any temporary detention or inquiry of the child necessary to comply with division (A) (1) of this section shall conform to the procedures and conditions prescribed by this chapter and rules of court. (B) If a parent, guardian, or other custodian fails, when requested, to bring the child before the court as provided by this section, the court may issue its warrant directing that the child be taken into custody and brought before the court." See also OCC 2151.27 (A) (2).

¹¹⁹ Ohio Rev. Code § 2151.314: "When a child is brought before the court or delivered to a place of detention or shelter care designated by the court, the intake or other authorized officer of the court shall immediately make an investigation and shall release the child unless it appears that his detention or shelter care is warranted or required under § 2151.31 of the Revised Code. . . ." See also OCC 2151.28.

¹²⁰ UJCA sections 14, 15, 16, and 17. The comment after Section 14 says, "Its provisions are consistent with not only current juvenile court acts but the modern trend not to hold persons in confinement when not necessary to assure their appearance in court."

¹²¹ Ohio Rev. Code § 2151.314 "If he is not so released, a complaint under § 2151.27 of the Revised Code shall be filed and an informal detention hearing held promptly, not later than seventy-two hours after he is placed in detention, to determine whether detention or shelter care is required. Rea-

(Continued on next page)

quires the court to inform the child of his right to remain silent, but only in delinquency cases.¹²² Again, at this detention hearing stage, the statute requires release unless there is a finding that detention is required by another section.¹²³

The complaint may be filed in the county where the child resides or where the offense occurred,¹²⁴ may be on information and relief, and must allege both the statutory language and the particular facts relied upon.¹²⁵ Both The Standards and the Uniform Act provide for screening at intake by a court officer to determine whether the interests of the public or of the child require further action.¹²⁶ The Ohio act does not provide for intake screening, and the sections listing the contents of the complaint do not require an allegation that the child is "in need of treat-

(Continued from preceding page)

sonable oral or written notice of the time, place, and purpose of the detention hearing shall be given to the child and, if they can be found, to his parents, guardian, or other custodian. Prior to the hearing, the court shall inform the parties of their right to counsel and to appointed counsel if they are indigent, . . ." See also OCC 2151.35.

¹²² Ohio Rev. Code § 2151.314: ". . . and of the child's right to remain silent with respect to any allegation of delinquency. . . ."

¹²³ Ohio Rev. Code § 2151.314: "Unless it appears from the hearing that the child's detention or shelter care is required under the provisions of section 2151.31 of the Revised Code, the court shall order his release as provided by section 2151.311 of the Revised Code. If a parent, guardian, or custodian has not been so notified and did not appear or waive appearance at the hearing, upon filing of his affidavit stating these facts, the court shall rehear the matter without unnecessary delay." See also OCC 2151.28.

¹²⁴ Ohio Rev. Code § 2151.27: "Any person having knowledge of a child who appears to be a juvenile traffic offender or to be delinquent, unruly, neglected, or dependent may, with respect to such child, file a sworn complaint in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, unruliness, neglect, or dependency occurred." See also OCC 2151.30 and 31; UJCA, Sections 20 and 21.

¹²⁵ Ohio Rev. Code § 2151.27: "Such sworn complaint may be upon information and belief, and in addition to the allegation that the child is delinquent, unruly, neglected, dependent, or a juvenile traffic offender, the complaint must allege the particular facts upon which the allegation of delinquency, unruliness, neglect, dependency, or juvenile traffic offender is based. Whenever a child, before arriving at the age of eighteen years, allegedly commits an act for which he may be adjudged delinquent, unruly, or a juvenile traffic offender, and the specific complaint thereon is not filed or a hearing held until after said child arrives at the age of eighteen years, the court has jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years. If the complainant in a neglect or dependency case is requesting permanent custody of the child or children, the complaint shall contain a prayer specifically requesting such custody."

¹²⁶ UJCA section 19, requires findings as to these "interests" before filing. The Standards, page 53, point out that one-half the states require screening now, and failure to do so is grounds for reversal. The Crime Commission bill includes no such requirement.

ment and rehabilitation."¹²⁷ Justice Fortas said, if "special procedures for juveniles" are justified, it would only be because of the "special considerations and treatment afforded them."¹²⁸ He also wondered (in *Gault*) why the juvenile judge did not make the traditional careful inquiry as to whether home discipline would not be adequate, rather than concentrating solely on the behavior of the child.¹²⁹ It is quite possible that *Gault* requires an allegation that the child is in need of treatment and rehabilitation and a finding of fact to support it.¹³⁰ Such a requirement would support the fundamental concept of juvenile justice,¹³¹ and should surely be included as a legislative standard.

Before holding a hearing on the merits of the complaint, when the alleged act charged would be a felony if committed by an adult, the court may hold a hearing to transfer the case to the criminal court.¹³² *Kent* establishes the minimum requisites for this hearing.¹³³ They include hearing, counsel, finding of facts, and a statement of reasons therefor. The Ohio act, as well as the Crime Commission Bill and the Uniform Act, states these requirements properly.

Both the Crime Commission Bill and the Uniform Act require that the child be at least sixteen years old, while the Ohio act specifies fifteen.¹³⁴ The court must find probable cause that the child committed the act,¹³⁵ that the child is not mentally

¹²⁷ UJCA, Prefatory Note, says of *Gault* and *Kent*, ". . . (I)f the departures in juvenile court from criminal procedure are to be justified when delinquent conduct is alleged involving what for an adult would be a criminal act, the juvenile court proceedings and dispositions must be governed in fact by the objectives of treatment and rehabilitation." See also comment after Section 21. Consider Ohio Rev. Code § 2151.01(B); Note, 53 *Vo. L. Rev.* 1134 (1967); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967).

¹²⁸ *Gault* at 22 n. 30.

¹²⁹ *Gault* at 28.

¹³⁰ See Dorsen and Reznick, *In Re Gault and the Future of Juvenile Law*, 1 *Fam. L. Quar.* 1, 45 (No. 4, Dec. 1967).

¹³¹ The Standards at 1, "Philosophy of the Court." See ORC 2151.01(B).

