1970

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JUVENILES AND THEIR RIGHT TO A JURY TRIAL

I. INTRODUCTION

Since the landmark decision of In re Gault, the emphasis in juvenile delinquency proceedings has been on assuring the accuracy and reliability of fact-finding procedures. Gault held that a juvenile’s possible loss of liberty, which is the ultimate consequence of being adjudged a delinquent, is sufficiently analogous to a criminal sentence to require a hearing that provides the essentials of due process and fair treatment. This is to be accomplished by affording juveniles those constitutional safeguards which are deemed necessary and essential to ensure a reliable hearing without displacing any of the recognized advantages of the juvenile system.

At the time this change in policy was being formulated by the Supreme Court, it had not yet decided whether the right to a jury trial was a fundamental right to be imposed upon the states through the due process clause of the Fourteenth Amendment. However, later in Duncan v. Louisiana, the Court did decide to add the right to a jury trial to the lengthening list of constitutional safeguards imposed on the states. Duncan requires that the states provide a jury trial in criminal proceedings whenever the accused faces a loss of liberty of sufficient length to be called serious. This holding was reinforced shortly thereafter in Bloom v. Illinois, by extending this right to criminal contempt proceedings which had traditionally been exempt from jury trial requirements. Both cases emphasize that it is the loss of liberty rather than the name given to the proceeding or the nature of the offense which determines whether a jury trial is a necessary element of due process. Thus, it could be argued, that the general holdings of these two cases along with Gault are of sufficient

1. 387 U.S. 1 (1967).
2. Id. at 30.
3. Id. at 21.
4. The Supreme Court had the chance to rule on the issue this term when the question was presented to the Court in DeBacker v. Brainard, 90 S. Ct. 163 (1969). However, in a per curiam opinion, the case was dismissed on the basis that this was not the proper case for considering the issue since Duncan was to receive prospective application only and that since appellant’s juvenile court hearing was held prior to the decision in Duncan he would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal court.
strength to justify a finding that due process includes the right to a jury trial when a child, as well as an adult, faces a substantial loss of liberty. However, these decisions are not conclusive of the issue since Gault still leaves open the distinct possibility of excluding the right to a jury trial if the over-riding interests of the juvenile court system would militate against its adoption.8

It is the purpose of this Comment to discuss the constitutional requirement of extending the right to a jury trial to a juvenile accused of committing a crime which, if perpetrated by an adult and triable in an adult court would entitle him to a jury trial, or the alternative of excluding a right to a jury trial as an unnecessary impediment on the juvenile system. It does not extend to a consideration of the jury requirement in other delinquency proceedings such as truancy, neglect or dependency hearings before a juvenile court.

II. Development of Juvenile Courts

Until the early part of the 20th century, juveniles in this country were generally treated as adults as far as the criminal law was concerned.9 They were afforded constitutional safeguards and the attendant procedures of arrest, trial and punishment similar to those provided adult offenders. Under the stern criminal law practices of an earlier day, juveniles were often given long prison sentences and incarcerated with hardened criminals and, in some instances, even executed.10

The early reformers in the field of juvenile justice were appalled by the application of adult procedures and penalties to juveniles. They believed that juvenile offenses reflected the condition of the child's environment rather than his character, thus making him particularly adaptable to rehabilitation.11 With the advent of juvenile court acts, the first of which was enacted in Illinois in 1899,12 a juvenile court system spread to every state in the union.13 These new institutions represented a new system based upon an enlightened philosophy concerning the role of the state in providing for the proper guidance of its younger generation. The

8. 387 U.S. 1 at 12.
9. E.g. the right to trial by jury was provided in Ex parte Becknell, 119 Cal. 496, 51 P. 692 (1897); the right to presentment by a grand jury was guaranteed in Commonwealth v. Horregan, 127 Mass. 450 (1897); and due process of law was fully applicable in People ex rel. O'Connell v. Turner, 55 Ill. 280 (1870). See Antieau, Constitutional Rights in Juvenile Courts, 46 CORNELL L. Q. 387, 391 (1961).
10. See Paulsen, Fairness to the Juvenile Offender, 41 MINN. L. REV. 547, 548 (1957).
11. For the most exhaustive and consulted survey into the basic aims of the reformers of the juvenile system see Mack, The Juvenile Court, 23 HARV. L. REV. 104 (1909).
founders sought, above all, to achieve the rehabilitation of the youthful offender.14

This result was to be realized through the doctrine of *parens patriae*15 under which the role of the judge was not to determine whether the child was guilty or innocent, but rather to decide what course of rehabilitation16 would be in the child's best interest. The procedural formalities of the adult criminal court were thought to be inappropriate in the new juvenile system. Instead, non-adversarial procedures were fashioned to afford the judge the greatest degree of flexibility in exercising his influence over the child and to provide an atmosphere of treatment rather than punishment.17 This led to informal procedures of fact-finding and sentencing. The rules of evidence were relaxed and confessions were encouraged.18 The juvenile was not afforded the usual constitutional safeguards such as the right of confrontation, privilege against self-incrimination, right to counsel and protection against double jeopardy. The right to trial by jury, although provided for in the first juvenile court act,19 soon began to disappear as did the right to a public hearing. This general procedural relaxation was justified on the theory that in a non-adversarial proceeding the juvenile was not being deprived of his liberty but was merely being taken into custody by the state for his own betterment. This rationale was explained by the Supreme Court as follows:

The right of the State, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attone to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions — that is, if the child is "delinquent" — the state may intervene. In

14. Mr. Justice Fortas said in Kent v. United States, 383 U.S. 541 (1966), that: The Juvenile Court is theoretically engaged in determining the needs of the child . . . rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation . . . not to fix criminal responsibility, guilt and punishment. 383 U.S. 541, 554 (1966).

15. This doctrine had its origin in early chancery practice where it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests of the child, but there is no mention of the doctrine in early criminal procedure. It follows that the term is not historically related to delinquent children. See Rappaport, Determination of Delinquency in Juvenile Court: A Suggested Approach, 1938 Wash. U.L.Q. 123, 131.

16. *See In re Gault, 387 U.S. 1, 14-17 (1967). See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Rappaport, supra note 15, at 123.


19. [I]n all trials under the act, any person interested therein may demand a jury of six, or the judge of his own motion may order a jury of the same number, to try the case. Laws of Ill. § 2 (1899), as cited in 387 U.S. 1, 14 (1967).
doing so, it does not deprive the child of any rights, because he has none. It merely provided the “custody” to which the child is entitled. On this basis, proceedings involving juveniles were described as “civil” not “criminal” and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.20

However, the commendable goals of the juvenile court system were never realized. Juvenile court judges were not well trained.21 Meager municipal budgets provided inadequate sociological and psychiatric services. The conditions of the “reform schools” in which the youth were incarcerated digressed from an ideal where the juvenile was to receive the best of rehabilitative care to a point where most of these institutions were little more than prisons where criminal tendencies were reinforced.22 Concurrently, juvenile delinquency, which was viewed originally as a minor problem, emerged as a major concern.23 With the ever-increasing numbers of juvenile crimes, overburdened courts found themselves unable to provide a sufficient amount of time to consider all the factors bearing on each case, thus resulting in a diminution of any rehabilitative value the proceedings may have provided. Informal hearings became summary proceedings. Occasionally, parties received no notice of a hearing or of the charges brought. Judges became little more than rubber stamps for probation officers whose investigations were often meager.24 As a result, the reliability of juvenile court proceedings became questionable.25 In spite of these conditions however, the hearings were practically immune from attack because they were considered to be civil rather than criminal proceedings26 and therefore did not require the procedural safeguards of due process.


21. See Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967). [hereinafter cited as Report by the President's Commission]. The report indicates that half of the juvenile judges as of 1964 had no undergraduate degree, a fifth had no college education at all, and a fifth were not members of the bar. Id. at 80.

22. Rappaport, supra note 15, at 126-27. The Gault Court in commenting on these conditions said: Instead of mother and father and sisters and brothers and friends and classmates, [the delinquent's] world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide. In re Gault, 387 U.S. 1, 27 (1967).


