Juries for Juveniles: Solving the Dilemma

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The Supreme Court has described as "constitutional domestication" the process by which in the past few years it has commanded the nation’s juvenile courts to obey the restraining leash of the due process clause when conducting adjudicatory hearings. The basic rights of notice, hearing, counsel, confrontation, cross-examination and privilege against self-incrimination were due process confines laid out by In re Gault. Considering “only the problems presented” by Gault’s petition, the Court specifically left for later demarcation issues of appellate review, recording and free transcript, use of hearsay, and standard of proof. It noted some additional prospective concerns, more directly raising the relationship between adjudicatory hearings and adult criminal trials:

[I]t has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.

The last of these, trial by jury, has been before the Court twice since Gault, but not resolved. By docketing for the coming term In re Bur-

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1. In re Gault, 387 U.S. 1, 22 (1967).
4. Id. at 13.
5. Id. at 58.
6. Id. at 11.
7. Id. at 12.
8. Id. at 14, citing Kent v. United States, 383 U.S. 541, 555 and n.22 (1966).
rus, Fucini v. Illinois and McKiever v. Pennsylvania, each squarely presenting the juvenile jury issue, the Court again appears ready to accept the opportunity offered by, but rejected in In re Whittington and DeBacker v. Brainard. If this opportunity is accepted, and the Court imposes jury trials, its command could affect juvenile court practice even more substantially than the initial shock of Gault. Despite the flurry raised by Gault, its impact may have been somewhat overemphasized. However, if the Supreme Court imposed an absolute, unrestricted jury requirement on juvenile courts, additional, and not inconsiderable burdens could encumber a system already severely strained. Trial by jury is expensive in both time and money, and the possibility of increased delay and cost, with little apparent benefit, cannot be disregarded. However, a minor's liberty is as precious to him as it is to an adult; its loss as grievous, if not more so. The jury trial could protect him, as it does the adult defendant, from unjust incarceration.

This article examines three recent Supreme Court decisions interpreting the "spacious language" of the due process clause. Two cases broadened the jury right for adult defendants, the third revised the standard of proof in juvenile court. After considering the significance of these three decisions for the juvenile jury claim, the article proposes a compromise between an unrestricted grant and an absolute denial of the right. This compromise secures a place for the jury at adjudicatory hearings, but restricts the right to those relatively few cases presenting

12. 391 U.S. 341 (1968), remanded "for consideration in light of In re Gault."
14. The rights required by Gault, except protection against self-incrimination, were required by statutory reform in several states prior to Gault (See Paulsen, The Constitutional Domestication of the Juvenile Court," 1967 Supreme Court Review 233, 243), and widely advocated by commentators and commissions. See, National Probation and Parole Association, Guides for Juvenile Court Judges 61-65 (1957); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 85-87 (1967); In re Dennis M., Cal. Rptr. 1, 6, 450 P.2d 296, 301 (1969).
16. One frequently made and obvious distinction is the greater relative impact on the juvenile removed from his home. See, e.g., Tappan, Unofficial Delinquency, 29 Neb. L. Rev. 547, 548 (1950); In re Gault, 387 U.S. 1, 27 (1967); In re Urbasek, 38 Ill. 2d 535, 554, 232 N.E.2d 716, 719 (1968); In re Winship, 397 U.S. 358, 374 (1970) (Harlan, J. concurring).
17. There has been little criticism of Gault's description of juvenile "correctional" facilities in terms equating those facilities with adult penal institutions, 387 U.S. 1, 27 (1967).
a *bona fide* danger of commitment. The concluding sections examine the proposal in light of the objections expressed by state court opinions denying juvenile jury demands.

**A View of the Due Process Clause: Duncan, Bloom and Winship**

In the pending jury right cases, as in *Gault*, "[T]he problem is to ascertain the precise impact of the due process requirement upon such proceedings." Since the decision of *Gault*, this "precise impact" has been measured and determined for two matters related to the juvenile jury claim. Through the due process clause, *Duncan v. Louisiana* and *Bloom v. Illinois* incorporated the Sixth Amendment jury trial guarantee into state court adult criminal trials. A third case, *In re Winship*, construed the due process clause to require proof beyond a reasonable doubt in juvenile court adjudicatory hearings.

Gary Duncan had been sentenced to serve sixty days after a battery conviction. His maximum punishment in Louisiana could have been two years, considered by that state to be a misdemeanor. Bloom had filed a forged will for probate, and been sentenced to two years for contempt of court. Each had demanded, and been denied, the right to have a jury determine the merits of his case. The Supreme Court reversed the convictions because the jury demands were not granted. In the words of Justice Fortas, concurring:

> [T]he Due Process Clause of the Fourteenth Amendment requires that the states accord the right to jury trial in prosecutions for offenses that are not petty.

Although the due process clause was held to require a jury trial right for serious crimes, that right was not found by the Court to be available in the absolute terms of the Sixth Amendment. The Court followed federal authority distinguishing "petty" and "serious" crimes, according to the potential maximum punishment. This authority defined as serious crimes those federal criminal cases in which incarceration of more than six months duration had been set. Justice White, for the ma-

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19. See note 1 *supra*, at 13, 14.
20. See note 18, *supra*.
22. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. CONST. amend. VI.
27. "In all criminal prosecutions..." U.S. CONST. amend. VI (emphasis supplied).
ajority, hinged the jury right on this distinction:

[T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.29

Duncan's companion case, Bloom, indicates that the question decided affirmatively by these two decisions is "whether a severe punishment would itself trigger the right to jury trial . . . ."30 In both cases the majority focused on the danger of depriving an adult criminal defendant of his liberty for an extended period of time without the protection of a jury trial. Thus, the potential period of detention, if it exceeds six months, automatically makes a jury available to the adult criminal defendant.