¹³² Ohio Rev. Code § 2151.26(A): "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, before hearing the complaint on its merits, transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making, in order, the following determination." See also OCC 2151.54; UJCA, Section 34; Standards at page 34.

¹³³ *Kent v. United States*, 383 U.S. 541 (1966).

¹³⁴ Ohio Rev. Code § 2151.26(A)(1): "The child was fifteen or more years of age at the time of the conduct charged."

¹³⁵ Ohio Rev. Code § 2151.26(A)(2): "There is probable cause to believe that the child committed the act alleged."

ill,¹³⁶ that he is not amenable to rehabilitation as a delinquent,¹³⁷ and that the safety of the community requires lengthy incarceration.¹³⁸

Notice must be given to the child's parents and counsel at least three days prior to the hearing.¹³⁹ The Uniform Act provides that anything he says at this hearing shall not be admissible over his objection in his subsequent criminal trial, but the Ohio act is silent on this matter. It would appear that, in order to have a meaningful hearing as required by *Kent*, the Uniform Act provision may be a necessity.¹⁴⁰

When the decision to transfer has been made, the child is turned over to the appropriate officer in accordance with the provisions of the criminal law.¹⁴¹

When a hearing on the merits is required, the court is direct-

¹³⁶ Ohio Rev. Code § 2151.26(A) (3): "After an investigation including a mental and physical examination of such child made by the Ohio youth commission, a public or private agency, or a person qualified to make such examination, that there are reasonable grounds to believe that: (a) He is not committable to an institution for the mentally retarded or mentally ill."

¹³⁷ Ohio Rev. Code § 2151.26(A) (3) (b): "He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children." See also text corresponding to footnotes 127 through 131.

¹³⁸ Ohio Rev. Code § 2151.26(A) (3) (c): "The safety of the community requires that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority."

¹³⁹ Ohio Rev. Code § 2151.26: "(B) 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. (C) No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen unless the case has been transferred as provided in this section. Any prosecution that is had in a criminal court on the mistaken belief that the child was over eighteen years of age at the time of the commission of the offense shall be deemed a nullity and the child shall not be considered to have been in jeopardy on the offense. (D) Upon such transfer the juvenile court shall state the reasons therefor and order such child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for such disposition as such court is authorized to make for a like act committed by an adult. Such transfer terminates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint."

¹⁴⁰ UJCA section 34, Comments. See *State v. Arverter*, 6 CrL 2346 (Mo. Sup. Ct., 1/12/70).

¹⁴¹ Ohio Rev. Code § 2151.312(A) (4): "If a case is transferred to another court for criminal prosecution, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime."

ed to schedule it within ten days if the child is being detained.¹⁴² Summons is sent to the parents, guardian, custodian, the person who has physical custody or with whom the child resides, and to such other persons as appear necessary. A copy of the complaint is included.¹⁴³

The summons is required to contain an explanation if permanent custody is in issue,¹⁴⁴ and it may contain orders for parents or guardians to appear with the child.¹⁴⁵ It must contain notice that any party is entitled to counsel and that counsel will be furnished for the indigent.¹⁴⁶ The summons may authorize an immediate taking of the child into custody,¹⁴⁷ and the statute

¹⁴² Ohio Rev. Code § 2151.28(A): "After the complaint has been filed, the court shall fix a time for hearing, which, if the child is in detention, shall not be later than ten days after the filing of the complaint." See also UJCA, Section 22. OCC 2151.32 provides that the hearing should be within seven days.

¹⁴³ Ohio Rev. Code § 2151.28(A): "It shall direct the issuance of a summons directed to the child except as provided by this section, the parents, guardian, custodian, or other person with whom the child may be and such other persons as appear to the court to be proper or necessary parties to the proceedings, requiring them to appear before the court at the time fixed to answer the allegations of the complaint. A child alleged to be neglected or dependent shall not be summoned unless the court so directs. A summons issued for a child who is under fourteen years of age and who is alleged to be a delinquent or unruly child or a juvenile traffic offender shall be served on his parent, guardian, or custodian in his behalf. If the person who has physical custody of the child, or with whom the child resides, is other than the parent or guardian, then the parents and guardian shall also be summoned. A copy of the complaint shall accompany the summons."

¹⁴⁴ Ohio Rev. Code § 2151.28(A): "If the complaint contains a prayer for permanent custody in a neglect or dependency case, the summons served on the parents shall contain an explanation that the granting of such custody permanently divests the parents of their parental rights and privileges." See also Ohio Rev. Code § 2151.28(F): "Before any temporary commitment is made permanent, the court shall fix a time for hearing and shall cause notice by summons to be served upon the parent or guardian of the child, or published, as provided in § 2151.29 of the Revised Code. Such summons shall contain an explanation that the granting of permanent custody permanently divests the parents of their parental rights and privileges."

¹⁴⁵ Ohio Rev. Code § 2151.28(B): "The court may endorse upon the summons an order directing the parents, or guardian of the child, or other person with whom the child may be to appear personally at the hearing and directing the person having the physical custody or control of the child to bring the child to the hearing."

¹⁴⁶ Ohio Rev. Code § 2151.28(C): "The summons shall contain a statement advising that any party is entitled to counsel in the proceedings and that the court will appoint counsel if the party is indigent."

¹⁴⁷ Ohio Rev. Code § 2151.28(D): "If it appears from affidavit filed or from sworn testimony before the court that the conduct, condition, or surroundings of the child are endangering his health or welfare or those of others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court, notwithstanding the service of the sum-

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allows waiver of service by parties other than the child.¹⁴⁸ Subpoena power is also expressly given.¹⁴⁹ The mechanical processes for both personal service and constructive service are provided.¹⁵⁰

In certain cases, to protect the child, the code provides for appointment of a Guardian Ad Litem.¹⁵¹ This procedure is followed when: the child has no parent; a conflict exists between child and parent; the parent is mentally incompetent; or the parent is under eighteen.

During this period of detention, the child normally may not be held in jail, the code allows such incarceration, when necessary, for delinquents, unruly children, or juvenile traffic offenders.¹⁵²

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mons, the court may endorse upon the summons an order that a law enforcement officer shall serve the summons and shall take the child into immediate custody and bring him forthwith to the court."