26. See note 88 infra.
III. IN RE GAULT AND ITS IMPLICATIONS

A. The Opinion

It is with this background that the Supreme Court decided In re Gault.27 In an informal hearing before an Arizona juvenile court, fifteen year old Gerald Gault was convicted of making a lewd telephone call to a strange woman. This offense would impose a two month sentence if committed by an adult28 but since Gault was a juvenile, he was sentenced to live the balance of his six year minority in a state industrial school. Throughout the proceeding, he was denied many of the Constitutional protections which an adult counterpart would have enjoyed. Neither Gault nor his parents had notice of the charge nor knowledge of their right to counsel. Two confessions were obtained in disregard of his right to remain silent and he was not confronted by prosecuting witnesses. The Arizona Supreme Court upheld the trial court on the grounds that the non-punitive, non-adversary philosophy of the Arizona Juvenile Code justified a procedure that was less formal than adult criminal proceedings.29 On appeal, the United States Supreme Court reversed holding that: (1) a juvenile charged with delinquency and his parents or guardians are entitled to advance notice of the specific charges against him;30 (2) the juvenile and his parents must be informed in advance of his right to be represented by counsel and that if they are unable to afford counsel one will be provided;31 (3) that a juvenile has the right not to be compelled to testify and to be informed that anything he says may be used against him at trial;32 and (4) the juvenile has the right to confront sworn witnesses who are subject to cross-examination by the child’s counsel.33

In the process of arriving at their conclusion, the Court divided the juvenile proceeding into three distinct stages — (1) the pre-judicial which includes the procedures of arrest, detention and interrogation; (2) the adjudicative which is the hearing itself; and (3) the dispositional where the judge, with the aid of a social report on the youth’s character and background, makes the appropriate disposition of the case.34 The scope of the decision is limited solely to the fact-finding or adjudicative hearing stage where a determination of delinquency frequently results in a substantial deprivation of liberty.35 The Court views this stage as merely

27. 387 U.S. 1 (1967).
31. Id. at 41.
32. Id. at 55.
33. Id. at 56.
34. Id. at 13, where the Court stated:

[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.
a procedure lacking rehabilitative value, by which society determines whether juveniles are guilty of committing the alleged crime; the emphasis being upon the reliability of the guilt-determining process rather than insuring an informal atmosphere for rehabilitative purposes.

This change in the Court's concept of the adjudicative stage of the delinquency proceeding represents a conscious repudiation of the *parens patriae* philosophy as it has been applied to that stage. No longer is the hearing to be simply a friendly conference, marked chiefly by its informality. The Court recognizes that, in substance, the determinations made at the hearing and the consequences of being found delinquent are comparable to those of a criminal trial and subsequent conviction. The possibility of incarceration in a juvenile reformatory and the consequent loss of liberty requires that the essentials of due process be satisfied.

**B. Gault's Implications — The Development of Juvenile Due Process**

In reaching the conclusion that juveniles have a right to liberty parallel to that of adults and that they are deprived of this liberty when confined to an institution, the Court seems to have cast doubt upon the validity of the *parens patriae* rationale to the extent that it has been applied to the adjudicative hearing.\(^{36}\) *Kent v. United States*,\(^{37}\) decided one year prior to *Gault*, was the first indication that the Supreme Court might not subscribe to the traditional *parens patriae* concept of the juvenile court. In *Kent* the Court said that:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.\(^{38}\)

Yet the *parens patriae* philosophy has not been rejected in full as the Court infers that it still has a viable role in the pre-judicial and dispositional stages.\(^{39}\)

*Gault* also dispels the notion that the traditional labelling of juvenile proceedings as civil rather than criminal justifies depriving juveniles of specific constitutional safeguards when they are in danger of being incarcerated for a substantial period of time.\(^{40}\) However, it should not be

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37. 383 U.S. 541 (1966). The Court held that the District of Columbia juvenile court statute, read in the context of juvenile principles required a statement of reasons supporting the decision to transfer a juvenile to adult court.

38. Id. at 555.


40. Id. at 23-24.
assumed that the distinction between criminal and civil proceedings in
the juvenile system has been obliterated. *Gault* did not go that far.
Instead it merely found that certain procedural safeguards of the criminal
process are also applicable to juveniles.

One of the distinctive features of the *Gault* decision is the absence
of any standards for determining the applicability of other procedural
safeguards not already imposed on juvenile proceedings.41 The majority
rejected the "total incorporation" theory espoused by Mr. Justice Black
which would extend the Bill of Rights safeguards to juveniles by applying
them to the states through the Fourteenth Amendment.42 Instead, they
seem to have adopted an approach analogous to the item-by-item pro-
cedure which the Court had taken previously with respect to the rights of
adult defendants in criminal courts.43 Since *Gault* arose out of a state
proceeding and the Bill of Rights was therefore not directly applicable,
the Court often spoke in terms of fundamental fairness and due process
in applying particular safeguards to juvenile proceedings.44 This has
caused some confusion because it is not altogether clear whether the
Court was referring to the same due process standards applicable in
state criminal prosecutions45 or whether it was formulating a selective
due process standard applicable only to juvenile proceedings. However,
the latter interpretation seems the most appropriate in light of the Court's
objective of displacing none of the present advantages of the non-adver-
sarial nature of the juvenile system, which include separate treatment for
juveniles, insulation of juvenile records from public scrutiny and a re-
duction of the stigma associated with a finding of criminal misconduct,
while at the same time providing those procedural safeguards deemed
necessary and essential to ensure a reliable hearing.46

This selective incorporation approach will ultimately involve a balancing
of the desirability of including a jury trial in a juvenile proceeding with

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41. In addition to trial by jury, *Gault* is silent on the following procedural rights:
(1) the right to a public hearing; (2) the right to bail; (3) the right to a free tran-
script; (4) the right to appeal; (5) the privilege against unreasonable searches and
seizures; (6) and the extension of Miranda v. Arizona, 384 U.S. 436 (1966) to pre-
trial statements.

42. In his concurring opinion, Mr. Justice Black stated:
I think the Constitution requires that [juveniles] be tried in accordance with
the guarantees of all the provisions of the Bill Of Rights made applicable to the
States by the Fourteenth Amendment.

43. Dorsen & Rezneck, *supra* note 6, at 10-11; *The Supreme Court, 1966 Term*,
81 Harv. L. Rev. 69, 172-73 (1967). The Court also declined to base any of its
holdings on the equal protection clause. This failure to rely on equal protection
coupled with the Court's candid appraisal of some of the benefits of the juvenile sys-
tem is another indication that juveniles may rationally be treated differently than
adults in matters of criminal procedure.


45. The current test employed by the Court in determining whether a particular
safeguard is implicit in due process is whether a specific procedure is so fundamental
to the American concept of justice that a fair legal system could not be conceived
the possible burden its presence would place on the substantive benefits of the juvenile system.47 Gault suggests that exposure to a substantial loss of liberty carries considerable weight in favor of conformity with adult criminal law procedures.48 This approach has much to recommend it. It allows the Court greater flexibility for the possibility of later differentiation between juvenile and criminal processes should the balancing process weigh in favor of excluding a particular guarantee. It also allows the Court to control the timing of imposing a particular safeguard on the juvenile system.

Since juveniles were previously deprived of virtually all procedural rights, thereby making the due process approach taken by the Gault Court unprecedented, it would appear to be appropriate to proceed with caution by incorporating only those safeguards which assure reliability in the hearing. They would include the right to counsel, the right to confrontation of witnesses and stricter rules of evidence. Other procedural safeguards such as a jury trial, the right to bail and the right to be free from unreasonable searches and seizures which are designed to protect the dignity of the individual might be withheld for future selective incorporation.49 This approach to the problem does not seem to have been followed by the Gault Court because of its adoption of the privilege against self-incrimination which, although supported by both values, is primarily directed toward the dignity of the individual.50 Thus, in considering whether a jury trial is an essential part of due process applicable to juveniles, a cut and dry approach of applying only those rights which support reliability while denying those based on the dignity of the individual is not available to attack its application.

