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A Cautious Step Forward

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similarities between article 2315 and Louisiana's Workmen's Compensation Act[50] and felt that *Levy v. Louisiana*,[51] a wrongful death case, was binding.[52] Should there arise a United States Supreme Court decision mandating equal treatment of a surviving spouse and a concubine under the workmen's compensation law, such a decision might be binding in a subsequent constitutional attack on the wrongful death provisions.

The decision in *Henderson* is palatable, particularly as a recognition of the impropriety of using "moral unworthiness" as a factor in awarding workmen's compensation benefits. By removing the moral judgment, this decision realizes the true purpose of a compensation scheme in an industrial society—compensation for dependents. However, as discussed earlier,[53] several problems lie ahead. It is submitted that the problems of a constitutional dimension could be eliminated by amending the death benefits provisions. By substituting one term such as "consort" for "spouse," "widow," and "widower," and by ascribing to "consort" a definition requiring living together in a permanent relationship, the courts could address each situation with needed flexibility and an awareness of the purpose behind the act, while adhering to the spirit of the present case.[54]

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In a juvenile delinquency proceeding alleging commission of first degree murder by a juvenile, the juvenile court denied pretrial motions requesting a public trial, a trial by jury, and

50. The Court noted that both the wrongful death provisions and the workmen's compensation law were "state-created compensation schemes" benefiting close relatives and dependents of the deceased and that both were "outgrowths and modifications of our basic tort law, designed to soften the often harsh common-law rules." 406 U.S. at 171-72.

51. 391 U.S. 68 (1968).

52. 406 U.S. at 168-72.

53. See text at notes 36-52, *supra*.

54. Although such an amendment could possibly have the effect of sanctioning concubinage, the simplicity and ease of administration which would result strongly militate in favor of it.

the suppression of an inculpatory statement. The Louisiana Supreme Court granted certiorari[1] and held that the juvenile's waiver of his right to counsel and privilege against self-incrimination had been ineffective because the state had failed to establish that there had been a meaningful consultation with an adult interested in the juvenile's welfare and fully advised of his rights prior to the waiver. The supreme court also held that, during an adjudication of delinquency involving acts that would constitute a crime if engaged in by an adult, a juvenile has the option of a public trial, but no right to a trial by jury.[2] *In re Dino,* 359 So. 2d 586 (La. 1978).

When the juvenile courts were first established, their task was not to determine criminal culpability, but rather to decide what should be done in the child's best interest.[3] Because of this emphasis on helping the child, juvenile court procedure was to be flexible and completely different from the procedure in a criminal court.[4] The proceedings were private to save the child from the taint of public stigma, and trial by jury was considered inappropriate because it implied a formal criminal procedure and interfered with the moral and educational influences of the judge.[5] Constitutional attacks on these informal proceedings were dismissed on the grounds that the state was acting as a parent under the parens patriae doctrine, and that the juvenile courts were civil courts, not criminal ones. Thus, constitutional guarantees were replaced with attempts to

1. *In re* Dino, 353 So. 2d 1334 (La. 1978).

2. Each of the issues was decided by a close margin. Although Justice Dennis wrote the majority opinion, he also wrote a separate opinion dissenting as to the holding on the jury trial issue and assigning additional reasons for the holding on the public trial issue. Thus, the opinion of the court might be called a plurality opinion, although referred to as a majority opinion in this note and by Justice Dennis in his separate opinion, concurring in part and dissenting in part. Only Justice Tate did not write or join in a separate opinion. By comparing all of the opinions in the case, and those justices who agreed with them, it is clear that only Justice Tate wanted to grant the right to a public trial and at the same time deny the right to a trial by jury. The remaining justices either wanted to grant the right to both a public and a jury trial or wanted to deny the right to both. It should also be noted that the majority opinion, while basing its holdings on the Louisiana Constitution, relied extensively on federal jurisprudence for its rationale, especially in the public and jury trial areas.