¹⁴⁸ Ohio Rev. Code § 2151.28(E): "A party, other than the child, may waive service of summons by written stipulation."

¹⁴⁹ Ohio Rev. Code § 2151.28(G): "Any person whose presence is considered necessary and who is not summoned may be subpoenaed to appear and testify at the hearing. Any one summoned or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas." See also OCC 2151.33.

¹⁵⁰ Ohio Rev. Code § 2151.29. OCC 2151.34.

¹⁵¹ Ohio Rev. Code § 2151.281: "The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent, unruly, neglected, or dependent child when: (A) The child has no parent, guardian, or legal custodian; (B) The court finds that there is a conflict of interest between the child and his parent, guardian, or legal custodian. In any proceeding concerning an alleged or adjudicated delinquent, unruly, neglected, or dependent child where the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of such parent. The court shall require such guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another. The court may fix compensation for the service of the guardian ad litem which shall be paid from the treasury of the county. A parent who is eighteen years of age or older and not mentally incompetent shall be deemed sui juris for the purpose of any proceeding relative to his child alleged or adjudicated to be a neglected or dependent child. In any case wherein a parent of a child alleged or adjudicated to be a neglected or dependent child is under eighteen years of age, the parents of said child shall be summoned to appear at any hearing respecting the alleged or adjudicated to be a neglected or dependent child."

¹⁵² Ohio Rev. Code § 2151.312(A): "A child alleged to be delinquent, unruly, or a juvenile traffic offender may be detained only in the following places: (1) A certified foster home or a home approved by the court; (2) A facility operated by a certified child welfare agency; (3) A detention home or center for delinquent children which is under the direction or supervision of the court or other public authority or of a private agency and

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The Uniform Act allows detention in jail under substantially the same circumstances as specified in the Ohio act, but only for delinquents.¹⁵³ It recognizes the potential harm that may result from mixing children with adult criminals, and it specifically provides that neglected and unruly children shall not be detained with either delinquents or adult criminals.¹⁵⁴

During this period of detention or during an investigation of a crime, the child may be fingerprinted or photographed.¹⁵⁵ The act requires law enforcement officers to have probable cause before they take fingerprints, and to turn the fingerprints and photographs over to the juvenile court when they no longer need them. The juvenile court is supposed to destroy them if a complaint is not filed or is dismissed, or if the child reaches the age of twenty-one and does not have a record after attaining the age of eighteen.

The Code also provides that the court can keep a child in

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approved by the court; (4) Any other suitable place designated by the court. A child may be detained in jail or other facility for detention of adults only if the facility in division (A) (3) of this section is not available and the detention is in a room separate and removed from those for adults. The court may order that a child over the age of fifteen years be detained in a jail in a room separate and removed from adults if public safety and protection reasonably require such detention. The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child, who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court." See OCC 2151.52.

¹⁵³ UJCA section 16.

¹⁵⁴ Ohio Rev. Code § 2151.312(B): "A child alleged to be neglected or dependent shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent unless upon order of the court." See *The Standards* at 60.

¹⁵⁵ Ohio Rev. Code § 2151.313: "No child shall be fingerprinted or photographed in the investigation of a crime without the consent of the judge, except as provided in this section. Fingerprints of a child may be taken by law enforcement officers investigating the commission of an act which would be a felony if committed by an adult when there is probable cause to believe that the child may have been involved in the felonious act being investigated. Unless otherwise ordered by the court, originals and all copies of such fingerprints or photographs shall be delivered to the juvenile court after use for their original purpose for such further use and disposition as the court directs. Fingerprints and photographs of a child shall be removed from the file and destroyed if: (A) A complaint is not filed or is dismissed after having been filed; (B) The child reaches twenty-one years of age and there has been no record that he committed a criminal offense after reaching eighteen years of age." See also UJCA, section 56; OCC 2151.57; *The Standards* at 50-52.

detention for no more than ninety days¹⁵⁶ while it is having the various studies made that will aid it in making a disposition.

Whenever these sections are amended, it is hoped that the legislature will add a specific provision governing what is normally called "informal adjustment."¹⁵⁷ The Standards point out that over half the states provide for court intake procedures now, with the basic issue being "whether the interests of the public or of the child require that further action be taken."¹⁵⁸ Certainly too, the complaint should contain an allegation that would force the court to focus on the need for treatment and rehabilitation,¹⁵⁹ rather than on the act or commission thereof. In addition, during transfer hearings, the desirability of the child's speaking freely should be recognized by providing that anything that he says cannot be used against him at a later stage.¹⁶⁰ Both the Crime Commission Bill and the original draft of the new code prohibit the placing of children in jails after June 30, 1972.¹⁶¹ It is hoped that this or a comparable limitation will soon be enacted. Clearly, a legislative spur is needed to bring about the development of detention centers¹⁶² in most of the counties in our state. All in all, the 1969 legislative modifications of these sections were minor and seem to have been designed merely to meet, or give the appearance of meeting, the constitutional minimums established by *Gault* and *Kent*. It would seem that the desirable recommendations of *The Challenge*, *The Standards*, and the Uniform Act should have been seriously considered by the legislature.¹⁶³

¹⁵⁶ Ohio Rev. Code § 2151.34: "No child under eighteen 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. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders."

¹⁵⁷ UJCA section 10. See *Gault* at 31 n. 48.

¹⁵⁸ *The Standards* at 53. Note that failure to conform to these requirements have been grounds for reversal.

¹⁵⁹ *Supra* notes 127 through 131.

¹⁶⁰ *Supra* note 140.

¹⁶¹ OCC 2151.52. Sub. H.B. No. 320 allowed it for those over fifteen who were charged with a felony.

¹⁶² Ohio Rev. Code §§ 2151.34 through 2151.3415 (1965).

¹⁶³ *Supra* text corresponding to note 17. I do not suggest that the Crime Commission offering was perfect, but I do regret that it was totally ignored.

