

Louisiana Law Review

Volume 32 | Number 1
December 1971

The Juvenile Jury Trial Case - A Regrettable "Policy Decision"

Lawrence Roe Dodd

Repository Citation

Lawrence Roe Dodd, *The Juvenile Jury Trial Case - A Regrettable "Policy Decision"*, 32 La. L. Rev. (1971)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol32/iss1/12>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

NOTES

THE JUVENILE JURY TRIAL CASE—A REGRETTABLE “POLICY DECISION”

Appellants were adjudged delinquents in separate and unrelated juvenile proceedings. In each instance a request for a jury trial was denied by the hearing court. All cases were affirmed on appeal to the highest court of their respective states.¹ The United States Supreme Court granted certiorari,² and the cases were consolidated for consideration. *Held*, a trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding. *McKeiver v. Pennsylvania*, 91 S.Ct. 1076 (1971).

The need for strengthening of juvenile rights and interests through the establishment of separate judicial proceedings was recognized in America during the nineteenth century, largely through the efforts of the reformers of that day.³ It was felt that

1. One case, from North Carolina, involved 46 black children charged individually with wilfully impeding traffic, misdemeanors under N.C. GEN. STAT. § 20-174.1 (1965). The charges resulted from a protest demonstration by black children and adults. *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), noted in 48 N.C. L. REV. 666 (1970).

Joseph McKeiver, aged 16, was charged in Philadelphia, Pa., with robbery, larceny, and receiving stolen goods, felonies under Pennsylvania law (PA. STAT. ANN. tit. 18, §§ 4704, 4807, and 4817 (1965)). The essence of the charge against McKeiver was the participation in the theft of some twenty-five cents from three younger teenagers. Pennsylvania law provides for an adjudication of delinquency upon a finding that a minor has violated a law of the Commonwealth. *Id.* tit. 11, § 243(4)(a). Another Pennsylvania case, that of Edward Terry, aged 15, was consolidated with McKeiver's for consideration by the Pennsylvania Supreme Court. *In re Terry*, 438 Pa. 339, 265 A.2d 350 (1970). Terry was charged with conspiracy and assault and battery on a police officer, misdemeanors in Pennsylvania under *id.* tit. 18, §§ 4708, 4302. It was alleged that Terry and another youth hit a police officer with their fists and a stick when the officer broke up a boys' fight which Terry and others were watching.

Of all the children involved in these cases, only Terry, who had a prior record of delinquency, was committed to a youth development center. He faces incarceration there until he attains the age of 21, a total of six years loss of freedom. *Id.* tit. 11, §250. Although all 47 other juveniles were placed on probation, each faced a similar potential length of incarceration.

2. 397 U.S. 1036 (1970), consolidated, 399 U.S. 925 (1970).

3. H. LOU, JUVENILE COURTS IN THE UNITED STATES 14 (1927). The first formal juvenile tribunal is acknowledged to have been that of Cook County, Illinois, established in 1899. S. GLUECK & E. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS 12 (1943). The earliest law in the United States with the purpose of separating juvenile and adult offenders was passed by Massachusetts in 1863. The legislation, which proved inadequate, was replaced in 1872 by a provision empowering police and courts to arrange separate hearings of juvenile offenders apart from other criminal cases. A law passed in 1877 used the term "session for juvenile offenders," probably for the first time. O. NYQUIST, JUVENILE JUSTICE 141 (1960). Also in 1877, New York passed

the juvenile would benefit more from the protection of the state than from punishment for his offenses, at least prior to a certain age of responsibility.⁴

The carefully delineated boundaries which distinguished juvenile proceedings from criminal trials⁵ began to blur noticeably with the United States Supreme Court's decision in *Haley v. Ohio*⁶ in 1948. *Haley* involved the admissibility of a confession obtained from a 15-year old accused of first-degree murder. The youth had confessed following five hours of continuous interrogation beginning at midnight. In light of this and other facts there developed,⁷ the Court held that the due process clause barred the use of the confession.⁸ Mr. Justice Douglas, writing for the majority, stated that "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."⁹

In 1966, the question of due process for juveniles was again presented to the Court in *Kent v. United States*.¹⁰ The majority stated that the latitude¹¹ allowed the juvenile court was not

legislation requiring segregation of juveniles from adults in institutions, courts, and police vehicles. H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 16-17 (1927).