3. Comment, *The Juvenile Court,* 23 HARV. L. REV. 104, 119-20 (1920).

4. M. PAULSEN, THE PROBLEMS OF JUVENILE COURTS AND THE RIGHTS OF CHILDREN 5 (1975).

5. H. LOU, JUVENILE COURTS IN THE UNITED STATES 132, 137 (1927).

achieve the rehabilitation, education, and salvation of the child.[6]

It eventually became apparent that there was a wide gulf between the juvenile court's theoretical purpose and its day-to-day realities.[7] The parens patriae and civil court arguments that had so long barred due process to the juvenile received a death blow from the United States Supreme Court in *In re Gault*.[8] The Supreme Court noted that the meaning of parens patriae was murky and that its historical credentials were of dubious relevance.[9] The Court also viewed the civil label as one of mere convenience and its invocation as a feeble enticement to disregard the constitutional problems presented in delinquency proceedings.[10]

Although *Gault* broke the due process barrier for juvenile court proceedings, it does not stand for the proposition that

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6. M. PAULSEN, *supra* note 4, at 5.

7. Both the United States Supreme Court and a presidential commission noted that juvenile courts, in general, had not lived up to the high hopes originally held for them. The Supreme Court stated:

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

Kent v. United States, 383 U.S. 541, 555 (1966). That the presidential commission came to the same conclusion can be seen by comparing the statement in *Kent* with the following conclusion of the Commission on Law Enforcement and Administration of Justice:

> Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency, or in bringing justice and compassion to the child offender.

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80 (1967) [hereinafter cited as CHALLENGE].

8. 387 U.S. 1 (1967).

9. *Id.* at 16. The doctrine of parens patriae originated in civil matters in English Chancery law. H. LOU, *supra* note 5, at 2-7. It was not until the jurisdiction over neglected, dependent, and delinquent children was consolidated in the first juvenile court that the parens patriae concept was applied to what had previously been a criminal matter. Prior to the first juvenile court, a child over seven years of age could have been tried and convicted in criminal court as if he were an adult. M. PAULSEN, *supra* note 4, at 3-4.

10. *In re* Gault, 387 U.S. at 49-50.

juveniles charged with delinquency are entitled to all of the rights enjoyed by an adult accused of a crime.[11] *Gault* presented a sweeping rationale, but a limited holding.[12] This dichotomy between rationale and result can be resolved by viewing juvenile court proceedings, in general, as neither wholly criminal nor wholly civil; juvenile courts are hybrids[13] and their proceedings are sui generis.[14] Thus, the question becomes which guarantees are necessary to protect the child, and the test developed by the United States Supreme Court is whether a particular guarantee is necessary to insure fundamental fairness in a juvenile proceeding.[15] In applying this test after *Gault*, the Supreme Court has held that the reasonable doubt standard must be used in a delinquency proceeding,[16] but that a trial by jury is not required.[17]

In re Dino[18] presented the Louisiana Supreme Court with three separate areas of juvenile rights: the right to trial by jury, the right to a public trial, and waiver of the right to counsel and the privilege against self-incrimination. As to the waiver issue, the court concluded that Dino's inculpatory statement should have been suppressed because there had been no con-

11. *Id.* at 30-31. The Court reiterated the view originally expressed in *Kent v. United States*, 383 U.S. 541 (1966), that the hearing need not conform to all of the requirements of a criminal trial or even the usual administrative hearing; but the hearing must measure up to the essentials of due process and fair treatment.

12. McKeiver v. Pennsylvania, 403 U.S. 528, 538-39 (1971); *In re* Terry, 438 Pa. 339, 265 A.2d 350 (1970). The United States Supreme Court in *McKeiver* cited the Pennsylvania Supreme Court in *In re Terry* with approval for the conclusion that *Gault* presented a sweeping rationale, but a limited holding.