47. See note 43 supra.

48. The Court placed great emphasis on the fact that Gerald Gault was to be confined for up to 6 years in an institution as opposed to a maximum of two months which could be ordered under the criminal law. For example, in determining the right to counsel, to apply to juvenile proceedings the Court said:

[T]he assistance of counsel is essential . . . so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.
387 U.S. at 36-37.

In applying the privilege against self-incrimination, the Court similarly stated that:
[A] juvenile proceeding to determine “delinquency,” which may lead to commitment in a state institution, must be regarded as “criminal” for purposes of the privilege against self-incrimination . . . For this purpose, at least, commitment is a deprivation of liberty.
Id. at 49, 50. (emphasis added).


IV. RIGHT OF A JURY TRIAL

A. Duncan v. Louisiana

No legal institution is more deeply rooted in the American legal system than the jury. When the colonists came to America they brought with them this sacred right to serve as a bulwark against the tyranny of the sovereign state. One of the first resolutions adopted by both the Stamp Act Congress and the First Continental Congress was that one of "the most essential rights and liberties of the colonists" was that of trial by jury — an inherent right of every British colonist. Indeed our Constitution itself provides that "The Trial of all Crimes . . . shall be by Jury;" and when the Bill of Rights was adopted it included the Sixth Amendment which provided in part that

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

While each state has a provision in its constitution guaranteeing this right in serious criminal cases, the Supreme Court had never until Duncan v. Louisiana held that the right to jury trial in criminal cases is a fundamental right which must be afforded by the states as part of the procedural safeguards implicit in due process.

In Duncan, appellant Gary Duncan had been charged with simple battery which under Louisiana law was a misdemeanor punishable by a maximum penalty of two years imprisonment and a fine of $300. Despite Duncan's timely request, the state court denied him a jury trial because the Louisiana constitution grants a jury trial only in cases where capital punishment or imprisonment at hard labor may be imposed. The Supreme Court reversed holding that the right to a jury trial in serious criminal cases is a fundamental right which must be recognized by the states as a part of their obligation to extend due process of law to all persons within their jurisdiction. In finding the right to trial by jury to be fundamental, the Court, by utilizing the selective incorporation theory favored by the majority, added a new element to the due process analysis. In the past, the standard for adding new elements under either the selective incorporation approach or the traditional formula of fundamental fairness was whether a fair and equitable legal system could be imagined

53. U.S. CONST. amend. VI.
57. LSA—CONST. art. VII, § 41.
59. See note 6 supra.
60. Palko v. Connecticut, 302 U.S. 319 (1938); Snyder v. Massachusetts, 291 U.S. 97 (1934). The text requires the states to provide those procedures which, in
without the particular safeguard. Reference was often made to other legal systems as a benchmark in deciding whether to apply the particular guarantee. In this way, the Court felt it was better able to distinguish between essential and merely desirable rights. Using this reasoning, one could easily conceive of a fair legal system without the right of trial by jury.  

In Duncan, the Court, by narrowing its inquiry to whether the particular safeguard is fundamental to the "American" scheme of legal justice, has changed the standard of selective incorporation from an inquiry of whether a fair legal system could be imagined without the particular safeguard to whether the safeguard is such a deep-rooted tradition in the American judicial process that justice could not be provided in its absence. This is analogous to the approach the Court would take in vindicating a vested political right, which is a citizen's right to live under the system of government established by the Constitution. In essence, the jury is being viewed as a political institution established by the Constitution and therefore guaranteed to the people.

B. Political Functions Served By a Jury

Although the Duncan Court, after an exhaustive survey of the historical role which the jury has played in our system, found the right to a jury trial to be fundamental, it did not extensively analyze the high purposes which a jury trial presently plays in the criminal process. The traditional function of the jury which is to "prevent oppression by the Government" was identified by the Court as being an important consideration which led to the provision for a jury trial in the federal and state constitutions. But this fact alone does not establish a present day need for such protection.

The foremost political function served by the jury as an institution today is that it provides the citizenry, in their capacity as jurors, with a vehicle, to directly participate in the operation of government. As part of the judicial system, they can prevent its arbitrary use or abuse. If in a particular case where there are specific considerations mitigating against

Mr. Justice Cardozo's phrases, are "... so rooted in the traditions and conscience of our people as to be ranked as fundamental," 291 U.S. at 105, which are "... of the very essence of a scheme of ordered liberty," ... it forbids to the states that which is repugnant to the conscience of mankind. 302 U.S. at 325. See note 42 supra.

61. It is estimated that the United States alone accounts for no less than 80% of criminal jury trials in the world today. Jury trials either do not exist or are on a steady decline throughout the world. Only a few countries outside of England and the United States have retained jury trial. H. Kalven & H. Zeisel, The American Jury 13 n.3 (1966).


64. 391 U.S. at 155. See also Comment, supra note 63 at 422.

65. P. Delvin, Trial by Jury 160 (1956); Dorsen & Reznick, supra note 36, at 23; Lipp, Changes in Trial by Jury 13, 13, 10, 10 (1928); Comment, supra note 69, at 425.
the verdict sought, the power of the jury to acquit or convict a defendant of a lesser offense enables a verdict to be rendered which reflects the moral sense of the community. However, this result is not accomplished by a conscious repudiation of the rules of law applicable to the case; but is a refusal to be a party to the enforcement of laws which, in their application to the particular facts of a case, are repugnant to their social conscience. In this way the jury serves as the peoples’ voice in the judicial process by acting as a means of reflecting the community standards of guilt under existing criminal laws.

A second function, of less importance but not to be overlooked, is that the existence of trial by a jury helps to insure the independence and the quality of the judges. Jurors have not reached their position by political favor or popular vote. They do not identify with a particular constituency nor must they justify their views to an individual who has appointed him. Instead, the verdict reached by the jury in no way reflects on a judge’s personal feelings in a given case. Thus continuance in office does not in any way depend on the number of convictions they can display to the electorate. The result is to relieve the system, so far as possible, from the effect of outside influence.

The jury system also induces public confidence in the administration of justice. The community is said to have more confidence in the judgment of twelve impartial jurors selected at random from the community, than of those who are learned in the law. This is most important in the crisis-ridden cities of today, where division is deep and mistrust of established institutions is widespread. The jury system, to some extent, helps to dispel this mistrust. By giving the minority and dispossessed a voice and a time and place to be heard, membership on a jury gives them a sense of participation in the decision-making process in which members of their community are involved. In light of the essential social and


67. One authority in the area has made the following comment:

Firmly believe that most people would rather have their controversies decided by a number of disinterested, intelligent jurors who bring to the task their diversified experience and their various points of view, than by one or more judges whose technical training—usually along the same narrow lines—may cause comparatively simple issues to take on unnecessary complications. Oppenheimer, Symposium—Trial by Jury, 11 U. CIN. L. Rev. 119, 146–47 (1937).


69. The rhetoric throughout the years in favor of a jury has been substantial. In addition to those already mentioned, traditional arguments advanced in favor of a jury include the following: (1) the jury must be an excellent system and serve a real need in society or else it would not have survived so long, Hall, The Present-Day Jury: A Defense, 10 A.B.A.J. 111 (1924); (2) the jury necessitates a separation of factual and legal questions and prevents the injustice of future cases involving different facts from being governed by a combined set of legal and factual determinations valid only for the case in which they are first employed, Dickinson, Legal Rules: Their Application and Elaboration, 79 U. PA. L. Rev. 1052 (1931); (3) the legal questions presented by the case are decided more quickly by jury trials and involve less effort and ex-
political functions outlined above, regardless of how one views the desirability of the jury system, it can not be said to have outlived its usefulness.

C. Serious-Petty Dichotomy

In addition to the absence of any statements as to the fundamental political functions a jury presently plays in our system, Duncan also failed to give any clear definition to what constitutes a "serious" crime, which would require a jury trial as a matter of right. However, Duncan does indicate that the dividing line may depend on the maximum amount of time one may be deprived of his liberty as a penalty.70 The standard might well become the federal one71 — all crimes with a maximum penalty of more than six months and $500 fine must be tried before a jury, or the standard used by forty-nine of the fifty states — all crimes that carry penalties of over one year require a jury trial.72 But regardless of the standard used in determining the dividing line between petty and serious offenses or the name given the proceeding, Duncan requires a trial by jury when the accused faces a loss of liberty of sufficient length to be called serious.