4. E. ELDEFONSO, *LAW ENFORCEMENT AND THE YOUTHFUL OFFENDER* 158 (1967).

5. The juvenile court system "was designed to eliminate the ancient, accusatory, prosecutive, punitive approach: to depose the state from its aggressive, hostile role; and to substitute a nonadversary, nonpunitive, solicitous approach aimed to protect and correct the child malefactor." Alexander, *Constitutional Rights in the Juvenile Court*, in *JUSTICE FOR THE CHILD* 84 (M. Rosenheim ed. 1962).

"[C]ertain peculiarities of [juvenile] courts . . . have greatly reduced their juridical character and have made them like administrative boards . . . [P]rivacy of hearings and decisions, the denial of jury trial, and greater informality of procedure . . . characterize the children's court. . . . [T]he perils of the accused are increased by the systematic exclusion of counsel in many places, the denial of a right to appeal in some, a very general disregard of the rules of evidence, . . . [and] few means to check error or abuse." Tappan, *Juridical & Administrative Approaches to Children with Problems*, in *JUSTICE FOR THE CHILD* 156 (M. Rosenheim ed. 1962). The author's description, although it refers to current procedure in a particular juvenile court system, is an accurate account of the procedural differences that have existed for many years.

6. 332 U.S. 596 (1948).

7. The interrogation was conducted by officers working in relays; the youth was not warned of his rights; and he had not the benefit of advice of friends, family, or counsel. *Id.* at 600.

8. *Accord*, *Gallegos v. Colorado*, 370 U.S. 49 (1962), where a 14-year-old was on trial.

9. 332 U.S. 596, 601 (1948).

10. 383 U.S. 541 (1966).

11. The 16-year-old involved in *Kent* had been remitted to the federal district court from a juvenile court for trial in accordance with the provi-

complete; rather it assumed "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness."¹² The *parens patriae*¹³ philosophy of the juvenile court system was said not to confer "an invitation to procedural arbitrariness."¹⁴

*In re Gault*¹⁵ represents the landmark Supreme Court decision in the area of juvenile justice. Due process for juveniles was in that case defined in specific terms as comprising, at minimum, written notice of charges; the right to the advice of counsel, retained or appointed; the right of confrontation and cross-examination; and protection against compelled self-incrimination. The Court declined to rule on two additional protections, the right to a transcript of the proceedings and the right of appellate review. Gault, fifteen years old, had been committed to an Arizona industrial school for a possible term of six years upon conviction of a charge that, had he been an adult, would have subjected him to a maximum fine of fifty dollars or imprisonment for not more than two months.¹⁶ The proceedings against him included none of the four essential guarantees aforementioned; therefore, his adjudication of delinquency was reversed by the Supreme Court. The majority opinion contained some rather sweeping language, including the statement that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁷ In referring to juvenile offenders in general, it was stated that:

"The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the

sions of D.C. CODE ANN. § 11-1553 (1965), permitting such remittance after a "full investigation." However, the judge who waived juvenile jurisdiction in Kent's case held no hearing, made no findings, and gave no reason for the waiver while refusing to consider a motion by Kent's counsel for a hearing on the waiver questions. After conviction in the district court, he received a sentence of from 30 to 90 years in prison.

12. 383 U.S. 541, 553 (1966).

13. Translated as "parent of the country," BLACK'S LAW DICTIONARY 1269 (4th ed. 1951). Generally used in this context as referring to the responsibility of the juvenile court to function in a "parental" relationship to the child.

14. 383 U.S. 541, 555 (1966).

15. 387 U.S. 1 (1967), noted in 28 LA. L. REV. 492 (1968) and 14 LOYOLA L. REV. 195 (1968).

16. The charge was uttering indecent language over the telephone, a violation of ARIZ. REV. STAT. ANN. § 13-377 (1956).

17. 387 U.S. 1, 13 (1967).

institution to which he is committed is called an Industrial School [Under the conditions of confinement the child is likely to experience in such a school] it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."¹⁸

The due process standard for juveniles was extended again by the United States Supreme Court in the 1970 case of *In Re Winship*.¹⁹ Proof of guilt beyond a reasonable doubt was there established as the necessary constitutional measure for juveniles as well as adults, thus overturning a New York statute which permitted an adjudication of delinquency on a preponderance of the evidence.