In the third case explicating the due process clause with significance for the juvenile jury claim, Samuel Winship was charged in a delinquency petition with larceny. As authorized by the applicable New York statute,31 the Family Court judge required the prosecutor to prove Winship's criminal conduct by a preponderance of the evidence. Finding this standard met, though acknowledging on the record that proof had not been beyond a reasonable doubt,32 the judge found Winship to be delinquent. The Supreme Court reversed, holding that for both the adult criminal defendant and juvenile court respondent, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . ."33

As in Gault, a dominant concern with the threat to the minor's liberty threads the Court's discussion. Justice Brennan, for the majority, considered the juvenile's freedom to be an "interest of transcending value,"34 and cited the New York Court of Appeals dissenters' concern with the possibility of "confinement for as long as six years."35 Justice Harlan, concurring, shared this concern, and re-stated his belief that "fundamental procedural fairness" was the appropriate test to apply.36 He tested the stricter standard of proof against the concerns of whether its use would:

(1) interfere with the worthy goal of rehabilitating the juvenile,

29. Id. at 159.
31. N.Y. Family Court Act, Sec. 744(b) (1962).
33. Id. at 364.
34. Id. at 364, citing Speiser v. Randell, 357 U.S. 513, 525, 526 (1958).
36. Id. at 372.
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(2) make any significant difference in the extent to which a youth is stigmatized as a “criminal” because he has been found to be delinquent, or (3) burden the juvenile courts with a procedural requirement which will make juvenile adjudications significantly more time consuming, or rigid.  

In sum, Duncan, Bloom and Winship indicate an abiding concern to fashion from the due process clause maximum protections for an individual threatened with a loss of his liberty. However, the three cases, singly or together, though significant for the juvenile jury trial issue, do not compel a decision either way. As Justice Harlan specifically noted in Winship, “there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases.” Nonetheless, this statement is not an answer: it is the question before the Court, rephrased.

The Juvenile Court Commitment Order

A prerequisite to analysis of the possible congruence between adult due process standards and juvenile court adjudicatory hearings is an understanding of the impact, significance and origin of juvenile court commitment orders. Three factors seem crucial to this understanding: the length of detention, the number of minors affected, and the considerations leading to a commitment order. It appears that commitment is a danger in a rather small minority of juvenile cases, and the decision is reached only after other efforts have failed, or seem certain of failure. However, it is also quite apparent that once commitment is ordered, no definite duration can be determined. In balance, the Duncan-Bloom due process standards, Justice Harlan’s concerns in Winship, and the three commitment factors indicate that a jury trial should be available, but on a restricted basis. This limited availability maximizes the protection offered to the juvenile actually subject to commitment, while avoiding a deleterious impact on the court’s general operation.

Proponents of a juvenile jury right emphasize their fear of an indefinite and extended term of incarceration, once the minor has been committed. Gerald Gault’s case highlighted the concern with the uncertain length of juvenile court commitment procedures. For an adult, maximum punishment would have been a $50 fine and two months in jail. Commitment as a juvenile delinquent to the State Industrial School sub-

37. Id. at 375.
38. Id. at 374, 375 (1970).
39. See n.37, supra.
40. See, note 1, supra at 29.
jected Gerald to a possible six year detention, at the discretion of the facility's personnel. This pattern is common to most juvenile court systems, which generally make the return of the minor to society contingent upon the progress of his rehabilitation.

Because the progress of individual rehabilitation cannot be forecast, statistics on average periods of detention do not adequately indicate the probable duration of detention in any single case. The most recently compiled national statistics tell us:

In 1968, 55 percent of the public institutions for delinquent children had average lengths of stay of 8 months or less, 20 percent of 9 months to 1 year, and 25 percent of 1 year or more. For training schools alone, the average length of stay in 1967 was approximately 10 months. Forestry camps and reception and diagnostic centers had average lengths of stay of 6 months and 3 months, respectively.41

These figures cannot, however, indicate with any certainty whatsoever the prospective date of release in an individual case. At the time the judge decides to place a particular juvenile in custody, any prediction about the duration of his incarceration is speculative. The term can only be described as indefinite.42 This indicates the great relevance of the due process standards for the jury right cases.

However, standing against any automatic application of Duncan and Bloom to juvenile proceedings is the fact that a substantial majority of juvenile proceedings do not threaten the respondents with a loss of liberty for any period whatsoever. In 1967, the nation's juvenile courts heard 811,000 delinquency cases (exclusive of traffic matters).43 During the year ending June 30, 1968, these courts made approximately 131,000 commitments to juvenile correctional institutions.44 Roughly extrapolated, these sets of figures indicate that sixteen percent of the juvenile court petitions result in commitments. Thus, the fear is unfounded that every appearance in juvenile court necessarily endangers the respondent with the risk of indefinite commitment. In fact, the number of cases in which the juvenile is actually threatened by a loss

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42. The Supreme Court recently dismissed an appeal challenging juvenile court indeterminate sentencing practices. State v. Rios, 448 S.W.2d 187 (Tex. Civ. App., 1970); — U.S. —, 91 S. Ct. 35 (1970); But see, Uniform Juvenile Court Act, Sec. 26(2), which sets a two year maximum, subject to extension.
of liberty is relatively small. This factor is particularly important in considering the impact of the jury on the operation of the court.