D. Bloom v. Illinois

The Duncan proposition that it is the loss of liberty rather than the name given the proceeding which is the decisive factor in determining whether a jury is a necessity was reinforced in Bloom v. Illinois.73 In Bloom, the Court overruled an historic line of authority which had held that an individual charged with criminal contempt was not entitled to a jury trial in either state or federal courts.74

The traditional rationale for denying this right was justified on the basis that summary power was necessary in such hearings to preserve the dignity and independence of the courts.75 While neither affirming nor
rejecting this rationale, the Bloom court reasoned that when a serious loss of liberty is threatened by the penalty which might be imposed for contempt, the denial of a demand for a jury trial cannot be justified on the basis that it is a desirable means of vindicating the authority of the court.  

Although a contempt proceeding has traditionally been considered as civil in nature, the Court recognized that a charge of criminal contempt has all the indicia of a crime and should be treated as a "serious" offense for purposes of the sixth amendment right of a jury trial. Furthermore, by holding that criminal contempt should be treated as a crime within the protections of the sixth amendment, the Court foreclosed the use of the test of examining the nature of a crime to determine whether it is serious enough to require a jury trial. Stating that criminal contempt is not of itself a serious offense without regard to the penalty imposed, the Court focused on the length of the sentence actually imposed in determining whether the defendant is charged with a serious crime and entitled to a jury trial.

The parallel between a criminal contempt proceeding and a delinquency proceeding in which a juvenile is accused of an offense that would entitle his adult counterpart to a trial by jury, creates a compelling analogy. Both charges have all the elements of a criminal offense, yet in each the accused has traditionally been denied access to a jury trial. A conviction of either of the above offenses will result in a substantial deprivation of liberty; this possibility being even greater in a juvenile proceeding where it is rare that the period of incarceration is less than three years. The presence of these two factors in Bloom, (1) a charge having all the indicia of a crime and (2) a possible deprivation of liberty for a substantial period, led the Bloom Court to the conclusion that denial of a jury trial in a criminal contempt proceeding can no longer be justified. This same type reasoning should also apply to juveniles.

Therefore, reading Duncan and Bloom together, it becomes apparent that the right to a jury trial in both delinquency and criminal contempt proceedings, even though traditionally denied, should depend not on the name of the proceeding or the nature of the alleged offense but upon the possibility of a loss of liberty for a substantial period of time.

77. 391 U.S. 194, 211 (1968). This is the test suggested in Cheff v. Schnackenberg, 384 U.S. 373 (1966), that the length of the sentence actually imposed be taken as indicative of the gravity of the offense. This is made necessary for those crimes for which sentences are not imposed by a statute.
78. Emphasis on the deprivation of liberty becomes most significant in juvenile proceedings since in most states the jurisdiction of the juvenile court is limited to youths age 18 and under and most determinations of delinquency carry with it incarceration until age 21, the length of the sentence is at least 3 years. In re Gault, 387 U.S. 1, 37 n.60 (1967).
79. For cases denying a jury in juvenile proceedings, see notes 85-88 infra. For those denying a jury in contempt proceedings, see Green v. United States, 356 U.S. 165 (1958); Gompers v. United States, 233 U.S. 604 (1914); In re Debs, 158 U.S. 564 (1895); I.C.C. v. Brimmer, 154 U.S. 447 (1894); Eilenbecker v. District Court of Plymouth County, 134 U.S. 919 (1890).
V. Duncan and Bloom as Applied to Juveniles

An examination of Gault in light of the broad holdings in Duncan and Bloom, would lead to the reasonable conclusion that if Gault is ultimately interpreted as meaning that in any juvenile court proceeding in which a youth is charged with being a "delinquent" is a "serious" offense because the child might lose his liberty for a substantial length of time, then every adjudication of juvenile delinquency would give rise to the right to a jury trial. But this would prove too much. While Duncan and Bloom do suggest that the basis for determining what constitutes a serious offense requiring a jury trial may be an objective one of either the sentence actually imposed or the length of possible punishment; these tests may not be practical in the setting of a juvenile proceeding.

An objective test may be appropriate in a general criminal court where individual crimes are defined in terms of specified acts with the punishments being allocated in accordance with the specific act committed. But a charge of delinquency on the other hand, is defined by most statutes in very broad terms as a youth (usually 18 or under) who violates any local, state or federal criminal law. That might include anything from using vile or vulgar language to rape. An adolescent may have committed only a minor infraction, yet standards of delinquency enable a judge to sentence him for a prolonged period of time — usually the period of his minority. Therefore, any determination of whether a juvenile should be afforded a jury trial based upon a correlation between juvenile and adult court should avoid length of punishment as the sole criterion. Such a standard would present difficult alternatives. Either a youth would be provided with a jury trial for any determination of delinquency, no matter how petty, or he is completely deprived of any opportunity to be tried by a jury. Faced with this alternative, a right to a jury trial should not apply to every delinquency proceeding where a youth is deprived of his liberty. A suggested criterion would be to provide a youth with a jury trial whenever he is charged with an offense, which if committed by an adult and triable in an adult court, would give the adult a right to be tried by a jury. In this manner, the juvenile is afforded the same right as his adult counterpart.

80. Gault itself gives an indication that such an interpretation of a delinquency proceeding might be in order where it states that:
[A] proceeding where the issue is whether the child will be found to be a "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.
387 U.S. at 36.
81. See note 77 supra.
82. See note 70 supra.
A. Jury Trials, Juveniles and the States

Prior to the decision of *In re Gault*, the states have consistently held that the constitutional right of trial by jury in criminal cases is inapplicable to juvenile proceedings.85 Even decisions after *Gault* and *Duncan*, decided in light of the strong implications they raise, have reached divergent conclusions. Those cases which have refused to extend this right to juveniles have based their decision on one or more of the following reasons: (1) the continued vitality of the *parens patriae* rationale in juvenile proceedings;86 (2) the fact that either the constitutional right to a jury trial does not apply to the states or, post-*Duncan*, that it does not extend to juveniles87 and; (3) a juvenile trial is basically a civil proceeding and therefore does not require a trial by jury.88 Those decisions based on the first rationale view the juvenile hearing as a consideration of that which is in the best interest of the child rather than merely as a determination of guilt or innocence. Although in each case in which a juvenile has been denied the right to a jury trial the courts have recognized that *Gault* requires a hearing that measures up to the essentials of due process, they find nothing in the philosophy or rationale of *Gault* to justify the conclusion that a jury trial in a juvenile proceeding is a constitutional right. They reason that the *parens patriae* theory still has an important role to play in juvenile procedures and that the inevitable formalities accompanying a jury trial would necessarily inhibit the rehabilitative function of the hearing.89 But as we have seen, this interpretation overlooks the

85. On the theory that juvenile proceedings are civil rather than criminal, many states have denied a jury trial to juveniles. Matter of Daedeler, 194 Cal. 320, 228 P. 467 (1924); Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1922); Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913); Marlow v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Commonwealth v. Bigwood, 334 Mass. 46, 133 N.E.2d 585 (1956); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943); *In re Perham*, 104 N.H. 276, 184 A.2d 449 (1962); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); Mill v. Brown, 31 Utah 473, 88 P. 609 (1907). Others have denied the right on the basis that a juvenile charged with delinquency is not a specific criminal offense. *Ex parte State ex rel. Echols*, 245 Ala. 333, 17 So. 2d 449 (1944); Martin v. State, 213 Ark. 507, 211 S.W.2d 116 (1948), while others have held that a juvenile is not entitled to a jury trial under due process of law. See Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1930); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943).