For example, the Court in *Gault*, stated, "The essential difference between [Gerald Gault's] case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case." 387 U.S. at 29. Despite this sweeping language which led the Court to require the right to counsel, the privilege against self-incrimination, and the right to notice in delinquency proceedings, the Court declined to rule on the issues of the right to appellate review and the right to transcripts of the proceedings. *Id.* at 58.

13. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 407 (1976) [hereinafter cited as JUVENILE JUSTICE]; Comment, *Fairness in Juvenile Court*, 27 LA. L. REV. 606, 608 (1967).

14. Carr, *Juries for Juveniles: Solving the Dilemma*, 2 LOY. CHI. L.J. 1, 14 (1971).

15. McKeiver v. Pennsylvania, 403 U.S. at 543; *In re* Winship, 397 U.S. 358, 363 (1970); *In re* Gault, 387 U.S. at 30-31.

16. *In re* Winship, 397 U.S. at 368.

17. McKeiver v. Pennsylvania, 403 U.S. at 545.

18. 359 So. 2d 586 (La. 1978).

sultation with an adult who was interested in Dino's welfare and fully advised of his rights, prior to the time when Dino waived his right to counsel and privilege against self-incrimination.[19] Because juveniles are presumed not to be mature enough to understand their rights or competent enough to exercise them, fundamental fairness requires that they not be permitted to waive constitutional rights without the aid of an adult. Therefore, the state was required to establish the occurrence of such a consultation in order to meet its burden of showing a knowing and intelligent waiver.[20]

Dino's counsel had requested a public trial due to the pretrial publicity involved in the case, feeling that such a trial was necessary to exonerate Dino in the public's eye.[21] The Louisiana statute which prohibited a public trial in juvenile proceedings[22] was declared unconstitutional by the supreme court insofar as it prohibited juveniles from electing a public trial in an adjudicatory proceeding based on criminal charges which would entitle an adult to have his trial conducted in public. The court found that the option of public trial was essential to meeting the due process and fair treatment requirements of article I, section 2, of the 1974 Louisiana Constitution[23] because a public trial protects the accused by exposing improper judicial behavior to the indignation of the community at large.[24]

On the other hand, the supreme court found that article I, section 2, does not require a jury trial for a juvenile during the adjudication of a charge of delinquency. However, beyond a vague reference to the United States Supreme Court's reasons in *McKeiver v. Pennsylvania*,[25] no reasons were given as a

19. *Id.* at 594.

20. *Id.*

21. Brief for Andrew Leonard Dino at 7, *In re* Dino, No. 1356 (La. App. 2d Cir. 1977).

22. LA. R.S. 13:1579(B) (Supp. 1972 & 1977) provides:

> The general public shall be excluded from hearings under this section. Only the child, his counsel, witnesses, the child's parents, tutor or other custodian, the officers of the court, and any other persons as the court finds have a legitimate or proper interest in the proceedings or in the work of the court may be admitted by the court.

23. LA. CONST. art. I, § 2, provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

24. 359 So. 2d at 597.

25. 403 U.S. 528 (1971).

basis for this holding.[26] As to which reasons in *McKeiver* were similar to those supporting the holding in the instant case, or how they were similar, both the majority opinion and the concurring opinions were silent.

With regard to the waiver issue, article I, section 13, of the 1974 Louisiana Constitution[27] requires that the *Miranda*[28] warnings be clear and easily understood, and that any waiver be the result of a voluntary relinquishment of a known privilege based on full understanding of what is being waived.[29] Since the presumed immaturity of juveniles presents special waiver problems in the areas of coercion, suggestion, ignorance of rights, and even "adolescent fantasy, fright or despair,"[30] it is logical to augment the normal *Miranda* requirements with