V. The Hearing

The new code, along with the Uniform Act and the Crime Commission Bill, continues the concept of an informal, private, non-jury hearing for children.¹⁶⁴

The Uniform Act restricts its coverage to those proceedings affecting the status or custody of children,¹⁶⁵ but the Ohio codes contemplate a continuing jurisdiction over both children and adults.¹⁶⁶ This retained jurisdiction over adults forces one to acknowledge the fact that our juvenile courts have held, and will continue to hold, public trials and hearings, for *adults* only, following ordinary rules of evidence, with all the formality usually found in a criminal court, including full-blown jury trials.¹⁶⁷

In spite of the unique judicial expertise available within our juvenile courts, the legislature chose to continue the experiment with informal process.¹⁶⁸ As *Gault* points out, due process has

¹⁶⁴ Ohio Rev. Code § 2151.35: "The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected and dependent children. The court shall hear and determine all cases of children without a jury." UJCA, Section 24. OCC 2151.36.

¹⁶⁵ UJCA section 3.

¹⁶⁶ Ohio Rev. Code §§ 2151.23(A) (6), 2151.41-2151.54, 2151.99; OCC 2151.18, 2151.79-2151.89, 2151.99.

¹⁶⁷ *State v. Miclau*, 167 O.S. 38, 146 N.E.2d 293 (1957); *State v. Griffin*, 93 Ohio App. 299, 106 N.E.2d 668 (1952). See Merrick-Rippner, *Ohio Probate Law* (2nd. ed. 1967), Chapter T 251(3) at 295 where Past practice is described: "The differences and peculiarities in Juvenile Court practice are frequently over-emphasized. . . . In respect to practice and procedure in criminal cases against adults in the Juvenile Court there is no variance from the rules which prevail in other courts." Chapter T 255(1) at 297, Prior to our new legislation, the Juvenile Court of Cuyahoga County was separate and independent; of the remaining eighty-seven Counties, twelve have courts established within the Common Pleas Court, and seventy-five are established within the Probate court. In any event, probate courts use juries and the formal procedures associated therewith in their probate work as well as under Sections 2151.41 to 2151.54 of our juvenile code. Also, the separate juvenile courts have exercised this jurisdiction over adult cases in the past and will continue to do so in the future, and hence, have used and are familiar with juries and formal procedures. Section 2151.47 establishes procedure for jury trials in juvenile courts, and specifies that it's the criminal panel of jurors referred to. It has been estimated that a juvenile court may try up to twelve jury cases a year. The Modern Courts Amendment gives probate courts the status of common pleas courts, and our new code, Section 2151.011(A) (1) defines 'Juvenile Court' as: ". . . the division of the court of common pleas or a juvenile court separately and independently created. . . ." See also 33 O. Jur. 2d, *Juvenile Courts*, §§ 71 through 73.

¹⁶⁸ *Gault* at 11 n. 7; and also part II at 12. See Paulsen, *The Child, the Court, and the Commission*, 18 Juv. Ct. J. 79 (1967).

an impact on juvenile court informality; and as *Kent* says, "(T)he hearing must measure up to the essentials of due process and fair treatment."¹⁶⁹

Informal proceedings have always been considered a bench mark of juvenile law, though it has been said that informality should not contemplate an absence of rules of evidence¹⁷⁰ or rules of procedure. This desired informality has been defined as "an absence of those technicalities which are not essential to justice and which tend to confuse or intimidate a child."¹⁷¹ In fact, however, informality has often served to permit rather extensive abuse,¹⁷² and evidence is now accumulating that informality itself may impair the rehabilitative efforts of the juvenile court.¹⁷³ In view of the fact that most of our juvenile court judges have probate as their primary function, it would appear that either the legislature, through juvenile court revision, or the Supreme Court, through its rule making power, should establish and

¹⁶⁹ *Kent v. United States*, 383 U.S. 541, 562 (1966).

¹⁷⁰ Whitlatch, *The Gault Decision—Its Effect on the Office of the Prosecuting Attorney*, 41 O. Bar 41 (1968). Judge Whitlatch says that the customary rules of evidence of civil trials must be followed. He continues (on page 45), "Unquestionably, hearsay has no place in any juvenile court proceeding and there is no reason to believe that juvenile court judges do not share the legal profession's traditional attitude toward hearsay." Auerbach, as late as 1966 (in *Juvenile Court: Time For A Change*, 37 Clev. Bar Ass'n. J. 145 and 179 (1966)) pointed out that rules of evidence are noted more in their breach than in their observance. He cited Judge Whitlatch as having offered the justification for this: Whitlatch, *Practices and Procedures in the Juvenile Court*, 21 Clev. Bar Journal 107, 118 (1950), "Close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment. . . ." Auerbach disagreed and concluded that we should return to a legal mode of dealing with juvenile delinquents and cited Roscoe Pound, *The Juvenile Court and the Law* (1944), reprinted in 10 *Crime and Delinquency*, 490, 499 (1964). Judge Woldman, a colleague of Judge Whitlatch on the Juvenile court of Cuyahoga County, in an article designed as a rebuttal to Auerbach, pointed out that Auerbach wanted to return to the legal mode, and that the legal mode was the horrible past from which we were trying to escape. Woldman, *Juvenile Court: "Neglected Child" of the Judiciary*, 37 Clev. Bar Ass'n. J. 257 (1966). See O. Ketcham, *Can Gault's Guidelines Protect the Public Interest?* Trial Magazine 15 (April-May 1968); "In the past, juvenile courts have refused to be trammled by constitutional requirements. . . ." O. Ketcham, *The Need for Law and Order in the Juvenile Court: Some Unanswered Questions*, 1 Fam. L. Q. 78 (June 1967).

¹⁷¹ The Standards at 70.

¹⁷² *Gault* at 18. See Rubin, *Constitutional Rights in Juvenile Courts*, 16 Clev.-Mar. L. Rev. 477, 486 (1967).

¹⁷³ Wheeler and Cottrell, *Juvenile Delinquency—Its Prevention and Control* 33 (Russell Sage Foundation 1966); Grygier, *The Concept Of The "State Of Delinquency," An Obituary*, 18 J. Legal Ed. 131, 135 (1965); *Gault* at 23.