Another aspect against automatic application of Duncan is seen from an examination of the considerations leading to the commitment order. It should be emphasized that the criminal conduct actually charged has only secondary importance in the determination of the juvenile’s disposition after the delinquency adjudication. The juvenile respondent referred to the court for the first time, even for a “serious” crime, is not likely to be subject to commitment. If the crime is particularly serious, or committed under aggravated circumstances, he may be transferred for trial in adult criminal court. But, as a general rule, efforts will be made to work with the minor within the juvenile system, despite the serious nature of the offense. In practice, commitment usually results only after efforts at rehabilitation have failed, or are deemed impossible of success. A juvenile recidivist charged with curfew violation, the trial of which would not require a jury under a literal application of Duncan and Bloom, may be a more likely prospect for commitment than a youthful armed robber before the court for the first time.

The dispositional hearing for any juvenile respondent, first offender or recidivist, will not focus upon the nature of (or penalty for) the crime charged. Rather, attention will be given to the prospects for rehabilitation without commitment. If rehabilitative potential appears to be slight, based upon an examination of the facts and circumstances of prior and present conduct, commitment is likely. This is so, without regard for the criminal conduct charged in the present instance, or whether it is “serious” or “petty.”

This aspect, combined with the relatively low number of cases in which commitment is a danger, indicates the inapplicability of the “serious-petty” distinction to a discussion of the juvenile jury problem. To deny a jury trial to the recidivist charged with curfew violation, and subject to commitment, while granting it to the youthful armed robber before the court for the first time, not so endangered, undoes the logical basis of any broad and automatic application of Duncan and Bloom. The decision to offer a jury trial to a juvenile cannot logically depend on the “serious” nature of the conduct charged. As has been aptly stated by the Oregon Supreme Court:

45. “Dispositional Hearing” is the hearing which determines what order of disposition is to be made after a finding of delinquency. See Ill. Rev. Stat., Ch. 37, Sec. 701-10 (1969); Glen, Bifurcated Hearings in the Juvenile Court, 16 Crime & Del. 255, 258-262 (1970).
Bloom reinforces the Duncan proposition that it is the loss of liberty, rather than the name given either to the proceedings or to the offense, which determines whether a jury is necessary to satisfy the demands of due process.46

Proponents of the absolute right to a jury trial for juveniles might argue that the first adjudication is but a prologue to the ultimate and inevitable petition, upon which commitment will follow. Such argument would assume that the first case endangers the minor's liberty as certainly as the last. Therefore, it would conclude, the jury should always be available, even in the first instance, though commitment is not then a present danger. The absolutists fear an accumulation of referrals and adjudications hanging over the courthouse door, waiting the juvenile's imminent return.

However, the presumed reappearance is by no means definite and certain. For many delinquents the first contact with the court is the last. For them, the court hearing and subsequent probationary period serve their good purposes. To be sure, success is not complete, and an unfortunately large number of juveniles do return. But their reappearance cannot be predicted in the first instance. To grant the jury right on all occasions for all respondents subjects many to the dangers of delay, while giving them an unjustified protection against an unlikely commitment. In view of the probable delays attendant upon a broad and unrestricted grant of the jury right, the benefits now available to most youths would be lost.

Adjusting Duncan and Bloom: A Compromise

The conclusion reached by Justice Douglas, dissenting from the dismissal of the appeal in DeBacker v. Brainard, exhibits an erroneously automatic application of Duncan and Bloom. He would have reached the merits and held:

[T]hat the Sixth and Fourteenth Amendments require a jury trial as a matter of right where the delinquency charged is an offense which, if the person were an adult, would be a crime triable by jury. Such is this case, for behind the facade of delinquency is the crime of forgery.47

To reach this conclusion, Justice Douglas made a crucial, but unwarranted assumption, that commitment necessarily will follow automatically upon a finding of delinquency based upon commission of a "seri-

ous" criminal act. A similar "automatic congruence"\textsuperscript{48} was believed by the New Mexico Supreme Court and a few others to require a jury option for all adjudicatory hearings in juvenile court.\textsuperscript{49} As shown in the preceding section, the nature of the offense plays a secondary role in the decision to commit.

The important consideration, and the one consistently overlooked, is to assess on a case-by-case basis the actual danger of incarceration in the individual instance, regardless of the offense charged. Rather than asking whether the alleged act of delinquency is a serious or a petty offense, the preliminary question should be: if this youth is found delinquent on this petition, will incarceration follow?

This question should be posed by the prosecuting attorney or other person representing the state, prior to the adjudicatory hearing. The answer should be based on an analysis not only of the facts of the particular offense, but as importantly, if not more so, upon records of prior police contacts, court referrals and rehabilitative efforts. With a repeat offender, this would necessitate a conference between the state's representative and the probation department. If, based upon a careful analysis, it appears that the balance of interests between society and the juvenile requires commitment, at that time the jury option should be made available to the minor. With the decision to seek commitment upon proof of the alleged facts, the state has made the risk of indefinite incarceration a reality. At that point the jury can give its uniquely effective guarantee of due process. When the fear becomes realistic, when court and counsel have been advised of a decision to seek commitment at the dispositional hearing, then the \textit{Duncan} and \textit{Bloom} due process requirements become relevant, and should be imposed.

This proposal's implementation would require more concerted and effective participation by the prosecutor's office towards achieving the purposes of the juvenile court system. If prosecutors are not presently assigned to juvenile court, it is an unwise effort to trim expenses. Competent and concerned prosecutors are as necessary to the effective operation of the court as adequate defense counsel. In those courts where prosecutors are in service, they would have to examine court and social records with greater attention than may now be customary.\textsuperscript{50} They

\textsuperscript{48} See, note 23, \textit{supra}, at 374, 375 (Harlan, J., concurring).