89. In Commonwealth v. Johnson, 211 Pa. Super. 62, 76-78, 234 A.2d 9, 16-17 (1967) the court said:

In certain circumstances it may become advisable to relax formal court procedure and to conduct an informal hearing. . . We find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of both liberty and due process, may employ simplified rules and techniques.
important language and ramifications of the *Gault* opinion. Not only has the viability of the *parens patriae* theory as applied to juveniles, been shaken; but *Gault* also found it necessary to qualify the traditional view that an informal proceeding is per se a substantive benefit of the juvenile process.90

The validity of the second argument — the right to a jury trial is not applicable to the states — was destroyed by the Supreme Court in *Duncan v. Louisiana.*91 However, it still might be possible to argue that *Duncan* should not be controlling in the juvenile context since *Duncan* does not specifically mention juveniles and it has not yet been established whether an adjudication of delinquency is a serious enough offense to require it.

Those decisions which hold that a juvenile trial is basically a civil proceeding may find some support in the argument that *Duncan* applies only to criminal proceedings. But, the unwillingness to equate a juvenile proceeding with a criminal trial, which has traditionally been the foremost reason for denying any constitutional safeguards in juvenile proceedings92 seems unfounded in light of *Gault* and *Duncan.* In *Gault,* the Court challenged the notion that the civil–criminal dichotomy justifies denying juveniles specific procedural safeguards where they are in danger of being incarcerated for a substantial period of time.93 Similarly, in *Duncan,* the Court viewed the loss of liberty as being determinative of whether a jury is necessary to satisfy the demands of due process.94

Even prior to *Duncan* and *Bloom,* at least one lower federal court addressed itself to the civil–criminal dichotomy and its relation to a juvenile's right to a trial by jury and reached its conclusion, in part, on the same reasoning later adopted by *Duncan* and *Bloom,* that the determination of one's constitutional rights should not flow from the name given the proceeding but from the fact that being adjudicated a juvenile delinquent will result in a deprivation of one's liberty. In *Nieves v. United States,*95 the federal district court for the District of Columbia

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The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.

90. *See p. 977 supra.*
92. *See note 85 supra.*
93. *In re Gault,* 387 U.S. 1, 23–24 (1967).
94. *See p. 983 supra.*
95. 280 F. Supp. 994 (S.D.N.Y. 1968), Nieves, a sixteen year old, was convicted on a violation of the federal narcotics law and because of his age came within the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–37 (1964). Pursuant to the Act, Nieves was forced to choose between his sixth amendment right to a jury trial and trial under the juvenile act. The court held that the waiver of a jury trial required by the Act was unconstitutional because it presented the offender with an impermissible choice between a non-jury hearing and the exercise of his sixth amendment right to a jury trial. But more important, as an alternative basis for the decision the court held that *Gault* required a jury trial for a juvenile prosecuted under the Federal Juvenile Delinquency Act. See 43 N.Y.U. L. Rev. 769 (1968).
held that the "civil" label given to juvenile proceedings was not determinative of the rights then in issue, but rather the possibility of incarceration was, and therefore, for purposes of the Sixth Amendment right to trial by jury, a delinquency proceeding is criminal in nature, and if the offense is serious enough, a right to a jury trial will be guaranteed in any federal proceeding. Similarly, those state courts providing for the extension of this right to delinquency proceedings have based their reasoning on the proposition that the civil-criminal distinction between juvenile and adult proceedings has been obliterated by the Gault decision. On this point the Rhode Island Family Court said:

[U]nless there is a separation of civil process from criminal process, the system will remain congested with many theories . . . All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally must be applied to a juvenile case, even including that of the right to a trial by jury of his peers . . . The Court is convinced that a juvenile is entitled to a trial by jury under the provisions of the Sixth Amendment to the U. S. Constitution, via the Fourteenth Amendment . . .

VI. THE "NEED" FOR A JURY IN JUVENILE PROCEEDINGS

Although Duncan and Bloom read in light of Gault provide a strong indication that the next logical step for the Court to take would be to grant juveniles the right to a trial by jury, their holdings have not answered the functional question of whether a difference in the fact-finding process between a criminal and juvenile proceeding justifies the burden that the presence of a jury will place on the juvenile system. Ultimately, this question will have to be decided and that decision will involve careful consideration of both the necessity and desirability of including the right to a jury trial as another essential element of juvenile due process or excluding it as an unnecessary impediment on the state's role as parens patriae. To begin the consideration of the efficacy of including a jury trial as an essential element of "juvenile" due process it seems appropriate to conduct a careful analysis of the distinct advantages which the absence of a jury trial allegedly provided for the juvenile system in the past.

that for the purposes of the fifth amendment privilege against self-incrimination, juvenile delinquency proceedings are criminal in nature. However, the soundness of this approach to providing a jury trial is doubtful. The privilege against self-incrimination has been extended to civil proceedings, both administrative and judicial, investigatory and adjudicatory. The sixth amendment right to trial by jury has been limited strictly to criminal trials. Thus, holding the privilege against self-incrimination applicable in juvenile cases does not, by itself, necessitate use of a jury trial in the same proceeding.

96. In re Rindell, 36 U.S.L.W. 2468 (R.I. Fam. Ct. 1968). Cf. De Backer v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968) (majority of four held Nebraska statute denying a right to a jury trial to be unconstitutional but because of Nebraska requirement that a majority of five concur in the declaration of a statute to be unconstitutional, the statute was upheld).

Traditionally, one of the substantive benefits of the juvenile proceeding, which the leaders in the juvenile court movement believed to be an integral part of *parens patriae*, was its informality. Since a jury trial would by its nature instill an added degree of formality, it was uniformly felt that the presence of a jury would place an undue restriction on one of the beneficial elements of a juvenile proceeding. In its place was substituted a wholly informal and flexible procedure in which the judge, parent and social worker put forth a co-operated effort to determine those facts related to both the child's past conduct and that which led to the filing of the petition. Each child was the subject of an investigative social report based primarily on hearsay which sought to determine the underlying cause of his delinquency.

Thus informality in procedure and disposition became a basic characteristic of the juvenile courts. The essential premise for such a rationale is that an informal hearing is conducive or even necessary to the exercise of *parens patriae*. However, this premise has been called into question by the *Gault* court which, in utilizing its balancing approach to determine which procedural safeguards were to apply to juvenile proceedings without displacing any of the substantive benefits of the juvenile process found it necessary to qualify the traditional view that an informal proceeding is per se a substantive benefit. This is largely because of the increased reaction in recent years against informality in juvenile proceedings which has resulted from a profound concern about the potential arbitrariness and unlimited judicial discretion that it fosters.


100. TASK FORCE REPORT, supra note 23, made the following comment concerning the juvenile's right to a jury trial:

As has been observed, 'a jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties.

101. The filing of a petition is the primary method by which a child is brought to the attention of the juvenile court. Ordinarily, the person filing the petition need only allege that he has knowledge that there exists some legal reason why the court should take cognizance of an act by a particular child. The petitioner may be, and often is, the parent or guardian of the child. He need not allege any personal injury, although some jurisdictions limit the parties entitled to file a petition to those with a direct interest. Comment, *Juvenile Court Procedure — Intake to Disposition*, 19 ALA. L. REV. 402 (1967).


103. 387 U.S. 1, at 31-32 (1967).

The recognition of the profound effect that a confrontation between a juvenile and those who have the power to deprive him of his freedom may have upon a youth, has prompted the juvenile courts to exercise continuing efforts toward utilizing the hearing as a constructive influence. It has been argued that the exposure of a juvenile offender to a judge with the power to choose, as the circumstances warrant, between various forms and degrees of severity of punishment is an effective rehabilitative tool.\textsuperscript{105} The major premise of this argument is that if the child is awed and impressed at the hearing, he will be deterred from further misbehavior. However, \textit{Gault} suggests that the impact from such informality is precisely opposite to that intended.\textsuperscript{106} The Court cites a recent study in which it is shown that instead of producing attitudes of trust and confidence, the high degree of procedural relaxation results in confusion and misunderstanding.\textsuperscript{107} Furthermore, the study indicates that the juvenile views the proceeding as completely personal and fears that the ultimate decision may turn on the whim, anger, or friendliness of the judge.