26. 359 So. 2d at 598. Justice Dennis, joined by Justices Dixon and Calogero, dissented as to the holding denying the right to trial by jury. Justice Dennis reasoned that because a juvenile faces consequences not essentially different from those faced by adult criminal defendants, denial of a jury trial to a juvenile charged with an offense which would entitle an adult to jury trial is an arbitrary and unreasonable discrimination on the basis of age. Therefore, denial of a jury trial to a juvenile constituted a denial of equal protection under article I, section 3, of the 1974 Louisiana Constitution. Justice Dennis also stated that, in addition to the due process reasons given in the majority opinion, the same equal protection argument would require a juvenile to have the right to demand a public trial. 359 So. 2d at 602-07 (Dennis, J., concurring in part and dissenting in part). As to Justice Dennis' conclusion that juveniles face risks not essentially different from those faced by criminal defendants, see notes 58 and 59, *infra*, and accompanying text. *See also In re* Causey, 363 So. 2d 472 (La. 1978). In *Causey*, Justice Tate, writing for a majority of the court, noted that the approach used by the United States Supreme Court inquired not only into whether a particular right was historically part of fundamental fairness, but also into whether granting that particular right would interfere with any of the beneficial aspects of juvenile proceedings. *Id.* at 474. Hence, only those rights which were too important to sacrifice in favor of the theoretical benefits would be required. *Id.* Justice Tate went on to note that the above approach had been adopted by the majority of the court in the instant case, *In re Dino*. *Id.* Furthermore, Justice Tate viewed *McKeiver* as centering on the function served by jury trial rather than on the degree of "fundamentality," and noted that, according to *McKeiver*, the jury was not a necessary component of accurate fact-finding. *Id.* at 475.

27. LA. CONST. art. I, § 13, provides:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

28. Miranda v. Arizona, 384 U.S. 436 (1966).

29. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 44 (1974).

30. *In re* Gault, 387 U.S. at 55.

extra protection for the juvenile. As the Louisiana Supreme Court noted in *Dino*, the use of the totality of the circumstances test for juveniles "tends to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them in adult cases."[31] Thus, the additional requirement of a consultation with an adult, before waiver is effective, performs the same function of avoiding constant courtroom speculation in the juvenile context as the *Miranda* warnings alone perform in the adult context.[32]

In the areas of public and jury trials, *Dino* seems to provide another example of a limited holding accompanied by a sweeping rationale. The court stated that juvenile delinquency proceedings were "not essentially different from a criminal trial"[33] and consequently granted the right to a public trial. Yet the court later held that juveniles were not entitled to a trial by jury.[34] However, the results achieved are not as inconsistent as it would seem at first blush. In a separate opinion in *McKeiver*, concurring in part and dissenting in part, Justice Brennan noted that jury trial and public trial provide a similar protection.[35] Both a jury and a public trial provide a check on possible

31. 359 So. 2d at 591.

32. *But see id.* at 598-601 (Sanders, C.J., concurring in part and dissenting in part). Chief Justice Sanders, joined by Justice Marcus, dissented as to the majority holding on this issue and stated that the "totality of the circumstances" test should be used. Using that test, Chief Justice Sanders did not find an adequate reason for disturbing the juvenile court's ruling not to suppress Dino's statement. *Id.* at 599-601. However, Justice Summers, while agreeing that the test to be used should be the "totality of the circumstances," felt that Dino's statement should be suppressed. *Id.* at 601-02 (Summers, J., concurring in part and dissenting in part). This disagreement as to result, under the "totality of the circumstances" test, seems to provide a small example of why a further prophylactic device, beyond those contained in *Miranda*, is necessary in the juvenile waiver area.

33. *Id.* at 595.

34. *Id.* at 598.