\textsuperscript{50} Cf., Feldman, \textit{The Prosecutor's Special Tasks in Juvenile Delinquency Pro-
would have to become less advocates and more participants.51

Although failure to grant the jury option would bar commitment, this trigger mechanism would not erode judicial power. Only one of several dispositional alternatives would be prohibited, if the adjudicatory hearing were held without the grant of a jury option before the hearing. Judicial flexibility, essential at the dispositional hearing, would be maintained, with the single exception of commitment. It would be worthwhile, if the jury option were to be made available, for the prosecutor, probation officer, and defense counsel to discuss with the judge the possibility of commitment. Such consultation would contain no more danger of prejudgment than a typical plea-bargaining session. If the judge indicated probable concurrence in the prosecutor's commitment request, the jury could obviate the dangers of judicial prejudice. Judicial inclination not to commit in the instant case could result in a consent decree,52 or the standard nonjury adjudication hearing.

Thus, the due process promise of Duncan and Bloom, Gault and Winship would be kept, if the juvenile is granted a jury option in advance of a hearing which could actually lead to a loss of his liberty. When the prosecutor states an intention to seek commitment, the hypothetical has become highly probable. At that point, the state which seeks to impose an indeterminate confinement should offer the minor the jury's due process protection. Then, and only then, is the mandate of Duncan and Bloom relevant and applicable.

An examination of state court opinions and other discussions of the juvenile jury claim indicates that this resolution of the "due process dilemma"53 has not been previously considered. Commentators advocating a juvenile jury right focus their discussions on the impact of Duncan and Bloom, and inaccurately assume the relevancy of the dividing line mandated for adult criminal defendants.54 Judicial opinions favor-

51. This would comply with the historical and statutory structure of the juvenile courts. See, e.g., Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909); Ill. Rev. Stat., Ch. 37, Sec. 701-20 (1969): "proceedings under this Act are not intended to be adversary..."

52. The use of consent decrees has been widely advocated as a means of maximum utilization of the juvenile court system. See e.g., In re Gault, 387 U.S. 1, 31, n.48 (1967), and authorities cited.

53. Note, A Due Process Dilemma—Juries for Juveniles, 45 N. Dak. L. Rev. 251 (1969); Paulsen, The Constitutional Domestication at the Juvenile Court, 1967 Supreme Court Rev. 233, 251, touched indirectly on the distinction between cases which might involve commitment and those which would not, in discussing possible limitations on the reach of Gault, and provision for participation of counsel.

54. Antineau Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 400
ing a juvenile jury right make the same erroneous assumption, and do
not consider alternatives to an automatic imposition of Duncan and
Bloom standards. In the many state court opinions denying a juvenile's
jury claim, no middle ground appears between broad grant or absolute
denial. Having assumed an all or nothing outcome, the various state
courts advance a number of justifications to support rejection of the
jury claim. None of these justifications, upon examination, appears to
be a satisfactory basis for denying the limited jury right suggested in this
article.

State Court Objections Examined

When compiled and distilled, the state court opinions denying the
jury right to juveniles reveal certain basic and repeated elements of ju-
dicial concern. Though individual decisions vary in their blend of
these objections, the state courts generally have relied on part or all of
the following criteria:

(A) Juvenile proceedings are civil; no jury is constitutionally re-
quired.66

(B) Presence of a jury would impart the indelible mark of the ad-
versary criminal trial on the process.57

(C) The jury would impair the proper functioning of the juvenile
court judge, who provides as fair a hearing as would a jury.58

55. See, e.g., People v. Fucini, 44 Ill. 2d 305, 307, 255 N.E.2d 380, 381 (1970),
appeal pending, 38 L.W. 3456 (1970); In re Johnson, 254 Md. 517, 520, 255 A.2d 419,
421 (1969); DeBacker v. Brainard, 183 Neb. 461, 468, 469, 161 N.W.2d 508, 512,
appeal dismissed, 396 U.S. 28 (1969); People v. Y.O. 2404, 57 Misc. 2d 30, 32, 291
56. See e.g., In re T.R.S., 1 Cal. App. 3d 178, 181, 81 Cal. Rptr. 574, 575
(1969); In re R.I., 3 Cal. App. 3d 100, 106, 83 Cal. Rptr. 81, 85 (1969); Bible v. State,
254 N.E.2d 319, 322 (Ind. 1970); Illinois v. Fucini, 44 Ill. 2d 305, 309, 255 N.E.2d
380, 383, appeal pending, 38 L.W. 3456 (1970); Shone v. State, 237 A.2d 412, 417
(Me. 1968); In re Johnson, 254 Md. 517, 523, 255 A.2d 419, 422 (1969); In re Geiger,
184 Neb. 581, 584, 169 N.W.2d 431, 433 (1969); People v. Y.O. 2404, 51 Misc. 2d 30,
—, 291 N.Y.S.2d 510, 514 (Sup. Ct. 1968); People v. K., 58 Misc. 2d 526, —, N.Y.S.2d
404, 407 (Sup. Ct. 1968); In re Agler, 19 Ohio St. 2d 70, 78, 79, 249, N.E.2d 808,
57. See, e.g., In T.R.S., 1 Cal. App. 3d 178, 182, 81 Cal. Rptr. 574, 576
(1969); In re Dennis M., 75 Cal. Rptr. 1. 8, 450 P.2d 296, 302 (1969); Bible v. State,
254 N.E.2d 319, 324 (Ind. 1969); Illinois v. Fucini, 44 Ill. 2d 305, 309, 255 N.E.2d
380, 382, appeal pending, 38 L.W. 3456 (1970); Dryden v. Commonwealth, 435 S.W.
2d 457, 461 (Ky. App. 1968); DeBacker v. Brainard, 183 Neb. 461, 474, 161 N.E.2d
508, 515 (1968), appeal dismissed, 396 U.S. 28 (1969); State v. Turner, 453 P.2d
58. See, e.g., People v. Fucini, 44 Ill. 2d 305, 310, 255 N.E.2d 380, 382, appeal
(D) Essential secrecy and confidentiality would be lost if trial were by jury. 58