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publish uniform guidelines for juvenile court judges, establishing the limits of informality¹⁷⁴ allowable in juvenile proceedings.

In addition to the claim that informality is a desirable attribute, it is also contended that the Ohio statute permitting exclusion of the public helps the rehabilitative process by preventing publicity and guaranteeing confidentiality of records.¹⁷⁵ Whether this is true or not,¹⁷⁶ the new code makes the usual grant of power to exclude the public in "any case." This cannot be interpreted to extend to the usual adult case,¹⁷⁷ and it cannot be extended to cover contempt cases.¹⁷⁸

The new code specifically provides that all cases involving children shall be heard without a jury.¹⁷⁹ *Kent* confirms the existence of this non-jury rule and *Gault* cites *Kent*;¹⁸⁰ but one must realize that *Kent* and *Gault* are the first cases dealing with juvenile court reform, and not the last.¹⁸¹ Since *Gault* was decided the Supreme Court, in *Duncan v. Louisiana* has held that trial by jury is "fundamental to the American scheme of jus-

¹⁷⁴ See *The Challenge* at 85, where doubts are expressed about the juvenile court's ability to make "reliable determinations of fact." *The Challenge* also notes that the State, through the court, is invoking its power to interfere with the lives of individuals, the same power as the Criminal Court, and where this is so, ". . . the justification for abandoning the protective procedural guarantees associated with due process of law disappears."

¹⁷⁵ *Gault* at 21. Most jurisdictions allow disclosure of court records by the judge. In Ohio there seems to be no statutory provision providing confidentiality. See Merrick-Rippner, *Ohio Probate Law*, T 255(12) at 300 (2nd. ed. 1967).

¹⁷⁶ UJCA at 23; Section 24, Comment.

¹⁷⁷ Merrick-Rippner, *supra* note 175, T 263(4) at 319.

¹⁷⁸ See UJCA, Section 24(c); *In re Oliver*, 333 U.S. 257, 266 (1948): "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country. . . . Summary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials."

¹⁷⁹ *Supra* note 164.

¹⁸⁰ *Gault* at 14 n. 12, which cites *Kent v. United States*, 383 U.S. 541, 555 n. 22 (1966).

¹⁸¹ Paulsen, *The Constitutional Domestication Of The Juvenile Court*, 1967 Sup. Ct. Rev. 233 (1967); O. Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 1967 Vir. L. Rev. 1700 (1967); Barkdull, *An Appeals Judge Looks At The Juvenile Court Process*, 18 Juv. Ct. Judges J. 96 (1967); Morris, *A Blueprint for Action*, 18 Juv. Ct. Judges J. 84 (1967); Bellfatto, *The Constitution In The Juvenile Court*, 13 N.Y.L.F. 1 (1967); and Reckless & Reckless, *The Initial Impact of the Gault Decision in Ohio*, 18 Juv. Ct. Judges J., 121 (1968).

tice."¹⁸² In *DeBacker*, a juvenile case¹⁸³ in which the hearing was held prior to *Duncan*, the Supreme Court noted that, because of the date of the hearing, even if appellant had been an adult he would not have had a constitutional right to a jury trial. The court then avoided the jury question by saying, "(T)his case is not an appropriate one for considering whether the Nebraska statute which provides that juvenile hearings are 'without a jury' . . . is constitutionally invalid in light of *Duncan* and *Bloom*."¹⁸⁴ That the court would consider this an open question, after their negative statement in *Kent*,¹⁸⁵ should put one on notice that Ohio's statutory provision may be susceptible to attack. Justice Black wanted to extend the right to trial by jury in *DeBacker*, and in dissent, he pointed out that *Gault* had extended notice, counsel, confrontation, and the privilege against self-incrimination to the juvenile, which made it seem remarkable that anything so fundamental as jury trial by jury could be denied juveniles.¹⁸⁶ Justice Douglas, also in dissent, wanted to extend jury trial equally to adult and juvenile. He observed that "behind the facade of delinquency is the crime of forgery,"¹⁸⁷ and he pointed out that lower courts have been divided on this question since the *Gault* decision.¹⁸⁸ As previously mentioned, it is arguable that *Gault* is but the first in a series of selective incorporation cases that will apply the guarantees of the Bill of Rights, jury trial included, to the juvenile court process, just as these guarantees have been made applicable in the criminal sphere.¹⁸⁹ Indeed, an Ohio Court of Appeals has recently declared a section

¹⁸² *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Bloom v. Illinois*, 391 U.S. 194 (1968); *De Stefano v. Woods*, 392 U.S. 631 (1968).

¹⁸³ *DeBacker v. Brainard*, 90 S. Ct. 163 (1969).

¹⁸⁴ *DeBacker* at 164.

¹⁸⁵ *Supra* note 180.

¹⁸⁶ *DeBacker* at 166.

¹⁸⁷ *DeBacker* at 167-168. He also argued that the juvenile court dream had failed in reality.

¹⁸⁸ *DeBacker* at 168-169. See *In re Johnson*, 254 Md. 517, 255 A.2d 419 (1969); *In re State ex rel. J. S.*, 106 N.J. Sup. Ct. 121, 254 A.2d 334 (1969); *People v. K.*, 58 N.Y. Misc. 526, 296 N.Y.S.2d 404 (1968); *In re Burrus*, 4 N.C.A. 523, 167 S.E.2d 454 (1969); See also, Oklahoma Statutes Annotated, Title 10, Ch. 51, Article I, Sec. 1110 (Laws 1968, C. 282, § 110, eff. Jan. 13, 1969). Colorado Revised Statutes 1963, Ch. 22, Article 8, Sec. 2(1) expressly provides for trial by jury: "In trials under this article, the child . . . shall have the right to demand a trial by jury. . . ."