Seventy years of jurisprudence, then, have seen an ever-increasing extension of constitutional protections to juvenile proceedings: the right to counsel; the privilege against self-incrimination; freedom from coerced confession; the right to adequate written notice; and a standard of proof beyond a reasonable doubt. The Court has extended these protections through tacit recognition of the great similarity between adjudicative delinquency proceedings and adult criminal trials. The applicability of other traditional criminal safeguards, one of them being the right to trial by jury, was still to be decided.

*Duncan v. Louisiana*²⁰ provided a guarantee of the right to trial by jury in all state criminal cases which, were they tried in federal court, would come under the sixth amendment's protection. In defining what offenses would be accorded such protection, the majority opinion stated that "the 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."²¹ While *Duncan* recognized that there exists a category of petty crimes not subject to the jury trial provision, the Court later specifically held that any crime with a possible penalty in excess of six

18. *Id.* at 27-28.

19. 397 U.S. 358 (1970).

20. 391 U.S. 145 (1968).

21. *Id.* at 159.

months would entitle the perpetrator to the constitutional protection.²²

In *DeBacker v. Brainard*²³ the Supreme Court side-stepped the juvenile jury trial issue on the basis that the appellant's juvenile court hearing had been held prior to the *Duncan* decision and that *Duncan* was to have only prospective application.²⁴ Prior to the *DeBacker* decision, however, a three-judge federal district court had confronted the issue squarely, in *Nieves v. United States*.²⁵ In that case the Federal Juvenile Delinquency Act²⁶ (FJDA) was held unconstitutional insofar as it mandated the absence of trial by jury. Relying upon the concern expressed in *Gault* for the constitutional rights of juveniles, the court held that the requirement of the FJDA that a juvenile must waive his right to jury trial in order to be tried as a juvenile for offenses that were criminally punishable presented a "Hobson's choice,"²⁷ and read *Gault* "to require the availability of that right [to jury trial] in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be violative of federal law."²⁸ Although this case dealt solely with federal law and federal courts, the reasoning²⁹ that prompted the court's decision is equally applicable to state proceedings.

Duncan and *Gault*, when considered together with the earlier cases extending constitutional protection to juveniles, would logically seem to dictate the extension of the right to jury trial to juvenile proceedings. But the availability of that option is denied by the instant case, and apparently the perimeter of due process for juveniles is now delineated.

22. *Baldwin v. New York*, 399 U.S. 66 (1970).

23. 396 U.S. 28 (1969).

24. *DeStefano v. Woods*, 392 U.S. 631 (1968).

25. 280 F. Supp. 994 (S.D.N.Y. 1968).

26. 18 U.S.C. § 5033 (1964).

27. 280 F. Supp. 994, 1000 (S.D. N.Y. 1968). The term is defined as "an apparent freedom to take or reject something offered when in fact no such freedom exists: . . . something that one must accept through want of any real alternative." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1076 (1969).

28. 280 F. Supp. 994, 1004 (S.D.N.Y. 1968).

29. Citing *Gault's* classification of juvenile proceedings as criminal in nature for the purpose of finding that the privilege against self-incrimination applied, the court in *Nieves* said: "When forced to decide whether juvenile court proceedings were civil or criminal in order to determine the applicability of a federal right which turns on the distinction, the Court did not hesitate in choosing the latter. We are convinced that this classification applies equally to the right of trial by jury in a juvenile court proceeding." *Id.*

The majority begins its reasoning process by asserting that imposing jury trials upon juvenile adjudicative proceedings would not greatly strengthen the fact-finding function, if indeed it would at all.³⁰ The rationale seems to be that the jury is not as qualified as the judge to make accurate findings in a juvenile proceeding.³¹ However, for at least 500 years the jury system has been recognized in Anglo-American jurisdictions as an exceptionally able fact-finding body,³² providing a safeguard against abuse by the government of the judicial process as well as protection from the biased judge. The jury trial is now firmly established as an essential element of a fair trial in serious criminal cases.³³ The functions of the fact finder—evaluating credibility of witnesses, weighing of evidence, and applying legal principles to the questions presented—are of equal difficulty whether an adult or a juvenile is being tried for the offense.

A recent study³⁴ illustrates that often a judge has access to information not properly a matter for factual determination.³⁵ This is especially true of the juvenile court judge, who has access to social records and probation reports containing hearsay and highly prejudicial data not necessarily relevant to the particular charge facing the accused youth.³⁶ Those who would re-

30. 91 S.Ct. 1976, 1987 (1971).

31. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-8 (1967) (hereinafter cited as TASK FORCE REPORT). The majority characterizes the report as "notable for its not making any recommendation that the jury trial [be made available to juveniles] . . . despite its vivid description of the system's deficiencies and disappointments." 91 S.Ct. 1976, 1986 (1971). See also note 42 *infra*.

32. S. McCART, TRIAL BY JURY 7 (1964). The author cites the first record of a jury trial conducted generally as at present as being contained in a Year Book of decisions during the reign of Henry IV (1399-1413). The commonly accepted theory that the jury trial was established by the Magna Charta in 1215 is rejected by McCart. *Id.* at 5.

33. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968). See generally R. Henry, *The Story of the Criminal Jury*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 162-63 (M. Radin & A. Kidd eds. 1935).

34. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

35. *Id.* at 127: "[T]he judge is exposed to prejudicial information which the law, in its regard for the rights of the defendant, aims to screen out of the evaluation of his guilt or innocence."

36. *Cf. In re Murchison*, 349 U.S. 133 (1955), where it was held that due process was violated by a particular judge presiding over the contempt trial of an individual where the same judge had witnessed the alleged act of contempt during a one-man grand jury proceeding presided over by that same judge. It was there said that ". . . 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance [of justice] nice, clear and true . . . denies [the accused] due process of law.'" *Id.* at 136. *Murchison* represents a unique fact situation, but one

tain the judge as the sole trier of fact argue that his long experience will prevent him from being unduly prejudiced by such information. It is submitted, however, that the juvenile judge's experience³⁷ does not remove the danger of prejudice. On the other hand, the jury would not be exposed to such unduly prejudicial material and the dangers would therefore be eliminated.

The majority substantiates its decision by stating that "[t]he Court has refrained . . . from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed on the . . . juvenile proceedings."³⁸ But the *Duncan* decision, with regard to this particular constitutional protection in cases where an offense punishable by two years in prison was alleged, is clearly in point. Insofar as juvenile offenders, upon an adjudication of delinquency, face commitment to institutions until they reach majority—a punishment that may span eleven years or more³⁹—it seems a contradiction to deny them the protection considered so important in *Duncan*. The analogy between a delinquency proceeding and an adult criminal trial for a "serious" crime was recognized in *Gault*: "[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."⁴⁰ In the absence of a meaningful distinction between an adjudicative delinquency hearing and an adult criminal proceeding,

that is not without parallel in many juvenile court jurisdictions throughout the United States.

The conduct of social investigations before, rather than after, juvenile hearings has been characterized as a "procedural perversion." Tappan, *Juridical & Administrative Approaches to Children with Problems*, in *JUSTICE FOR THE CHILD* 156 (M. Rosenheim ed. (1962)).

37. A problem created by the judge's experience is illustrated by the fact that the same social workers and probation officers are likely to be called upon to appear in one juvenile hearing after another, and the inescapable result is that the presiding judge will be well acquainted or probably friendly with these individuals. At the same time, the juvenile involved is highly likely to have appeared before the judge on one or more prior occasions. It is submitted that this creates an inevitable tendency on the judge's part to see a familiar pattern, whether one exists or not, with the likelihood that the judge will be inclined to categorize witnesses and youthful offenders alike.

38. 91 S.Ct. 1976, 1986 (1971).

39. The Louisiana Criminal Code states that "[t]hose who have not reached the age of ten years are exempt from *criminal* responsibility." (Emphasis added.) LA. R.S. 14:13 (1950). The Revised Statutes provide that a child, defined as a person less than seventeen years of age (*id.* 13:1569), is subject to the jurisdiction of the juvenile court for purposes of detention until he attains the age of 21 years. *Id.* 13:1572. It is unclear at what minimum age children are liable for acts of delinquency and hence the maximum period of confinement possible can not be determined with certainty.

40. 387 U.S. 1, 36 (1967).

Gault and *Duncan* demand that jury trial be granted when requested.⁴¹ Using the potential loss of liberty as a yardstick, the absence of any such meaningful distinction is apparent.