(E) Jury trials would create an unmanageable administrative burden, and make impossible prompt determination of delinquency status and attendant rehabilitative benefits. 60

A. Civil not Criminal

The presence of juveniles on trial and in jail with adult criminals led to efforts, which culminated at the turn of the century, to withdraw juveniles from the rigors of the adult criminal process. Reform advocates found the new system's model in equity, and they borrowed liberally from chancery customs, usage and nomenclature. In the new juvenile court, young defendants became "wards" with "best interests" found and applied by a benevolent judicial parens patriae. 61 To these borrowings, the reformers added a substantial measure of original terminology. There would be adjudications of delinquency, not findings of guilt; commitment, not incarceration; rehabilitation, not punishment. 62 The reformers believed that their most important innovation, and a prime requisite to the new system's success, was the creation of a new, quasi-judicial proceeding, the non-adversary hearing. 63

These terms, and the concepts they represent, retain vigor. But, as Gault publicized, the rhetoric of chancery practices, bound up in the


term, *parens patriae*, concealed flourishing inequities nurtured by the new system. Non-adversary proceedings brought about some distinctly adverse consequences.64

After considering this history, and examining the contemporary realities, the *Gault* Court condemned the traditional reliance on a “civil label of convenience,”65 and challenged the intellectual basis of the *parens patriae* concept, as presenting “historic credentials . . . of dubious relevance.”66 The hope of *Gault* is clear: to introduce some aspects of a due process adversary proceeding would promote the beneficent purposes of juvenile courts:

[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.67

However, even after *Gault*, Justice Fortas’ cautionary language, to avoid labels of convenience, has been more frequently disregarded than observed. Several opinions denying the jury right claim reveal the ease with which courts continue to succumb to the temptation, describing the juvenile proceeding as,

a civil proceeding and under the doctrine of *parens patriae*, the constitutional guarantees of a jury trial and the incidents thereto are not applicable to a juvenile proceeding . . . .68

This continued reliance on the obsolete misnomer (though in apparent accord with juvenile court’s historical origins) is an unfortunate substitute for realistic appraisal of the proceeding’s actual conduct and potential consequences. The vestigal appellation, *parens patriae*, and “the civil label of convenience” unjustifiably avoid the complex issues raised by the demand for a jury trial. As the Supreme Court stressed in *Winship*:

civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.69

All efforts at pinning a familiar label, be it “criminal,” “civil” (or “quasi” either) on the proceedings are undone by the hard kernel of truth in Justice Stewart’s statement: “Juvenile proceedings are not criminal

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64. See, Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 389-391 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 548 (1957); In re Gault, note 1 supra at 18.
65. See note 1, supra, at 50.
66. Id. at 16.
67. See, note 1, supra, at 21; See also, Paulsen, The Constitutional Domestication of the Juvenile Court, 1967 Supreme Court Rev. 233, 241.
68. In re Geiger 184 Neb. 581, 584, 169 N.W.2d 431, 433 (1969); See cases cited, n.56, supra.
69. See, note 23 supra at 365, 366.
trials. They are not civil trials." Rather these proceedings are unique, *sui generis*, related to, but not coincident with, either the typical civil or criminal proceeding. This unique character of a juvenile hearing has been described by the California Supreme Court:

But even after Gault, as we have seen, juvenile proceedings retain a *sui generis* character: although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question.

The use of the "civil" label originated in the reformers' desire to avoid "the foul taint of the convict." The merit of this desire is obvious, and should still be viable, even if today's delinquent may carry stigmata as harsh as the adult felon. However, a wish not to call him a criminal, or formally divest him of certain rights of citizenship, or give him a criminal record, does not convert the proceedings into a "civil" hearing. The place of the jury in juvenile court depends not on the label but upon the actual danger of commitment. The solution proposed by this article, to grant juries in certain limited instances, does not exchange a "criminal" label for the civil designation. The juvenile jury right should not be contingent upon any simplistically descriptive but inaccurate label.

**B. The Threat of the Adversary System**

The reformers' desire to avoid a criminal trial for juveniles caused them to conceive court appearances free of adversary clashes. "Informal" proceedings substituted flexibility for the regulated rigidity of a criminal trial. The minor's best interests could better be found if he was more a subject, and less a participant. Tactics and trickery of the adult trial were to be avoided almost at all costs. The ultimate severity of the costs, borne by the juvenile, have been well described.

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70. See note 1 *supra*, at 78 (Stewart, J., dissenting).
75. See, e.g., Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 120 (1909): "The ordinary trappings of the courtroom are out of place in such hearings."
Though *Gault* mandates formal notice and a right to counsel, sight of an attorney in juvenile court still raises an unpleasant spectre for many judges. A related fear—the adversary trial—has caused several courts to deny a juvenile’s claim for a jury:

A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile court proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were.\(^7\)

Along with the clash and clamor believed to arise from a hearing before a jury would come, it is feared, “austerity,” and a loss of “flexible procedures and techniques.”\(^7\) A hearing with a jury would have a “strong tone of criminality”,\(^7\) resulting in a proceeding:

where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, . . . and reinstates the evils of trying young juveniles on the same basis as adult criminals.\(^8\)

This conclusion, that the introduction of jurors into the courtroom necessarily brings with their attendance all “the formalities, procedural complexities, and inflexible aspects”\(^8\) found in criminal proceedings, finds support, according to many courts, in the enduring premises and hope that “crime and punishment are not the primary business of the juvenile court.”\(^8\)

Its purpose is corrective and reformatory, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrong-doers with more consideration for [their] future development than for their past shortcomings.\(^8\)

However, these premises do not sustain the conclusion that a juvenile should not have a jury right. First, the right to participate as an adversary in his hearing has been guaranteed by *Gault’s* requirement for counsel, if desired:


\(^7\) In re Dennis M., 472, 75 Cal. Rptr. 1, 8, 450 P.2d 296, 302 (1969).