35. McKeiver v. Pennsylvania, 403 U.S. at 554-56 (Brennan, J., concurring in part and dissenting in part). A comparison of the leading cases decided by the United States Supreme Court in the area of public and jury trials points out the similarity of function between public and jury trial. As to public trial, the Court has found that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re* Oliver, 333 U.S. 257, 270 (1948). Similarly, the Court has found that a jury trial provides a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" and that the insistence upon community participation in the determination of guilt or innocence is an expression in the criminal law of a fear of unchecked power. Duncan v. Louisiana, 391 U.S. 145, 156

abuse of power on the part of the judge or prosecutor by involving the community in the case; the public trial performs this function by making the proceedings open to inspection by the community, and the jury trial performs it through community participation in the determination of guilt or innocence.[36] It is because of this similarity between the functions of public and jury trials that Justice Brennan would hinge his granting of a jury trial on whether the juvenile had a right to a public trial.[37] Justice Brennan's opinion has been influential,[38] and the supreme court in *Dino* seemed to recognize his position when it noted that a public trial worked analagously to a jury trial.[39] Thus, the results in *Dino* are not as inconsistent as they seem in that when a juvenile elects to have a public trial he receives a protection similar to that provided by a jury trial.

The instant case demonstrates that the granting of a public trial *option* is not inconsistent with the juvenile justice ideal of avoiding stigma,[40] because Dino needed an open trial to counteract the stigma resulting from pre-trial publicity.[41] Since the choice of whether or not to have a public trial rests with the juvenile, the right will not conflict with the juvenile justice goal of avoiding stigma, and at the same time it will perform a function similar to that of a jury trial in the cases where a juvenile chooses to have a public trial.

It should also be noted that the court, while granting a

(1968). Thus, one purpose of both the public and the jury trial is to provide a check on the abuse of court power, and this check is provided by community involvement.

36. Justice Brennan noted that the Constitution has rejected the idea that public trial is an adequate substitute for trial by jury in serious adult cases, but that public trial may be enough in juvenile delinquency cases because juvenile courts, despite some failure in practice, demonstrate by their very existence the community's sympathy and concern for the young. 403 U.S. at 555 (Brennan, J., concurring in part and dissenting in part). Another reason for finding that a protection is adequate in the juvenile delinquency context, but not adequate in the adult context, is that juveniles do not face consequences as serious as those faced by adult criminal defendants. See notes 58 and 59, *infra*, and accompanying text.

37. 403 U.S. at 554-57 (Brennan, J., concurring in part and dissenting in part).

38. A recent federal committee quoted directly from Justice Brennan's opinion in *McKeiver* in its commentary on the recommendation to allow the public trial option to juveniles. JUVENILE JUSTICE, *supra* note 13, at 381. The Committee later commented that the grant of a public trial would do much to compensate for the recommendation against the right to trial by jury. *Id.* at 421.

39. 359 So. 2d at 597.

40. See note 7, *supra*, and accompanying text.

41. See note 21, *supra*, and accompanying text.

right that does not conflict with the juvenile justice ideals, did so without any significant impact on the mechanics of the juvenile court system. Implementation of the option of a public trial should have only a minimal impact on juvenile court operation because the proceedings themselves remain essentially unaltered, the only difference being admission of the general public to the trial. On the other hand, granting the right to a jury trial could have a significant impact on juvenile court operations—an impact which might be more detrimental than beneficial.

While the option of a public trial provides a double benefit in cases similar to *Dino,* this is not true of all juvenile delinquency cases. If a juvenile has not been subjected to the pretrial publicity that *Dino* was, he is forced to decide between inviting stigma by electing to have a public trial or foregoing the protection provided by either a public or a jury trial because, under *Dino,* a jury trial is unavailable. Because a juvenile may not always be able to afford to choose a public trial to achieve the safeguard of community involvement, it is still necessary to evaluate whether the right to a jury trial is necessary for fundamental fairness in juvenile delinquency proceedings.

In determining whether a trial by jury is necessary for fundamental fairness in juvenile delinquency proceedings, it is necessary to consider the benefits and drawbacks of a jury trial. As already noted, one benefit of a jury trial is that it can provide a protection similar to that provided by a public trial in those cases where the choice of a public trial would be in conflict with the juvenile justice ideal of avoiding stigma. Furthermore, while a jury and a public trial provide a similar protection, the jury provides a more direct check on the judicial process by actually determining guilt or innocence.