¹⁸⁹ See Dorsen and Reznick, *In Re Gault and the Future of Juvenile Law*, 1 Fam. L. Q. 1, 10 (Dec. 1967).

of Ohio's code¹⁹⁰ unconstitutional partly because of a denial of jury trial.¹⁹¹ It would seem that this reasoning might well apply in all cases concerning delinquents, and in others under our code that can result in commitment.¹⁹² The District of Columbia has been using trial by jury for thirty years, and out of 10,000 cases referred to its juvenile court last year, there were only about fifty requests for jury trial.¹⁹³

Closely allied to the jury trial problem is the question of the proper burden of proof applicable in juvenile court proceedings. The Nebraska Statute involved in *DeBacker*¹⁹⁴ provided for a preponderance of the evidence, but *DeBacker*'s counsel admitted during oral argument that the evidence satisfied even a reasonable doubt standard. The Supreme Court, consequently, avoided the issue.¹⁹⁵ In *Gault*, the court acknowledged Arizona's use of the "clear and convincing evidence" standard, and commented on the "less stringent preponderance of the evidence test."¹⁹⁶ The court also quoted a World Health Organization Study: "One of the most definite conclusions of this investigation is that few fields exist in which more serious coercive measures are applied, on such flimsy objective evidence, than in that of juvenile delinquency."¹⁹⁷ Since *Gault*, the Supreme Court has avoided the burden of proof issue in the *Whittington* case,¹⁹⁸ as well as in *De-*

¹⁹⁰ Repealed Section 2151.35(E): This section limited commitment to the Ohio State Reformatory. Our new Section 2151.355(E) does not. It allows commitment to any maximum security institution, Ohio Penitentiary included. See note 75 *supra*.

¹⁹¹ *State v. Fisher*, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969). See *In Re Baker*, 20 Ohio St. 2d 142, 254 N.E.2d 363 (1969).

¹⁹² See *Application of Stevenson*, 458 P.2d 414 (Ore. Sup. Ct. 1969).

¹⁹³ *Gault: What now for the Juvenile Court?* (Norden Ed. 1968) as cited in Hall, Kamisar, LaFave and Israel, *Modern Criminal Procedure* 1350 (3rd. ed. 1969).

¹⁹⁴ *DeBacker*, *supra* note 183 at 164 n. 3, where it is mentioned that four of the seven judges on the Nebraska Supreme Court thought the Statute denying jury trial was unconstitutional; and also, that the "preponderance of the evidence" standard was unconstitutional.

¹⁹⁵ *DeBacker* at 165. ". . . this case is not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings."

¹⁹⁶ *Gault* at 12.

¹⁹⁷ *Gault* at 19 n. 25 citing Doctor Ronet, the Swiss psychiatrist, in his monograph for the World Health Organization, *Psychiatric Aspects of Juvenile Delinquency* 79 (1951).

¹⁹⁸ *In Re Whittington*, 391 U.S. 341 (1968); See *Juvenile Court Digest* (May, 1968, Vol. 1, No. 4) at 13, where it is reported that counsel for the national council of Juvenile Court Judges, in oral argument, admitted; "The record sets one's teeth on edge."

Backer, but they are considering it once again in the *Winship* case.¹⁹⁹

Whittington, of course, is an Ohio case, possibly decided under our prior code. While we may never know "What Happened to *Whittington*,"²⁰⁰ we do know that the juvenile court rendered judgment as follows: "... that said Buddy Lynn *Whittington* had probably committed a felony. . . ." ²⁰¹ This decision was thought to be in accord with the Ohio rule, which specified that a mere preponderance of evidence was sufficient.²⁰² The case was appealed to the United States Supreme Court, which remanded for reconsideration in light of the *Gault* decision.²⁰³ The Court of Appeals sent the case back to the Juvenile Court with similar instructions.²⁰⁴ Justice McLaughlin, in dissent, described this as an abdication of responsibility and said that his court should have decided the constitutional burden of proof issue. He concluded that the "basic premise" of *Gault* is a finding of "guilt beyond a reasonable doubt."²⁰⁵ Other courts have split on the issue.²⁰⁶ Both of the new Ohio codes²⁰⁷ specify a clear and con-

¹⁹⁹ *In Re Winship*, No. 778, argued 1/20/70, 6 CrL 4130 (1-28-70). In answer to a question from Mr. Justice Harlan: "Do you know of any holding of this court that says that 'beyond a reasonable doubt' is required by the Constitution?" Miss Uviller, arguing for *Winship*, replied: "No I do not, your Honor. . . ." However, she said that it is such a fundamental principle and so universally accepted in all states that it is exactly the sort of thing that is meant by the phrase "due process." She also conceded that the standard will be applicable in all cases involving confinement whether we call them "delinquents" or "Pins."

²⁰⁰ O. Ketcham, *What Happened to Whittington?* 37 Geo. Wash. L. Rev. 324 (1968-1969).

²⁰¹ *In Re Whittington*, 17 Ohio App. 2d 164, 254 N.E.2d 364, 366 (Feb. 5, 1969).

²⁰² *State v. Shardell*, 107 App. 338, 153 N.E.2d 510 (1958). See also the post-*Gault* case of *In re Agler*, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1968).

²⁰³ *In Re Whittington*, 391 U.S. 341 (1968).

²⁰⁴ *In Re Whittington*, 17 Ohio App. 2d 164, 177 254 N.E.2d 364, 372 (Feb. 5, 1969).

²⁰⁵ *In Re Whittington*, *Id.* at 181, 245 N.E.2d at 373, dissenting opinion by Presiding Justice McLaughlin. This opinion of the Court of Appeals of Fairfield County was appealed to the Ohio Supreme Court which on March 5, 1970, affirmed (Akron Beacon Journal, March 5, 1970, page A4, column 1), finding no constitutional issues. Justice McLaughlin argued, "Certainly the long delay here calls for a direct and definite order from this court. . . ." The quantum of evidence necessary surely should be "guilty beyond a reasonable doubt." But see Schwartz, *Constitutional Guarantees in the Juvenile Court*, 39 Ohio Bar 1385 (1966).

²⁰⁶ *In re Urbasek*, 38 Ill. 2d 535, 323 N.E.2d 716 (1967); *United States v. Constanzo*, 395 F.2d 441 (4th Cir. 1968), cert. denied 393 U.S. 883 (1968); *In re Dennis M.*, 63 Cal. Rptr. 512, 450 P.2d 296 (1969); *In the Matter of Samuel W. v. Family Court*, 24 N.Y.2d 196, 299 N.Y.S.2d 414 (1969).