\(^8\) Bible v. State, 254 N.E.2d 319, 323 (Ind., 1969).


Gault assures the juvenile the right to inject into the proceeding all of the “clash and clamor” of an adversary proceeding that his counsel wishes to employ in asserting the due process rights specified in that opinion. Gault having permitted these inroads upon the traditional rehabilitative process, the basic character of the courtroom setting is changed from one of quiet communion between judge and child to that of an adversary arena of the ordinary lawsuit if the child or his parents so elect.84

Having assured counsel to the juvenile, even appointed counsel, if needed, Gault must clearly imply the propriety of active professional representation. Separate and distinct parties are in court, and the crossing of adversarial swords cannot be avoided: “contested cases will introduce some elements of the adversary system . . . .”85

Secondly, the injection of an adversary quality into the hearing does not doom the hearing to the tone and tenor of the adult criminal trial. Though counsel performs his function as advocate-presenting motions, objections and argument—his representation of his client is incomplete, if his form and style are carried over from the criminal court. As several authors have noted, the legal profession’s participation in juvenile court is both long overdue and unique.86 Effective assistance of counsel in juvenile court means more than mere advocacy, though advocacy as the representative of an adversary party is the initial cause for his appearance.

Thirdly, the error in the belief that crime is not the business of the juvenile court, at least at the adjudicatory hearing, should be clear. Given this fact, our question should focus on whether the rehabilitative process is helped, rather than hurt, by the presence of a jury. The importance of an atmosphere of fairness cannot be over emphasized,87 and a child, just as an adult, may have greater confidence in twelve strangers than one. No rehabilitative purpose is served, nor can any rehabilitative efforts succeed, if the juvenile believes he was wrongly or unfairly found delinquent. He knows that in effect he is charged with

84. See note 82 supra, at 915 (O’Connell, J., dissenting).
85. See note 1 supra, at 27.
criminal conduct—no adult eloquence could persuade him otherwise; he also may feel a burden of proving himself innocent, and no citation of a constitutional mandate to the contrary can relieve the weight of that burden.

Some relief from his fears may be had, however, if he is presented at the outset with an option, allowing him to choose between a judge or the jury. Given the fact that a charge of delinquency may coat a more bitter pill, the taste of which cannot be washed out without some effort by the juvenile, his sense of the clash and clamor of the courtroom is made neither more bland nor more sharp by the presence of the jury. An ability to exercise an option to be heard by a jury may, in fact, reduce the taint of hypocrisy now felt by many juveniles.

Finally, it should be noted that the physical setting for the hearing, deemed so important by the reformers, would remain substantially the same, even with a jury. To be sure, it would be necessary to provide space for jurors, and a place for them to deliberate. But the proceeding's relatively relaxed character could be maintained, if it is presently observed. The parties, court and counsel remain seated; and the more formal aspects of the courtroom—bailiffs and clerks, files and rubber stamps, judicial robes and austerity—are equally out of place, with or without a jury. The "informality" desired by the reformers need not be completely abandoned, though the implementation of procedural requirements, including juries, requires some of the physical attributes of the typical courtroom. Hopefully a balance can be struck, to create an atmosphere conveying procedural fairness and sympathetic concern.

C. Disruption of the Judge's Role

The juvenile court judge has traditionally been regarded as more a father figure than a fact-finder. His efforts were to be devoted primarily to the correction and guidance of the child, and only secondarily to exercising his judicial talent to determine complicity. The bond forged by confidential, informal sessions would lead to open discussions and frank admissions. By short circuiting the fact finding process, the court would be open to a quick discharge of the juvenile's impulse to acknowledge his wrong and seek help.

Experience contradicts optimistic faith in the juvenile court judge's ability to perform the good works envisioned by the reformers. To be

89. Id.
sure, the successes have been the commendable achievement of concerned and able judges. But recent studies indicate that they have been a minority, and that "juvenile court judgeship does not have high status in the eyes of the bar" appears to be the least of the deficiencies:

A recent study of juvenile court judges in the United States revealed that half had no undergraduate degree; a fifth had received no college education at all; a fifth were not members of the bar.

Secondly, whereas the reformers conceived successful results from a single probing and effective session, most contemporary juvenile court acts either require or acknowledge a bifurcated judicial function. The first half determines the child's complicity, the second, usually after a probation officer's examination and report, the best available means of preventing future criminal conduct. The distinction between these two phases, adjudicatory and dispositional, is frequently not considered when a claim for a jury trial is made at the earlier phase. Many courts tend to confuse the two hearings, and the distinct functions of the single (and usually the same) judge at each. The following quotation, well describing the purposes of the dispositional phase, represents a typical disregard for the separate adjudicatory and dispositional activities:

[T]he juvenile court's purpose is corrective and reformative, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrongdoers with more consideration for the future developments than for their past shortcomings.

The same misunderstanding of the bifurcated nature of juvenile court proceedings appears in a recent decision of the Indiana Supreme Court denying a juvenile's jury right claim:

During the hearing the juvenile court judge takes into account such factors as the child's age, his family life, the nature of the charges against him, the environment in which he lives, his relationship with his parents, previous acts of delinquency, and any other pertinent factors relevant to the child and his conduct.