Perhaps the greatest benefit of a jury trial is its effect on the reasonable doubt standard, which is required in juvenile delinquency proceedings.[42] A "frequently cited study of American juries"[43] concluded that disagreements between judge and

42. *In re* Winship, 397 U.S. at 368.

43. Johnson v. Louisiana, 406 U.S. 356, 374 n.12 (1972) (Powell, J., concurring in Apodaca v. Oregon, 406 U.S. 404 (1972)). The study referred to, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), was undertaken by the University of Chicago Law

jury were not as frequent as might have been expected.[44] However, a significant factor in cases where the judge and jury disagreed as fact finders was their different treatment of the reasonable doubt standard. The study found that the jury, in general, required more proof to reach the threshold of "beyond a reasonable doubt" than did a judge.[45] Thus, a juvenile could acquire the benefit of a more strict interpretation of the reasonable doubt standard by having the right to a trial by jury.

In contrast to the above benefits, there are possible drawbacks of a trial by jury which must be considered. One potential disadvantage of requiring jury trials is that unnecessary formality would be injected into juvenile delinquency proceedings.[46] Closely linked to this potential increase in formality is the probability of increased expenditure of court time and other resources,[47] not only in delinquency proceedings, but in all juvenile proceedings. The detrimental effect on time and

School and involved a decade of research. The United States Supreme Court has referred to the study as, "[t]he most complete statistical study of jury behavior," Apodaca v. Oregon, 406 U.S. 404, 411 n.5 (1972), and as "the most recent and exhaustive study of the jury in criminal cases," Duncan v. Louisiana, 391 U.S. 145, 157 & n. 26 (1968).

44. H. KALVEN & H. ZEISEL, *supra* note 43, at 198. This finding may have been the reason that the Supreme Court stated that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function . . . ." McKeiver v. Pennsylvania, 403 U.S. at 547.

45. H. KALVEN & H. ZEISEL, *supra* note 43, at 182-90.

46. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 38 (1967). This report cites three areas of formality which are likely to be injected into a jury trial. They are: (1) the formality of the proceedings designed to instill in the jurors a sense of the seriousness and solemnity of their duties; (2) the formal, restrictive rules of evidence, designed to protect the jury from prejudicial and irrelevant evidence and aid them in distinguishing between the more and the less probative; and (3) the theatrical presentation of the evidence emphasized by some attorneys when arguing a case to a jury, as opposed to the more businesslike approach used when presenting a case to a judge. *Id.*

47. The National Advisory Committee on Criminal Justice Standards and Goals in its first report felt that the benefits of a jury trial in delinquency proceedings were outweighed by the increase in cost in terms of court time and other resources. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 303 (1973). In a later and more extensive report, the Committee came to the same conclusion citing the "excessive formality and delay" caused by a jury trial. JUVENILE JUSTICE, *supra* note 13, at 421. In comparing these two reports, it seems that formality could be considered a factor in the increased cost in court time and other resources. If formality increases the time that it takes to hear a case, this increases the overall cost of court operation in the same manner that the additional time necessary to impanel a jury does.

cost can clearly be seen in the District of Columbia experience with juvenile jury trials. The right of trial by jury in juvenile proceedings was withdrawn[48] after a dramatic increase in the number of jury trials.[49] This increase in the number of such trials had the effect of "increasing delays in *all* juvenile cases above and beyond the delay which is to be expected as a result of the increase in the number of cases coming into the court."[50]

Other factors must be considered which can not be labeled simply as benefits or drawbacks of a jury trial. There has been a significant de-emphasis of the importance of the right to trial by jury in decisions of the United States Supreme Court subsequent to *Duncan v. Louisiana*.[51] Later cases have held that *Duncan* is to have prospective effect only[52] and that twelve-member juries[53] and unanimous verdicts[54] are unnecessary. These decisions call into question whether the right to trial by jury is as important as other constitutional rights,[55] and they significantly dilute the importance of the jury in the reasonable doubt standard. By not requiring unanimous verdicts, the

48. D.C. CODE ANN. tit. 16, § 2316, *as amended by* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 121, 84 Stat. 473 (1970).