One implication of the \textit{Gault} decision seems to be that the formalities of due process may even have a positive effect on rehabilitation since the elements of impartiality, fairness, and orderliness are likely to impress a juvenile with respect for the legal system.\textsuperscript{108} When a juvenile is in danger of being substantially deprived of his liberty as a result of being adjudged a delinquent, it is submitted that the formality that a jury brings to the proceeding is desirable in a matter of such consequence.\textsuperscript{109} Indeed, with the procedural safeguards now applicable in the juvenile courts, it may be argued that the presence of a jury adds little formality to that which \textit{Gault} demands as a minimum requirement of due process. The juvenile is assured the right to all the procedural formalities specified in that opinion. Once the proceedings have been changed into a trial directed by council, the traditional rehabilitative function of the adjudicative stage is almost eliminated irrespective of the presence of a jury.

It should not be assumed however, that informality has been displaced entirely from the juvenile process. Although \textit{Gault} somewhat formalized the adjudicative stage of the process, the Court did indicate that flexibility should exist in the disposition stage to provide a greater opportunity for


\textsuperscript{106} 387 U.S. 1, 26 (1967).


\textsuperscript{108} \textit{Id.}

\textsuperscript{109} Two noted authorities stated the following:

\ldots Trial by jury is not a matter of form — like a judge’s robe or gavel — but of substance, the product of long historical experience and expressing a profound judgment by our legal system about the means of adjudicating criminal behavior.

\textit{Dersen & Reznick, supra} note 36, at 25.
therapeutic treatment. It is in the exercise of this dispositive function that the expertise of the juvenile judge is most useful. His main concern during the sentencing process should be rehabilitation of the juvenile rather than punishment and protection of the public. During this stage it becomes essential that the judge familiarize himself with the juvenile's entire record including social and psychological reports which would be inadmissible in the fact-finding hearing before a jury. In order to assure the proper use of the youth's social report during the dispositional phase without violating the juvenile's right to confrontation guaranteed to him during the adjudicative stage, a divided hearing that totally separates the two functions should be provided.

B. Confidentiality

Another traditional objection to providing a jury in juvenile proceedings is that it would destroy its confidentiality. This was deemed necessary to protect the child from the stigma of criminality which results from public exposure. However, this promise of secrecy has not been fulfilled. In most jurisdictions disclosure of juvenile records is discretionary with the judge. It is not uncommon for many courts to routinely supply information to the armed forces, the government and even private employers. The police are even more liberal. Most law enforcement agencies keep a complete file of juvenile offenders and readily supply any information requested to the Federal Bureau of Investigation, the military and similar agencies. Although some degree of confidentiality will be dissipated if a trial by jury is deemed essential, compared to the present exposure the effect would be miniscule. In addition, it should be kept in mind that if the attorney and his client feel that it will be in the best interests of the juvenile to keep the proceedings strictly confidential, a knowing and intelligent waiver of a jury trial is always available. While it may be in the best interests of a youth who admits his guilt to adhere to strict confidentiality in the trial, one who aggressively protests the formal accusations in the petition is more interested in seeking the most expedient means of proving his innocence than in being certain that the hearing is kept confidential. The best approach to this problem would seem to be to provide the juvenile offender with a choice as to whether the trial will be by a jury.

What has been said does not mean that a juvenile proceeding is required to be open to the public. The prevailing view at the present

110. The Court, in dividing the delinquency determination process into three distinct parts, implied that each should serve a separate function and that rehabilitation would be best served in the disposition stage. 375 U.S. 1, 13 (1967).
time is that there is no right to a public hearing in juvenile courts. An application of the balancing as set out in Gault to a public trial would seem to justify an exclusion of it as an unnecessary impediment on the state's role as parens patriae. A reduction of the stigma associated with a finding of criminal misconduct is one of the substantive benefits of the juvenile process recognized by the Gault court. It is true that an open trial would serve as a check on arbitrary action by the court, but the stigma resulting from public access would tend to handicap rehabilitative possibilities. However, the exclusion of the public from the hearing does not create an inherent conflict between preserving the privacy of the juvenile hearing and the sixth amendment right to a jury trial. Admission of a jury is not tantamount to the publicity that would result from the presence of the press or the public generally. Although the presence of a jury creates the potential for publication, this possibility would not seem so great as to outweigh the desirability of a jury as the fact-finder.

C. Jury as a Fact-Finder

One further objection to including a jury in a juvenile proceeding is the belief that a jury is not as qualified as a judge to be the fact-finder in a juvenile proceeding. Therefore, an examination of the jury's capabilities as a fact-finder seems appropriate before any final determination can be made as to the propriety of including a jury in the juvenile process. In order to examine its capabilities, it should be remembered that the prevailing goal of the juvenile system is to achieve, above all, the rehabilitation of the youthful offender. Consistent with this goal is the proposition that any efforts to treat or rehabilitate, if they are to have any real chance of success, must be based on an accurate determination of the facts that led to the filing of a petition.

The attributes of a jury trial, including protection against the abuse of the judicial process by the government and the preservation of judicial

114. See e.g., State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); In re Lewis, 51 Wash. 2d 193, 316 P.2d 907 (1957).


117. Most jurisdictions provide for exclusion of the public from juvenile hearings. These take one of three forms: (1) an outright ban of all public presence as in Me. Rev. Stat. Ann. tit. 15, § 2699 (1965); Wis. Stat. Ann. § 48.25 (1) (1965); (2) admission according to discretion of the judge as e.g., Ala. Code tit. 13, § 533 (1959); Conn. Gen. Stat. Rev. § 17-67 (1958); or (3) admission on request of the youth, Cal. Welf. and Inst'n's Code § 733 (West 1966).

118. See Texas Rules of Court, art. 13, 94, 95; Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 541, 559 (1957).
independence, have long been established as fundamental rights essential for assuring a fair trial in all serious criminal cases.\textsuperscript{119} This does not mean, however, that a jury as a fact-finder is superior to a judge or that any trial held before a judge alone would be unfair. But it is submitted that the efficacy of the jury as a fact-finder is well founded.\textsuperscript{120} In a recent study it was discovered that in a majority of cases tried before a jury there was every indication that the jury was able to follow the evidence, understand the case and come to a sound conclusion. When the juries reached a different result than the judge would have, it was usually because they were serving some of the basic functions for which they were created.\textsuperscript{121} Joining this acknowledgment of the capability of the jury in a criminal trial with the view taken in \textit{Gault} that the adjudicative procedure is merely a procedure without any therapeutic value, in which the court determines which juveniles are proper subjects of rehabilitative treatment,\textsuperscript{122} the legal questions to be presented to a jury in a delinquency trial are identical to those presented in a criminal trial for the same offense. Judging the credibility of witnesses, finding the facts and weighing the evidence are of equal difficulty regardless of whether an adult or a juvenile is being tried for the alleged offense.\textsuperscript{123} Additionally, the jury function of protecting the defendant from a biased judge would seem to be equally as applicable in a juvenile court as it is in a criminal court. However some commentators have observed that the traditional jury function of protection against judge bias and government oppression is not applicable in juvenile trials because an adult jury is likely to have the same or even more prejudices toward children than judges.\textsuperscript{124} They argue that since juveniles would not be tried by a jury of their peers who can relate to the accused and understand and sympathize with his problems, much of the protection afforded by a determination of the facts by a jury would be lost, therefore making the significance of this right tenuous. They conclude that perhaps judges who are in constant contact with juveniles and who deal with their problems every day, could best understand their problems and sympathize with them.