Another basis for the instant decision was that requiring a jury trial would convert the juvenile process into a fully adversary proceeding, thereby putting an end "to what has been the idealistic prospect of an intimate, informal protective proceeding."⁴² Apparently the majority was of the opinion that the nature of juvenile proceedings is inconsistent with the concept of jury trial. Admittedly, procedural due process effects greater formality, but the concept of informality of proceedings as being in the best interests of the child had already been qualified in both *Gault* and *Kent* to the extent that such informality must give way to the assurance of due process.⁴³ The informality of juvenile proceedings has been recognized to contribute more often to a denial of due process than to a furthering of the young offender's best interests.⁴⁴ An informal hearing promotes possible arbitrariness and unfettered judicial discretion not always in the best interests of the child.⁴⁵ The dangers thus engendered have evoked considerable concern, and the belief that there is

41. Note, 48 N.C. L. Rev. 666, 669 (1971). This conclusion is predicated in large part on the sweeping language found in the majority's opinion in *Gault*. However, in the instant case, the majority seems to disregard the broad statements of policy in *Gault*, apparently adopting instead Justice Robert's opinion for the Pennsylvania Supreme Court, which found *Gault* "a paradox, being both broad and narrow at the same time." Justice Roberts' classification of the decision as "narrow" seems to be based on the *Gault* court's failure to reach and decide the questions of a right to a transcript and of a right to appellate review. See 438 Pa. 339, 343, 265 A.2d 350, 353 (1970).

42. 91 S.Ct. 1976, 1986 (1971). It is now generally recognized, however, that the lofty ideals of the social experiment that is the juvenile court system have not been realized. Comment, 22 MIAMI L. REV. 906, 912 (1968). See generally Parker, *Some Historical Observations on the Juvenile Court*, 9 CRIM. L.Q. 467 (1967). Various reasons for this failure have been advanced: inadequate financial support for the juvenile court programs; a lack of proper training and skills among existing staffs necessary to implement the treatments prescribed by the courts; loose drafting of juvenile court statutes resulting in vagueness of extent of jurisdiction; a lack of full acceptance of the rehabilitative aspect of the juvenile court, leading reform schools to be viewed as no more than junior prisons; and a dismal lack of qualification of juvenile court judges. See GAULT: WHAT NOW FOR THE JUVENILE COURT? 9-12 (V. Nordin ed. 1968); TASK FORCE REPORT 7-8 (1967); Cadena, *Due Process and the Juvenile Offender*, 1 ST. MARY'S L.J. 23, 24 (1969).

43. *In re Gault*, 387 U.S. 1, 20 (1967); *Kent v. United States*, 383 U.S. 541, 562 (1966).

44. See TASK FORCE REPORT 9 (1967).

45. Note, 67 COLUM. L. REV. 281, 284 (1967).

a necessity to qualify the traditional view that informality is per se a substantive benefit.

While it might be argued that the provision for a jury trial would destroy the confidentiality of juvenile proceedings, again the substantive benefits derived from the preservation of that confidentiality must be examined. Confidentiality was originally considered essential in order to protect the youthful offender from any criminal stigma.⁴⁶ If the child pleads guilty to the offense charged, trial by jury will not be requested and the child's secret will be preserved. Conversely, an innocent child's interest lies in establishing his innocence, thereby preserving his reputation. Additionally, the confidential nature of juvenile hearings is violated each day. Most law enforcement agencies provide data on juvenile offenders upon request to the Federal Bureau of Investigation, the military services, and similar agencies.⁴⁷ In light of these facts, it is submitted that the inclusion of a right to trial by jury upon request would not further deteriorate the confidential ideal of the system.

The strongest basis for the Court's denial of the right to jury trial for juveniles is to be found in the statement that "[the jury trial] would bring with it . . . the traditional delay . . . of the adversary system and, possibly, the public trial."⁴⁸ The Court was clearly and understandably desirous of keeping juvenile court dockets relatively current, as compared with adult criminal dockets in most large cities, so as to facilitate quick disposal of juvenile cases in accord with the rehabilitative goal of the system. This objective necessitated classification of the right to trial by jury as being of somewhat lesser constitutional importance than the protections extended by the earlier cases. It is at least arguable that, on a purely practical basis, the result of the majority decision was necessary⁴⁹ because the opposite result

46. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

47. *In re Gault*, 387 U.S. 1, 25-26 (1967); Note, 67 COLUM. L. REV. In fact, in many jurisdictions, the public at large has access to "secret" juvenile records. Such information is disclosed as a matter of routine to prospective employers and such agencies as retail credit investigation companies, in addition to the governmental and quasi-public agencies mentioned in the text.