49. COURT MANAGEMENT STUDY, REPORT FOR THE USE OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA, UNITED STATES SENATE, pt. 2, at 228 (1970).

Table 21

Juvenile Cases	June 30, 1967	June 30, 1968	June 30, 1969
Court Trials	134	242	358
Jury Trials	34	187	290

50. *Anti-Crime Proposals: Hearings on H.R. 14334, H.R. 14224 and H.R. 14189, H.R. 256, and H.R. 2747 Before Subcommittee No. 3 of the Committee on the District of Columbia*, 91st Cong., 2d Sess. 34 (1970) (statement of Donald E. Santarelli, Deputy Attorney General).

51. 391 U.S. 145 (1968).

52. DeStefano v. Woods, 392 U.S. 631, 633 (1968).

53. Williams v. Florida, 399 U.S. 78, 86 (1970).

54. Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

55. By holding that the right to trial by jury was to have prospective effect only, the Supreme Court in effect ranked jury trial as less important than other rights, such as the right to counsel, which have had retroactive effect. A further example of the jury trial being less important than other rights can be seen in the juvenile delinquency context by comparing *Gault*, which found the right to counsel necessary for fundamental fairness, with *McKeiver*, which found trial by jury not necessary for fundamental fairness.

jury's collective threshold of proof of "beyond a reasonable doubt" is lowered by eliminating from consideration the juror who was not persuaded enough to convict.[56] One author, commenting on the less than twelve-member juries and anticipating the non-unanimity decision, stated, "If we continue to reduce the power of the jury as it stood at common law, we may soon confront the question as to why a jury at all or why so much of it."[57] Thus, one of the major benefits to be derived from granting a juvenile the right to trial by jury has been significantly reduced.

In light of the decreased importance of the jury trial, both practically and constitutionally, a jury trial may not add much to fundamental fairness in juvenile delinquency proceedings. Furthermore, the due process requirements already in use may be sufficient to insure fundamental fairness in those juvenile delinquency cases where a public trial is undesirable. In addition, jury trials may not be needed as badly in delinquency proceedings because the consequences faced by juveniles, while serious, are not as serious as those faced by adult criminals.[58] While juvenile sentences are indefinite, juveniles cannot be confined beyond their twenty-first birthday or for a longer time than an adult could have been for the same offense.[59] Thus,

56. Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 369 (1972).

57. *Id.* at 370. The author is one of the coauthors of the study which noted the importance of the jury in the reasonable doubt standard. See note 45, *supra*, and accompanying text. However, the study was completed before *Duncan*, and the quoted statement seems to call into question how much of a benefit trial by jury is after subsequent Supreme Court decisions. See notes 52 and 53, *supra*.

58. M. MIDONICK, CHILDREN, PARENTS, AND THE COURTS: JUVENILE DELINQUENCY, UNGOVERNABILITY AND NEGLECT 97-98 (1972); Comment, *supra* note 15, at 608. *Contra*, *In re Dino* 359 So. 2d at 602-07 (Dennis, J., concurring in part and dissenting in part), wherein Justice Dennis stated that juveniles faced consequences not essentially different from those faced by adult criminal defendants. *Id.* at 604. Justice Dennis pointed out that the average term of confinement of juveniles exceeds six months and reproduced statistics by the Louisiana Department of Corrections to back up his finding. *Id.* at 602-03 & n.8. This finding certainly points to serious consequences faced by the juvenile, but are they as serious as the consequences faced by adult criminal defendants? The longest average confinement contained in the statistics used by Justice Dennis was 371 days—this was the average confinement for those juveniles leaving between 1976 and 1977 who had been committed based on a charge of Robbery or Extortion. No comparable statistics for adult criminals could be found, but one cannot but wonder if the prison terms for adults confined on the same charges would average only one year. Furthermore, the question must also be asked, is confinement in a training school as serious as confinement in Angola?