One response to the argument that adult jurors are unsympathetic toward and harbor prejudices against juvenile offenders can be found in a recent comprehensive study on the criminal jury compiled by Kalven

\textsuperscript{121} \textit{See supra}.
\textsuperscript{122} \textit{See supra}.
\textsuperscript{123} \textit{See supra} note 36, at 23, where the authors state:
Other values of the jury system — as a bulwark against possible judicial arbitrariness, as an assurance that each case will receive individual attention, and not become another item on the assembly line of an overworked judge, and as a means of filtering the enacted criminal law through current community standards of guilt — are as applicable for juveniles as for adult offenders.
and Zeisel.\textsuperscript{128} During this study a survey of jurors was conducted in which they were asked to consider the significance of the sex, age, and race of a defendant, in relation to whether a particular defendant generated any sympathy. The one factor which evoked the most sympathy was age, with defendants under the age of 21 generating the greatest degree of sympathy.\textsuperscript{126} Although the results of this survey are not conclusive, it does tend to offer some evidence that the adult juror is capable of showing compassion to the juvenile. Furthermore, the juror, like the juvenile and witnesses, is unaccustomed to the atmosphere of the courtroom and can best feel and know the youth's reactions, confusion and mental state.

The argument that a judge because of his experience in dealing with juvenile cases during the course of a year is a better fact-finder than a jury seems questionable.\textsuperscript{127} On the contrary his work by necessity becomes routine and systematized. A resulting tendency from such a routine might be to categorize each defendant and witness into classifications developed over years of observation in juvenile matters. The danger here is that an expert trier of fact is somewhat too ready to see a familiar pattern. In contrast, the jury, by its very nature is not prone to classification and does not lose the intense interest and awareness associated with the uniqueness of the situation.\textsuperscript{128}

Another factor to consider in support of replacing the judge as the fact-finder in juvenile proceedings is the existence of mistrust of our legal system among the poor and alienated residents of our urban communities. In a disproportionate number of cases the delinquent child is a member of a minority race living in a low income community.\textsuperscript{129} The mistrust which these people have for the legal process might be dispelled to some extent by the presence of a jury since that would tend to formalize procedure and hence minimize the potential for abuse of discretion. An impartial jury chosen at random from the members of his community would provide the juvenile with a feeling of security and legitimatize the outcome of the proceedings.

In light of the preceding analysis and the proposition that due process, as applied to juveniles, involves a careful determination of which procedural safeguards are essential to a fair adjudication without displacing any of the advantages of the juvenile system,\textsuperscript{130} it can readily be seen that the traditional policy reasons for concluding that a jury trial would unduly

\textsuperscript{126} Id. at 211, Table 65 and comments thereto. Participating jurors were asked to classify defendants as to whether they created a sympathetic, unattractive or average impression. The "index of sympathy" was determined by deducting the percentage of unattractive from the sympathetic. Although not all variations of a particular defendant are present, the authors defended their position by maintaining that their classifications captured all of the relevant variations among criminal defendants.
\textsuperscript{127} See Corbin, The Jury on Trial, 14 A.B.A.J. 507, 509 (1928).
\textsuperscript{128} Norton, What a Jury Is, 16 Va. L. Rev. 261, 266 (1930).
\textsuperscript{129} See Task Force Report, supra note 23 at 43.
\textsuperscript{130} See p. 976 supra.
impede the juvenile process no longer have a basis in fact. This conclusion coupled with the Duncan proposition that a right to a jury trial is fundamental when a defendant faces a significant abridgment of his freedom may lead one to conclude that a juvenile charged with an offense, which would entitle his adult counterpart to a jury trial, is constitutionally entitled to the same protection.

VII. Specific Problems Created by the Presence of a Jury

A. Administrative Difficulties

Obviously, an inevitable result of requiring a trial by jury in juvenile courts would be an increase in the economic and administrative difficulties that already exist. For example, it is foreseeable that the increase in the number of jury trials could delay a case for a substantial period of time and that this delay would complicate the rehabilitation process.131

The granting of the right to trial by jury to juveniles does not necessarily mean that this right must be exercised as often as it is in criminal cases. In fact, experience has shown an opposite tendency. In Washington, D.C., for example, where the juvenile's right to a trial by jury is provided by statute, there were only two jury trials conducted in the two-year period from 1964 to 1966,132 and in Denver, Colorado, where jury trial is also provided for, there have been only two requests for it in twenty-five years and both requests were withdrawn before trial.133

Of course, with the increased use of attorneys in juvenile proceedings there is a possibility that the request for jury trials will increase134 plus the additional danger that attorneys might request a jury trial for the tactical purpose of delaying the judicial process. But assuming that we are dealing with responsible attorneys working in the best interest of the youth, this tactic will not be widely used because of the hindrance on the rehabilitative process a delay in the juvenile process will cause.

However, in light of such factors as the high number of admissions of guilt,135 the need for the particular youth's character growth, the nature

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131. Some of the other problems pointed to by critics of the jury trial are that: (1) it is too time-consuming because elements such as jury deliberations and instructions require more time than is presently utilized; (2) the maintenance of the jury is prohibitively expensive; (3) it contributes to delay and; (4) it imposes an unfair tax and social cost upon those forced to serve. See Comment, A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court, 64 Nw. U. L Rev. 87, 113 (1969); Comment, Juvenile Justice in Transition, 14 U.C.L.A. L. Rev. 1144, 1156 (1967).


135. As of 1964, of all the juvenile convictions in the federal district courts, 90% were settled by guilty pleas. Connecticut had 94% settled by a guilty plea; New York 95%; Minnesota 91%; Kansas 90%; Massachusetts 85%. See Task Force Report,
of the offense and the strength of the evidence, an attorney may well find that it is in the best interests of his client to waive a jury trial. But this should not preclude a juvenile, in the relatively rare situations where he elects to contest his guilt, from having such a trial merely because it might consume a little more time or money. Moreover, it should again be emphasized at this point that we are not advocating a jury trial for every offense, but only for those crimes, which if committed by an adult and triable in an adult court, would entitle the adult to a trial by jury. Thus, the sparse use of a jury would seem to dispel any fear that the availability of this right would overburden the already congested calendars of many courts.

To help alleviate some of the expense and time consuming procedures associated with a jury trial, many of the jurisdictions which have extended this right to juveniles have adopted variations to traditional jury practice. Three states have provided for juries of only six members. Massachusetts has required a jury only on appeal, while other states provide one only when requested. Alaska has taken the innovative approach of providing for a panel of young people to assist the judge in determining the facts. Assuming that a juvenile's right to a jury trial is constitutionally required, these state provisions would seem to comply with sixth amendment standards since it only requires that a defendant be afforded the right to an "impartial jury." Therefore, many possibilities are open to the states to provide the essentials of due process without creating undue economic and administrative difficulties.

B. Evidentiary Problems

1. Hearsay

With the advent of a jury trial in juvenile proceedings a change in the current rules of evidence would naturally have to follow. In conjunction with the traditional concept that the hearing is an informal fact-finding procedure, was the feeling that the strict rules of evidence should not apply in juvenile courts. Thus, otherwise inadmissible evidence such as social reports based primarily on hearsay and past criminal records of the accused were used with regularity in most jurisdictions. Even the Gault decision contemplated that juvenile courts would not be subject to strict rules of evidence when it suggested that "only competent material

and relevant evidence under rules applicable to civil cases should be admitted in evidence."142 This language should not be construed, however, as giving juvenile courts a license to depart from the evidentiary principles applicable in criminal cases. The disparity between criminal and civil rules of evidence is only minimal and although Gault does not anticipate the application of all the strict rules of evidence, it does, for the first time, represent a willingness to limit the discretion of the juvenile court judge to admit evidence. In that case the Supreme Court held the statements of the complaining witness who never appeared before the trier of fact to be inadmissible on the grounds that this procedure violated the juvenile's constitutional right to confront and cross-examine witnesses testifying against him.143 Thus placing the evidentiary rule of hearsay on a constitutional basis, it may be safely said that hearsay evidence is no longer admissible in juvenile trials.144

2. Other Rules of Evidence

With Gault serving as a foundation, it is not too difficult to argue that the rest of the basic rules of evidence necessitated by the presence of a jury should also apply to juvenile proceedings. It is a customary practice both in criminal and civil trials that judges exercise more leniency in admitting evidence when there is no jury present. This is justified on the presumption that a judge is aware of the rules of evidence and can therefore be relied on to exclude from his consideration that which is prejudicial.145 Whatever validity this presumption has with respect to a criminal trial,146 it loses much of its force when applied to a juvenile trial. Because of the traditional notion that a juvenile proceeding does not serve the same function as a criminal trial, it seems probable that juvenile judges might be confused as to the proper role of hearsay and other forms of inadmissible evidence thus giving them the same status as direct evidence without effectively separating the two from their final determination.147 A possible solution to this problem would be to simply apply the jury rules of evidence to all trials whether by judge or jury.148 Some states have

148. One commentator has remarked in this manner: The advantages of such a procedure are numerous. Certain evidence that is incapable of any meaningful cross-examination is excluded. Judges are not expected to
done this. Moreover, the introduction of stricter rules of evidence would not be contrary to any of the recognized substantive benefits of the existing juvenile system. For example, nothing would be lost by requiring a witness to testify in person rather than through a social report. On the contrary, reliability would be improved. Since most, if not all of these rules are founded in reason and experience, their general application to juvenile proceedings seems desirable.