The factors listed by the Indiana court do indeed have a proper place in the conduct of juvenile court proceedings: at the dispositional hear-

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91. Id.
94. See note 81 supra, at 323.
ing, which can occur only after a finding of criminal conduct. The
danger of arbitrary judicial action in the absence of the jury can be pro-
jected from two Pennsylvania opinions, which state that the juvenile
judge “must be prepared to inject or vary his personality as the situation
requires,”95 to “guide and mold the hearings.”96 The old warrior, err-
rant brave myth lives on, and Gault stressed the dangers inherent in its
continued vitality:

Juvenile Court history has again demonstrated that unbridled dis-
cretion, however benevolently motivated, is frequently a poor
substitute for principle and procedure.97

Some courts quickly pass off the question of the most appropriate
fact finder by referring to Dean Paulsen’s since modified observation:

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.98

Using a spurious balancing of the interests test, these courts trade off
the juvenile’s claim to a jury trial for judicial flexibility. In making the
exchange, they overlook the fact that judicial flexibility has been rele-
gated, in the statutory scheme, to the dispositional phase, where it is
useful and necessary. The trade-off of the juvenile’s jury claim for
judicial flexibility may be further justified:

Certainly we cannot regard a jury as a better, fairer, more accurate
fact-finder than a competent and conscientious circuit judge.
There may be some judges who do not fit this description, but
neither do all juries.99

Any lingering fear that a judge may be fallible100 is assuaged by the
promise that:

There exists a right of appeal to remedy error and reviewing
courts may exercise vigilance over arbitrary determination of de-
linquency.101

97. See, note 1, supra, at 18.
98. Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 559 (1957);
Presidential Commission on Law Enforcement and Administration of Justice, “Juvenile
Delinquency and Youth Crime,” 38 (1967); See the more recent attitude in Paulsen,
KENT V. UNITED STATES: The Constitutional Context of Juvenile
Cases, 1966 Supreme Court Rev. 167, 186; for opinions relying on the earlier observation, see Com-
Turner, — Ore. —, —, 453 P.2d 910, 913 (Ore., 1969); In re Dennis M., 75 Cal. Rptr.
1, 8, 450 P.2d 296, 302 (1969).
100. The phrase used by the dissent in State v. Turner, 453 P.2d 910, 915 (Ore.,
1969) is “arbitrary, corrupt or biased.”
101. In re Agler, 19 Ohio St. 2d 70, 79, 249 N.E.2d 808, 814 (1969); accord,
The bright hope held out by the promised right to appeal dims before the fact that few appeals are taken from juvenile court, even where the outcome is commitment. Most juvenile respondents are indigent, with only the public defender to represent them. Bond is not available, as it might be for an adult appellant, but time delays are equally costly. Even when taken, many appeals may fall before the principle that the fact-finder alone determines credibility. In neither their crimes nor their accounts of those crimes are juveniles very innovative. One judge may hear the same story several times a week, and where, as is frequent, the number of witnesses for either side is two or three or less, credibility is the determinative issue. No appeal lies from disbelief.

More importantly, with the casual assumption that a jury does not promise a more sure finding of fact, these courts disregard the original purpose and place of the jury in our legal system:

The guarantees of a jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression from the Government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the will of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted in further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over zealous prosecutor and against the compliant, biased or eccentric judge.102

To exchange the jury for judicial flexibility would seem to prove the framers' gravest fears. By emphasizing the need for a flexible judicial role in juvenile court, the opponents of a juvenile jury right appear to prove too much. If they extend flexibility to include the adjudicatory phase, they build in a high risk of arbitrary findings. Or, if by their arguments in favor of such flexibility they mean to limit its exercise to the dispositional hearing, they would seem to have eliminated the basis for their objections.

Even if we could be reasonably sure of the judge's qualifications and compassion, the option of a trial by jury to determine the issue of delinquency would have a proper and useful place in the best juvenile


102. See, note 18 supra, at 155.
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court system. This is so, even if it is impossible to show that the jury gives "the youngster a demonstrably better fact finding process than trial before judge . . . ."\textsuperscript{103} or that the jury is the "most trustworthy instrumentality"\textsuperscript{104} of protection. Doubts about the infallibility of the jury do not adequately meet fears of judicial fallibility. No one would argue that a jury is a prerequisite to determining the truth. Hence most administrative, civil and even criminal matters are left by law or the litigants for determination by the judge alone. But our system allows a person threatened with a loss of liberty to have the truth sought by either twelve or six, not just by one. The preservation of this option is the important concern—not a speculative contention about how often which fact finder is likely to be most accurate.

D. Loss of Secrecy

A hallmark of juvenile court proceedings has been their privacy. Attendance at the hearings may be limited, as is publication of their outcome or participants. This practice well accords with the desire to prevent youthful slips from leaving a lasting and public scar.

Believing this end to be best served by denying the claim for a jury, a small number of courts have stated that to allow trial before a jury would transform the proceedings into a public trial.\textsuperscript{105} Assuming the validity of the premise, that secrecy is in fact available,\textsuperscript{106} the shallowness of this conclusion should be evident. A panel of six or twelve is not the public at large. Its members can be required to keep silent about the proceedings, upon penalty of contempt. In short, no connection exists between a public trial and a hearing before a jury in juvenile court.

E. Burden on the Courts

One of the implied justifications for informal, non-adversary juvenile proceedings was the opportunity for summary adjudication. Quick action was necessary, according to the reformers, to prevent the progress

\textsuperscript{103} Presidential Commission on Law Enforcement and Administration of Justice, "Juvenile Delinquency and Youth Crime," 38 (1967).
\textsuperscript{106} But see, In re Gault, supra note 1 at 24 (1967); "The claim of secrecy, however, is more rhetoric than reality."
towards crime from gathering momentum. Only if the proceedings could move quickly would the court be able to make a timely offer of its unique benefits. But even among those courts which deny a place for a jury, there is a tacit acknowledgement that increasing crime rates and inadequate facilities have caused the hope of “individualized attention and treatment” to remain “an unfulfilled dream.”

However, it must be acknowledged that involvement in the court is of apparent benefit for many of the juveniles who appear before it. Though the recidivist rates are high, a substantial number of youths never return to court after their first appearance. The reasons for this result may be unclear, but it is certain that something in the court experience deters further criminal conduct. For all its failings, the court’s expeditious processing of cases achieves some success.

Some courts have expressed concern that the system’s ability to summarize adjudicate delinquency petitions would be lost if jury trials were imposed. The concern is twofold: delays, caused by backlogs, and administrative burdens, including cost. Mr. Justice Harlan stressed the concern with delay in Winship, when he tested the stricter standard of proof by whether its use would make the proceedings “more time consuming, or rigid.”

Given the backlog in our civil and criminal courts, caused in large part by jury trials, possible aggravation of the backlog problem in juvenile court cannot be disregarded. The experience in the District of Columbia is illustrative. Prior to 1970, the District’s juvenile courts had statutory authority to grant jury trials. Until the mid-1960’s, this right was only infrequently invoked. During the period, 1965-1969, use of the jury demand substantially increased. By the end of fiscal 1969, 290 jury cases were pending, with a consequent effect of increas-

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111. See note 23 supra at 375 (Harlan, J., concurring).
112. D.L.C.E. Sec. 16-2307 (repealed effective July 1, 1970).
ing the delays in all juvenile court matters. The Conference report on the District of Columbia Court Reform Act indicated:

The conferees are deeply concerned about the backlog of over 6,000 cases in the Juvenile Court of the District of Columbia and the long delays in the processing of juvenile cases through the court.

As a result of this concern, Congress repealed the juvenile jury right in the District of Columbia.

Thus, if the jury right is mandated by the Supreme Court without limitation, the consequent delays could injure those very minors believed to be protected by an unlimited jury option. The impact of the delays and administrative burdens would fall most heavily on juveniles whose present delinquent conduct can be corrected, and future acts prevented, by the court's quick action. This group includes those minors not threatened in any way with commitment in the present instance. If they can be helped, they may never return to court, and the question of commitment will never arise. Once placed on the docket treadmill, however, they may never reach the needed help. In the meantime, they are either in "temporary detention" or on the street with neither corrective guidance nor protection.

Limiting the availability of the jury right to cases of potential commitment reduces the impact of the jury on speedy hearings for non-commitable delinquents. Also, a minor whose prior record might suggest commitment receives an additional protection. The prosecutorial urge to seek incarceration in the borderline case would be restrained by a concern to maintain an expeditious processing of all cases.

When the jury is made available, care must be taken by all parties to see that the right is not abused, as it apparently was in the District of Columbia. This requires appearance in juvenile court of attorneys trained for and familiar with juvenile court's unique purposes, practices and procedures. The demand for a jury trial must not degenerate into the automatic filing of the form, as is frequently the case in other matters, such as personal injury cases. Counsel in juvenile court must be cognizant of his tripartite role—advocate, guardian, and officer of the court—and seek to exercise the right on behalf of his client accordingly.

115. 8 U.S. Code Congressional and Administrative News 2509, 2582 (August 20, 1970); D.L.C.E. § 16-2316(a) (effective July 1, 1970).
Faith that a resolution of the dilemmas posed by representation of a juvenile respondent can be resolved without disruption of the juvenile court system was expressed in Peyton v. Nord:

We assume that in most cases jury trial will be waived as in the best interests of the juvenile, and that it will be the exceptional case where a jury is demanded.\(^{116}\)

It should be emphasized that although implementation of the jury right might result in few demands for such hearing, the need for the option is not \textit{de minimus}. Sufficient occasions can and do arise in which "the worthy goal of rehabilitating the juvenile,"\(^{117}\) will be well served by a jury trial. The option should be made available in cases in which commitment is an actual danger, and exercised for the minor's benefit by informed, concerned counsel.

Finally, it should be acknowledged that implementation of the jury right clearly would require additional expense. The juvenile court system, like our penal system generally, has never been well endowed with the time or money needed to make it functional and effective.\(^{118}\) But a cynical appraisal of past funding inadequacies should be no excuse to lose faith that the reformers' bright hopes may someday be realized. Faith in the curative power of money may be simplistic, but it is hardly heretical in juvenile court.

\textbf{Conclusion}

Decision of the cases now pending before the Supreme Court will not end the problem of juries for juveniles. Those states which grant the right presently will be unaffected, and those states which may have to change their procedures (if the right is granted) should do so on the restricted basis outlined above. Commitment—the indeterminate loss of liberty—is a grave consequence, and one which should follow only after all other resources have been exhausted, and all procedural protections, including jury trial, offered and afforded. If a jury trial is available on a limited basis, the risk of backlog would not be great, the change in present procedure would be slight, and the quality of justice in the nation’s juvenile courts would be improved. Thus, the best interests of the state and its young, whom the state seeks both to condemn and re-

\(^{116}\) 78 N.M. 717, 727, 437 P.2d 716, 726 (1968).
\(^{117}\) See, note 23 \textit{supra} at 375 (Harlan, J. concurring).
\(^{118}\) One commentator has referred to \textit{The 3-Minute Children's Hour}. Lemert, \textit{The Juvenile Court—Quest and Realities}, in \textit{Garbedian & Gibbons, Becoming Delinquent}, 135, 138, 139 (1970).
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deem, could attain a somewhat greater degree of co-incidence. As Justice Fortas stated in Duncan and Bloom:

While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of affording that right must be uniform. We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.¹¹⁹

¹¹⁹. 391 U.S. 162, 214, 215 (Fortas, J., concurring).