²⁰⁷ Ohio Rev. Code § 2151.35; OCC 2151.32(D).

vincing evidence standard, while the Uniform Act²⁰⁸ and The Standards²⁰⁹ mention all the options but seemingly endorse the clear and convincing evidence standard.

After specifying the burden of proof, the new Ohio code provides that the court shall proceed immediately (or at a postponed hearing) to the dispositional phase.²¹⁰ The Crime Commission offering calls for an adjudicatory hearing²¹¹ and a dispositional hearing,²¹² and provides specifically that predispositional reports cannot be used as evidence in the adjudicatory hearings.²¹³ The new code clearly authorizes the use of "any report" in "the hearing,"²¹⁴ and, in fact, provides that an attorney for the child can see the report only if he makes a written request based on a showing of good cause, prior to the hearing.²¹⁵ These reports usually contain hearsay and the prior record of the youth,²¹⁶ and juvenile court practice includes their use prior to the adjudicatory hearing.²¹⁷ It is difficult to reconcile this legislation and

²⁰⁸ UJCA section 29: The comments say that "preponderance" is not sufficient, that "clear and convincing" probably is, but that "beyond a reasonable doubt" may be required.

²⁰⁹ The Standards at 72 point out that a majority use preponderance, while the minority apply the "beyond a reasonable doubt" standard. The Standards predate *Gault*.

²¹⁰ Ohio Rev. Code § 2151.35: "If the court finds from clear and convincing evidence that the child is a delinquent, unruly, neglected, or dependent child, or a juvenile traffic offender, the court shall proceed immediately or at a postponed hearing, to hear the evidence as to the proper disposition to be made under sections 2151.352 to 2151.355, inclusive, of the Revised Code." (For the remainder of this paragraph see note 223 *infra*.) See Tenny, *The New Dilemma in the Juvenile Courts*, 47 Neb. L. Rev. 67, 70 (1968): "Here, legal problems for the most part may be laid aside and an open-ended inquiry may be made into what is best for this particular child."

²¹¹ OCC 2151.32.

²¹² OCC 2151.38.

²¹³ OCC 2151.37(A): "After the determinations under section 2151.32 . . . the courts shall order a predisposition study. . . . No such report shall be used as evidence in any connected hearing concerning facts alleged in a complaint."

²¹⁴ Ohio Rev. Code § 2151.352: "Any report or part thereof concerning such child which has been prepared by an employee of the court, which is used in the hearing and is pertinent thereto. . . ."

²¹⁵ Ohio Rev. Code § 2151.352: ". . . Shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child."

²¹⁶ Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Col. L. Rev. 281, 335 (1967).

²¹⁷ *Id.* at 335 through 339, especially at 336: "Although in most jurisdictions neither a delinquency conviction nor a neglect adjudication will be sus-

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these practices with the concepts of confrontation and cross-examination guaranteed by *Gault*.²¹⁸ The Standards specifically prohibit the use of such reports at the adjudicatory stage.²¹⁹ *The Challenge* recommends that such reports not be made known to the judge prior to the adjudication.²²⁰ The Uniform Act prohibits the making of such reports prior to the termination of the adjudicatory hearing,²²¹ and the Proposed Rules for Juvenile Court provide for bifurcated hearings, specifying that reports such as these can only be used at the dispositional hearing.²²² Clearly, many groups, including the Rules Advisory Committee of the Ohio Judicial Conference, see a need for a much clearer legislative statement than the one enacted.

The same section²²³ of the new Ohio code provides for dismissal of the complaint and discharge of the child if the court does not find delinquency, etc. If this means no more than the absence of an affirmative finding of delinquency, etc. based on the facts alleged in the complaint, then the provision is not needed. In construing the section one should note that the Crime Commission Bill provides that even after the adjudicatory hearing is concluded and the child is found to be a delinquent, if the court in the dispositional phase finds that the child is not in need of treatment, it should dismiss the proceedings and discharge the child.²²⁴ The Uniform Act provides that, in addition to proving

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tained if it is based solely upon inadmissible evidence, other restrictions upon the use of such evidence remain lax—particularly with respect to hearsay. Appellate courts will uphold a decision as long as the record contains sufficient admissible evidence to support the adjudication. These courts are aided by the presumption that the juvenile court judge—unlike a jury—can be relied upon to exclude such evidence from his consideration.” See also Whitlatch, *The Juvenile Court—A Court of Law*, 18 Western Res. L. Rev. 1239, 1248 (1967): “It is the writer’s practice in juvenile proceedings to state that everything in the reports given by policemen and social workers which is not competent will be considered as would the opening statement of counsel, that is, not as evidence but rather as being what the witness expects the competent evidence to show, and that any hearsay contained in the report is rejected unless it is later supported by competent, sworn testimony.”

²¹⁸ *Id.* at 336 n. 293; *Gault* at 56.

²¹⁹ The Standards at 73.

²²⁰ *The Challenge* at 87.

²²¹ UJCA, Section 28(A).

²²² *Supra* note 27 at 346, Rule 74.5 and 74.6.

²²³ Ohio Rev. Code § 2151.35: “If the court does not so find, it shall order that the complaint be dismissed and that the child be discharged from any detention or restriction theretofore ordered.”

²²⁴ OCC 2151.38.

that the child committed the acts of delinquency, the court must find that the child is also in need of treatment before initiating a dispositional hearing.²²⁵ One wonders if this language of the Ohio act might not have been included to deal with this "in need of treatment" problem.²²⁶

The section concludes with a provision providing for a record of the proceedings if requested.²²⁷ This is probably required by the Modern Courts Amendment, if not by *Gault*.²²⁸

Except in the purpose clause, and with the exception of "Right to Counsel," the Ohio code is silent concerning due process rights.²²⁹ By contrast, the Uniform Act specifically extends to any juvenile the right to introduce evidence and otherwise be heard in his own behalf, and gives him the right of confrontation and cross-examination. It provides: that a child need not incriminate himself if charged with delinquency; that confessions or admissions inadmissible in a criminal proceeding cannot be used against a child; that illegally seized evidence cannot be used against him; and that out-of-court confessions must be corroborated by other evidence.²³⁰ *Gault*, of course, extends some constitutional rights available in criminal trials to some juveniles, but it could not and does not extend all criminal procedural rights to all juveniles. In order to prevent useless litigation,²³¹

²²⁵ UJCA section 29.