48. 91 S.Ct. 1976, 1988 (1971).

49. However, it is possible to distinguish the probable effect of the jury trial on juvenile proceedings from the problems added to adult criminal trials by the jury requirement. There exists an extremely high incidence of admissions of guilt in the juvenile system as well as the adult criminal system. See TASK FORCE REPORT 9 (1967). One might well speculate that counsel for juveniles would often find it advantageous to waive the right to jury trial when faced with strong evidence of guilt, or when it was felt that the

in the instant case would have undoubtedly resulted in an increase in economic and administrative difficulties,⁵⁰ and would have required sweeping procedural changes in many juvenile jurisdictions.

However, as a practical matter, in those jurisdictions which provided for juvenile jury trials before the current decision, the right was not often exercised. The dissenting opinion cites a study demonstrating that over a period of more than five years, cumulative requests for jury trials in those jurisdictions totaled 15 or less per year in 22 of 26 courts surveyed. The courts were mostly in large metropolitan areas and handled about 75,000 total juvenile cases per year.⁵¹ It is submitted, therefore, that the increase in caseload of the juvenile court caused by jury trials would not be so burdensome as to outweigh the young accused's right to a determination of his guilt or innocence by an impartial finder of fact.

Additionally, the processing of juvenile cases in an expeditious manner has its disadvantages. The dissent cites in this regard an opinion by Judge De Ciantis of the Family Court of Providence, Rhode Island. A portion of Judge De Ciantis' comprehensive and well-reasoned opinion is attached to the dissent as an appendix, and states:

"In fact the very argument of expediency, suggesting 'super-market' or 'assembly line' justice is one of the most forceful arguments in favor of granting jury trials. By granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time. It will provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him

child's best interests might be served by such a waiver. But this provides no reason to preclude the availability of the right to those juveniles who might choose to exercise it.

50. Other problems that have been cited as inevitable results by critics of the jury trial include: (1) jury trials are too time-consuming because of jury instructions and deliberations; (2) maintenance of juries is an excessively expensive cost; (3) greater delays; and (4) unduly burdensome to those citizens required to serve as jurors. *See generally* Comment, 64 Nw. U.L. REV. 87, 113 (1969).

51. 91 S.Ct. 1976, 1994 (1971). The study cited was conducted by the Public Defender Service for the District of Columbia and the Neighborhood Legal Services Program of Washington, D.C., who jointly filed an *amicus* brief.

because of some past occurrence which was heard by the same judge."⁵²

As to the objection that extending the right to jury trial would possibly necessitate public trials, it is submitted that the two are not interdependent. The presence of a jury is not tantamount to the admission of the press and public generally, with the accompanying widespread publicity that would result if the latter two were present in the hearing room. Thus, the addition of the jury is not essentially inconsistent with the prevailing view that in order to protect the child there should be no right to a public hearing in juvenile proceedings.⁵³ Besides, as established earlier, juvenile proceedings as now conducted are far from secret. In addition to law enforcement agents present in the hearing room, whose respective agencies have unlimited access to records, witnesses for both the prosecution and defense are usually present. The addition of a jury would not further impair the non-public nature of the proceedings.⁵⁴

The majority implies that the use of a jury would in some way impair the concern and sympathy that should be manifested toward juveniles.⁵⁵ However, a comprehensive study evaluating the efficacy of juries⁵⁶ demonstrates that this contention is fal-

52. *Id.* at 1996. The entire appendix to the dissent provides an excellent rebuttal of most of the justifications advanced by the majority for denial of the right to the juvenile accused. The opinion was rendered in a case entitled *In the Matter of McCloud*, decided by Judge De Ciantis on January 15, 1971 in Family Court of Providence, Rhode Island.

53. *See, e.g.*, *State v. Cronin*, 220 La. 233, 56 So.2d 242 (1951).

54. It is at least arguable that conversion of juvenile proceedings to a fully public trial would improve, rather than impair, juvenile justice. Mr. Justice Brennan distinguishes the cases consolidated in *McKeiver* on that basis, voting to affirm the decision against the Pennsylvania juveniles, where the public and press had been freely admitted to the courtroom, and voting to reverse in the case from North Carolina, where the public had been excluded over objection of counsel. 91 S.Ct. 1976, 1990 (1971).