3. **Use of the Social Report**

One critical problem which would be created by the application of the rules of evidence to juvenile proceedings is the exclusion of the social report compiled on the juvenile. This is a compilation of material gathered over the years concerning the youth's social, psychological, and environmental background which is used by the judge in making his final determination. Such reports often contain the hearsay statements of a variety of sources and are clearly inadmissible under the ordinary jury rules of evidence. Despite their inadmissibility, however, these reports are extremely valuable to the juvenile judge in disposing of the case.

One approach which might be employed to solve this problem is to permit the report to be used in the disposition stage only after the jury has made a finding as to the delinquency of the youth. At this point in the proceedings, the report should be available to the judge to aid him in making a proper disposition. This procedure is not without precedent for in *Williams v. New York*, the Supreme Court held that in a criminal proceeding the judge may consider evidence of this type in sentencing even though the reports were constitutionally inadmissible in the guilt-determining process. This example suggests that if a jury trial was provided for juveniles, the rules of evidence could be tailored to accommodate the unique demands of this proceeding while maintaining the protections they were designed to achieve.

**C. Admissibility of Confessions**

Another area related to the rules of evidence which deserves consideration is the problem concerning the admissibility of confessions. be superhuman, as they are when required to render decisions not based in the smallest degree on admitted inflammatory evidence; they can act with greater certainty, using definite standards for admission, and can be forced to articulate bases for their decision. Counsel preparing for trial will be able to plan their evidentiary tactics and to know what evidence they will have to refute.

Comment, *supra* note 146, at 414.


152. 337 U.S. 241 (1949).

153. *Gault* leaves little doubt that the constitutional prohibition against the admissibility of involuntary confessions is fully applicable in juvenile proceedings.
It has been estimated that in over ninety per cent of all juvenile court cases, the suspect has made a confession.\textsuperscript{154} But with the increased technical assistance of counsel provided under \textit{Gault}, it seems most certain that the incidence of guilty pleas will decrease, thus making their admissibility into evidence a crucial issue.\textsuperscript{155} Under current procedures, the same judge who is called on to rule on the legality of the confession also hears the case.\textsuperscript{156} He is presumed to consider only that evidence which is competent in determining the voluntariness of the confession and to disregard corroborating evidence showing that it was true and that the defendant committed the crime. Whatever the ability of a trained legal mind to perform this feat, it is highly questionable whether a jury could possibly consider the circumstances of the confession objectively; and then disregard the confession completely if it found it to be involuntary. One solution might be to apply the doctrine of \textit{Jackson v. Denno}\textsuperscript{157} to juvenile proceedings. This doctrine provides that in a criminal trial, a state court must provide the defendant with an opportunity to have an initial determination of the voluntariness of his confession prior to the submission of that issue to the trier of fact.\textsuperscript{158} Under this procedure, the judge hears the evidence surrounding the confession out of the presence of the jury and only those confessions which the judge independently determines to be voluntary are then submitted to the jury for its consideration.\textsuperscript{159} Surely, the same danger of prejudice created by the inability of a jury to effectively separate evidence surrounding the confession and that relating to guilt or innocence is just as prevalent in a juvenile trial as in a criminal trial. Thus, as a necessary consequence of providing

\textsuperscript{154}. Handler, \textit{The Juvenile Court and the Adversary System: Problems of Function and Form}, 1965 Wis. L. Rev. 7, 19.

\textsuperscript{155}. Additionally, it appears from \textit{Gault} that Miranda v. Arizona, 384 U.S. 436 (1966) will apply to juvenile custodial interrogation, despite the Court's reservation of the issue. This is based on: (1) the Court's conclusion that Gault's privilege against self-incrimination was violated by citing a number of leading confession cases, including \textit{Miranda} and by a lengthy consideration of the danger of juvenile confessions therefore, applying the privilege beyond testimony to pre-trial interrogation and; (2) its conclusion that Gault's right was violated because his confession was obtained by the probation officer without warning him of his right to remain silent and out of the presence of his parents. See Dorsten & Rezneck, supra note 36, at 37-39.


\textsuperscript{157}. 378 U.S. 368 (1964).

\textsuperscript{158}. The rationale underlying \textit{Jackson} is the desire to protect against the obvious prejudice engendered by having the same trier of fact that hears the evidence surrounding the confession hear the case. It is therefore submitted that in order to serve the purpose which the rule was designed to serve, the implementation of the rule should not be dependent on whether the trial is by jury and should be extended to non-jury trials as well. \textit{Jackson} can be read as providing a right to have an independent determination of voluntariness by someone other than the ultimate trier of fact, regardless of whether jury trial is elected or waived. See Commonwealth v. Johnson, 211 Pa. Super. 62, 68, 234 A.2d 9, 12, 13 (1967).

\textsuperscript{159}. Jackson v. Denno, 378 U.S. 368, 394 (1964).
a jury trial, this safeguard which is already constitutionally required in adult criminal trials would be made to apply to a juvenile proceeding and would therefore effectively eliminate one of the obvious problems created by the presence of a jury.

D. Burden of Proof

The final area of inquiry concerning the rules of evidence which deserves attention is the proper burden of proof required in the juvenile proceeding. Most courts considering this problem have held that the civil test of preponderance of the evidence is the proper criteria, while a minority have insisted on the criminal standard of beyond a reasonable doubt. The requirement of only a preponderance of the evidence is usually justified on the basis that juvenile proceedings are basically civil in nature and that being judged a delinquent does not carry the stigma associated with a criminal conviction.

A contrary approach suggested by one commentator is that there is much to be said in favor of the criminal standard of beyond a reasonable doubt over the preponderance of the evidence test, particularly where a jury is present. His argument is that:

The reasonable doubt standard impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue; the preponderance test is susceptible to the misrepresentation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.

This latter approach to the problem warrants merit since it does not seem reasonable, in light of Gault, to grant juveniles the same procedural rights that protect adults charged with a crime, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required in a criminal proceeding.

VIII. Conclusion

Since the institution of the juvenile court and the individual rights of the juvenile are both so important, a reasonable reconciliation of the two interests must be reached. In balancing these two interests, it is submitted that the Duncan proposition that a right to a jury trial is so
fundamental to due process that it must be provided in any criminal proceeding where a defendant faces a significant abridgment of his freedom,\textsuperscript{165} should extend to juveniles \textit{unless} its presence would seriously interfere with the recognized benefits of the juvenile process. But, as examined previously, the traditional policy reasons for holding that due process, when applied to juveniles, does not necessarily include the right to have a jury no longer have a basis in fact.\textsuperscript{166} Furthermore, any inherent problems created by its presence in the system would not be so insurmountable as to preclude its adoption.\textsuperscript{167} Yet in spite of the substantial evidence in favor of extending this fundamental right to juveniles, we have consistently persisted in refusing to do so. Perhaps it was just this type of situation which prompted the Supreme Court recently to observe:

There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.\textsuperscript{168}

\textit{Timothy E. Foley}

\textsuperscript{165} See note 58 \textit{supra}.  
\textsuperscript{166} See pp. 989-95 \textit{supra}.  
\textsuperscript{167} See pp. 995-1000 \textit{supra}.  
\textsuperscript{168} 383 U.S. 541, 556 (1966).