²²⁶ *Supra* text corresponding to footnotes 127 through 131.

²²⁷ Ohio Rev. Code § 2151.35: "A record of all testimony and other oral proceedings in juvenile court shall be made upon request as provided in section 2301.20 of the Revised Code."

²²⁸ Our Modern Courts Amendment makes the juvenile court a division of the Common Pleas Court. See Merrick-Rippner, T251(6) (pocket parts at page 20), where it says, "The *Gault* case, however, is silent on the right of a juvenile in delinquency cases, as it is on the necessity of the Juvenile Court's supplying a record of the proceedings." *Gault* at 58, "... failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the juvenile judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him." The Standards at 76, recommend a verbatim recording of the hearing, which can be preserved and transcribed if needed for an appeal. See also *The Challenge* at 86.

²²⁹ Ohio Rev. Code § 2151.01(D); OCC 2151.02(D); Comment, *In Re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 Neb. L. Rev. 558 (1968).

²³⁰ UJCA section 27.

²³¹ *In Re Whittington*, 17 Ohio App. 2d 164, 245 N.E.2d 364, 368 (1969): "After two years and six appeals this case has been before the Juvenile

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the Ohio legislature should have considered these above-mentioned procedural rights and others,²³² and incorporated both the constitutionally essential ones and the merely desirable ones into the new code.²³³

Another section concerning Right to Counsel was added.²³⁴ It explicitly states that both the child and the person in loco parentis are entitled to counsel, that the court has a duty to make this fact known to all and a duty to appoint counsel for an indigent unless the right is "completely and intelligently" waived. It requires that counsel be provided for any child not represented

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Court, the Common Pleas Court, the Fifth District Court of Appeals, the Supreme Court of Ohio, the United States Supreme Court and is now again before this Court of Appeals." In dissent (at 373), Justice McLaughlin argues that Gault and due process requires "proof beyond a reasonable doubt." An appeal from this decision went, once again, to the Supreme Court of Ohio, where no constitutional issue was found, and the decision was affirmed.

²³² *Supra* note 22. See *Harling v. U. S.*, 295 F.2d 161 (D.C. Cir. 1961); *State v. Arbeiter*, 6 CrL 2346 (Jan. 12, 1970). Draft Ohio Rules of Civil Procedure, 42 Ohio Bar 339, 348 (March 10, 1969), for instance, extends the right to remain silent to delinquent, unruly, or juvenile traffic offenders while the legislature revisions extend the right to just delinquents. See note 122 *supra*.

²³³ *Supra* note 122. Arthur, *The Uniform Juvenile Court Act*, 19 *Juv. Ct. Judges J.* 153, 155 (1969): "Obviously, the inclusion of broad civil rights in the statute is both necessary and desirable and it is now generally recognized by juvenile court judges that such will in no sense interfere with the rehabilitative philosophies of the juvenile court." See also, Dorsen and Reznick, *In re Gault and the Future of Juvenile Law*, 1 *Fam. L. Quar.* 1, 3-13 (Dec. 1967); George, *Juvenile Delinquency Proceedings: The Due Process Model*, 40 *Univ. of Colo. L. Rev.* 315 (1968). But see Schwartz, *Constitutional Guarantees in the Juvenile Court*, 39 *Ohio Bar* 1385 (1966).

²³⁴ Ohio Rev. Code § 2151.352: "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. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel by the court if he is an indigent person. The court may continue the case to enable a party to obtain counsel and shall provide counsel for an unrepresented indigent person upon his request. The court shall appoint counsel for any parties found to be indigent unless representation is competently and intelligently waived. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them. An indigent person is one who, at the time his need is determined, is unable by reason of lack of property or income to provide for the full payment of legal counsel and all other necessary expenses of representation." See Young, *Some Observations on Lawyers and the Juvenile Court*, 39 *Ohio Bar* 170 (1966). See also Remarks by former Supreme Court Justices Abe Fortas, Judge Miller of the District of Columbia Juvenile Court, Dean Monrad Paulson, Professor Fox, and Judge Ketcham as reported in 6 CrL 2172 (Dec. 3, 1969).

by a guardian, and it provides for the appointment of Separate Counsel for both parent and child when their interests are in conflict.

For those who are found to be delinquent or unruly, the new revisions provide for expungement proceedings.²³⁵ The code provides that the court "may order" the records sealed. By comparison, the Uniform Act says the court "shall order" the sealing. One wonders, since other juveniles can be treated as delinquents,²³⁶ why the new code does not provide the potential of expungement for all children with juvenile records.

To summarize Ohio's legislative reforms concerning the hearing phase, it can be said that Ohio has continued the old practice of having informal, private, non-jury type hearings. The standard of proof has been elevated to "clear and convincing," but this may not necessarily meet the minimum constitutional standard for delinquency cases. Ohio has not adequately restricted the abusive use of social reports and, again, may have fallen short of constitutional minimums. The new legislation does, however, provide that juvenile court proceedings must be recorded upon request.

The Challenge says: ". . . (T)he system should operate with all the procedural formality necessary to safeguard adequately the rights that any person has when he is subject to the application of coercive power."²³⁷ The attainment of this goal remains a challenge.

²³⁵ Ohio Rev. Code § 2151.358; OCC 2151.58; UJCA, Section 57. See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U. L. Q. 147, 174 (1966).

²³⁶ Ohio Rev. Code § 2151.356(E): "If after making such disposition the court finds upon further hearing that the child has failed to comply with the orders of the court and his operation of a motor vehicle constitutes him a danger to himself and to others, the court may make any disposition authorized by section 2151.355 [2151.35.5] of the Revised Code."

²³⁷ *The Challenge* at 88.