Mr. Justice Brennan states: "[A] similar protection [to that afforded by jury trial] may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining if necessary executive redress through the medium of public indignation." *Id.* at 1991.

Judge De Ciantis, citing *In re Oliver*, 333 U.S. 257 (1948), lists among the benefits of public trial: the disclosure of key witnesses previously unknown who may come forward with their testimony; the education of spectators and the inspiration of confidence in judicial remedies; and an effective restraint on possible abuse of judicial power. 91 S.Ct. 1976, 1997 (1971) (appendix to dissenting opinion).

55. 91 S.Ct. 1976, 1989 (1971). *See also* note 42 *supra*.

56. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). Although the survey was not designed to procure juvenile data, that fact limits the sig-

lacious. Sympathy for youthful defendants was a highly prevalent characteristic of the juries examined by the study. Of three "sympathy factors"—age, sex, and race—evaluated through questionnaires, age evoked the most sympathy, with defendants under the age of 21 generating the greatest degree of sympathy.⁵⁷ This demonstrates that juries are capable of displaying compassion and concern for juveniles.

A feasible solution to any real difficulties raised by the addition of a right to jury trial would be the separation of the juvenile proceeding into two completely distinct phases, adjudicative and dispositional.⁵⁸ The adjudicative phase, concerned exclusively with fact-finding and guilt-determination, would provide the juvenile the protection of trial by jury upon request. The dispositional phase is properly the exclusive province of an experienced juvenile judge, and the area where his expertise is most important. Judge De Ciantis described the benefits to be gained from such a division of the hearing, and was further quoted in the appendix to the dissent:

"The role of the jury will be only to ascertain whether the facts, which give the court jurisdiction, have been established beyond a reasonable doubt. The jury will not be concerned with the social and psychological factors. These factors, along with prior record, family and educational background, will be considered by the judge during the dispositional phase.

"Taking into consideration the social background and other facts, the judge, during the dispositional phase, will determine what disposition is in the best interests of the child and society. It is at this stage that a judge's expertise is most important, and the granting of a jury trial will not prevent the judge from carrying out the basic philosophy of the juvenile court."⁵⁹

In conclusion, it is suggested that the instant decision is un-

nificance of the information contained therein only slightly for the purpose of this inquiry. "Youth" as used in the survey may mean any age from 18 to the early twenties; but the data is at least as applicable to younger individuals who comprise the group subject to juvenile jurisdiction. *Id.* at 200.

57. *Id.* at 211 (Table 65 and comments).

58. *Gault* recognized the existence of three distinguishable phases of a juvenile proceeding: the pre-judicial stage, the adjudicative hearing, and the post-adjudicative or dispositional process. *In re Gault*, 387 U.S. 1, 13 (1967).

59. 91 S.Ct. 1976, 1997 (1971).

satisfactory in that it ignores the possibility of a reconciliation between the rehabilitative ideal of the juvenile court system and the preservation of the individual rights of juveniles. Rehabilitation for the guilty, as well as freedom for the innocent, begins with a fair and accurate determination of the facts.⁶⁰ The jury system both traditionally and practically is the best vehicle to achieve that beginning. The sixth amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury" Read literally, the clear indication is that all criminally accused persons shall enjoy that right. The juvenile proceeding has been classified as criminal in nature in the *Gault* case so as to deserve other constitutional protections applicable in criminal proceedings.⁶¹ Practical arguments which militate against the right to trial by jury in juvenile proceedings are not so insurmountable as to preclude its adoption. The *Duncan* decision, holding that due process of law necessarily involves the right to jury trial when the accused faces a significant abridgement of his freedom, should be particularly applicable to juvenile proceedings where the child accused of a crime may face a period of confinement many times longer than the imprisonment that would confront an adult charged with the same offense. The *McKeiver* decision, in creating a lesser standard of due process for juveniles, has fulfilled an earlier prophetic observation of the Court:

"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."⁶²

Lawrence Roe Dodd

DOUBLE JEOPARDY—DECLARATION OF MISTRIAL WITHOUT
CONSENT OF DEFENDANT

The defendant was charged in federal district court with willfully assisting in the preparation of fraudulent income tax

60. TASK FORCE REPORT 30 (1967).

61. 387 U.S. 1, 49-50 (1967).

62. *Kent v. United States*, 383 U.S. 541, 556 (1966).