59. LA. R.S. 13:1580(A)(2)(a) (Supp. 1975 & 1977) provides:

while Dino could have faced capital punishment or life imprisonment as an adult, as a juvenile he faced, at worst, confinement until age twenty-one.

Because juveniles do not face the same definite sentences that adults do, the jury requirements of article I, section 17, of the 1974 Louisiana Constitution[60] are not readily applicable to juvenile proceedings. Since article I, section 17, does not provide for which types of jury should be used in juvenile proceedings, legislative action would be necessary to provide the answer.

The application of article I, section 17, is but one of the many areas where imposition of jury trials in delinquency proceedings presents difficulties; the problems demonstrate the desirability of imposing jury trials by legislative scheme rather than by judicial fiat. Furthermore, our knowledge about the problems of delinquency and juvenile justice is grossly inadequate[61] and a decision in this vacuum of knowledge should only be made cautiously.

In sum, there is some doubt about whether a jury trial is really necessary for juvenile delinquency proceedings to be fundamentally fair. Furthermore, the benefits of a jury trial in a small number of cases may be outweighed by the profound effects imposition of jury trials might have on the juvenile system as a whole. Considering the lack of objective knowledge in the juvenile justice area, and the short time frame since *Gault*, it is not known if the due process requirements already imposed are sufficient. Future studies and evaluation may show the way.

A child over the age of thirteen who has been adjudged a proper person for commitment, based on a finding of delinquency, may be confined for an indefinite period, but in no case beyond his twenty-first birthday. However, no such child shall be confined for a period which exceeds the length of time for which an adult could be confined if convicted of the offense which formed the basis for the adjudication of delinquency.

60. LA. CONST. art. I, § 17 provides:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.

61. JUVENILE JUSTICE, *supra* note 13, at 15.

If the right to a jury trial was imposed, maintaining a separate juvenile court for delinquency proceedings might be unnecessary because a district court could hear a delinquency proceeding as a criminal case with the only difference being the dispositional alternatives available to the judge. However, such a move would be undesirable. Although the problems of the juvenile courts are serious, "the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver . . . ."[62] Furthermore, as delinquency proceedings become more akin to criminal proceedings, it becomes more likely that the attitude will develop that juvenile delinquents are no different from criminals.

Dino seems to represent a cautious step forward in the juvenile due process area; it represents no radical departure from current thought in the areas of public and jury trials.[63] *Dino* also seems to reflect a hesitance to deliver what could be the coup de grace to the juvenile court with respect to its delinquency jurisdiction without allowing time for evaluation of whether the due process requirements already in effect provide fundamental fairness to the juvenile making further erosion of the old ideals unnecessary.

Joseph G. Jarzabek

State v. Nelson: EXCLUSION OF EVIDENCE DERIVED FROM A PRIVATE SEARCH

Having reasonable cause to believe that the defendant had stolen a diamond ring, two department store security guards detained him under authority of Louisiana's "shoplifting statute."[1] During the detention, one guard, convinced that the de-

62. CHALLENGE, *supra* note 7, at 81.

63. RLR v. State, 487 P.2d 27 (Alaska 1971). In this case, the Alaska Supreme Court held that the statutory prohibition of jury trial and public trial for delinquents violated the Alaska Constitution. This is the only decision requiring a jury trial, absent a statutory mandate, since *McKeiver*. As to public trial, while the weight of authority may not be in favor of granting this right, adopting the right to public trial is not without support either. See notes 35-38, *supra*, and accompanying text.

1. LA. CODE CRIM. P. art. 215(A) states in pertinent part: