# Criminal Procedure -- Juries in the Juvenile Justice System?

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rather than excluded.[63] Whether the authority of the House under article 1, section 5 to expel a member "with the Concurrence of two-thirds" constitutes an unreviewable textual commitment remains to be answered. Yet surely a legislative body has the authority to police the conduct of its own members. To hold otherwise is to conclude that it is at the mercy of its unscrupulous or disruptive legislators.

The specific holding of *Powell*—that a duly elected legislator cannot be excluded if he meets the constitutionally specified requirements—is of little significance in the day-to-day practice of law. Its real importance to the practitioner is in the partial collapse of the political-question doctrine as an aid to a policy of judicial self-restraint. It would seem that *Powell* has provided authority for federal courts to hear important constitutional issues previously held to be non-justiciable.

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## Criminal Procedure—Juries in the Juvenile Justice System?

*In re Gault*[1] indicated in dictum that a juvenile hearing must meet the basic requirements of due process.[2] *Duncan v. Louisiana*[3] held that trial by jury in non-petty criminal cases is a basic requirement of due process. The logical completion of the syllogism is: A juvenile hearing must involve a jury if the youth's offense is not petty or his term

[63] 395 U.S. at 508. The Court also expressed no view on what, if any, limitation may exist on Congress' expulsion powers. *Id.* at 507 n.27.

[1] 387 U.S. 1 (1967).

[2] The Court in *Gault* said that in Kent v. United States, 383 U.S. 541 (1966), [w]e announced . . . that while "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; . . . we do hold that the hearing must measure up to the essentials of due process and fair treatment." We reiterate that view, here in connection with a juvenile court adjudication of "delinquency" . . . .

387 U.S. at 30 (footnote omitted). The Court in *Gault* was silent about trial by jury: Duncan v. Louisiana, 391 U.S. 145 (1968), had not yet been decided, and the facts might not have presented the issue in any event since Gerald Gault's offense if committed by an adult could not have brought a sentence of longer than two months. *Id.* at 8-9. The specific holding of *Gault* went only so far as to require notice of the charges, *id.* at 33-34; the right to be represented by counsel or by appointed counsel in cases of poverty, *id.* at 41; the privilege to remain silent, *id.* at 55; and the right to confront and cross-examine witnesses, *id.* at 56-57.

[3] 391 U.S. 145 (1968). *See also* Bloom v. Illinois, 391 U.S. 194 (1968).

of institutionalization potentially extensive. On the basis of a technicality, however, the United States Supreme Court declined the opportunity to apply this logic and dismissed the recent case of *DeBacker v. Brainard*,[4] which squarely presented the issue of the right to a jury in juvenile hearings.

The state courts are split on the question, both internally and from jurisdiction to jurisdiction. Since *Gault* was handed down, fewer courts have followed the logic outlined above than not.[5] The most recent of majority persuasion is the North Carolina Supreme Court, which in deciding *In re Burrus*[6] noted that the juvenile (district) court had met all the narrow *Gault* requirements,[7] that trial by jury was not among them, and that, therefore, the case was closed.[8]

The decisions and opinions against the jury requirement in juvenile proceedings elaborate in detail the theory that gave rise to a separate system of justice for juveniles at the turn of the century; they point to the excellence of the goals of the theory; they emphasize the crucial differences between that theory and the criminal justice system for adults. At times admitting a certain gap between theory and actuality,[9] these

[4] 396 U.S. 28 (1969). In DeStefano v. Woods, 392 U.S. 631 (1968), the Court held that *Duncan* and *Bloom* would have only prospective application. Clarence DeBacker's juvenile court hearing was held on March 28, 1968; *Duncan* and *Bloom* were handed down on May 20, 1968.

[5] Three pre-*Duncan* cases interpreted *Gault* to require trial by jury in the juvenile hearing: Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968); *In re* Rindell, 2 BNA CRIM. L. REP. 3121 (Providence, R.I., Fam. Ct. 1968). *See also* Hogan v. Rosenberg, 24 N.Y.2d 207, 247 N.E.2d 260, 299 N.Y.S.2d 424, *prob. juris. noted sub nom.* Baldwin v. New York, 395 U.S. 932, *motion to expedite denied sub nom.* Puryear v. Hogan, 395 U.S. 973 (1969). Among the decisions denying trial by jury before *Duncan* are: Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967) and Estes v. Hopp, 73 Wash. 2d 272, 438 P.2d 205 (1968); after *Duncan*: Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968); *In re* Johnson, 255 Md. 1, 255 A.2d 419 (1969); DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), *aff'd per curiam*, 396 U.S. 28 (1969); *In re* State *ex rel.* J. W., 106 N.J. Super. 129, 254 A.2d 334 (Union County Juv. & Dom. Rel. Ct. 1969); and *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969). The rift is most clearly demonstrated with the *DeBacker* case. Four of the seven judges on the Nebraska Supreme Court found the confluence of *Gault* and *Duncan* a mandate to reverse that state's policy of excluding the jury from the juvenile hearing. However, the Nebraska Constitution provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." NEB. CONST. art. 5, § 2.

[6] 275 N.C. 517, 169 S.E.2d 879 (1969).

[7] These requirements are listed in note 2 *supra*.

[8] 275 N.C. at 533-34, 169 S.E.2d at 889.

[9] *In re* Johnson, 255 Md. 1, —, 255 A.2d 419, 423 (1969); *In re* W., 24

opinions nonetheless indicate a belief that interjecting the jury would mean a retrogression to the "ordinary criminal trial."[10] The theory favored can be expressed in this fashion: The wayward child is not to be examined with regard to the act he might have committed; but rather the judge, as the child's surrogate parent, is benignly to inquire into the totality of circumstances impinging on the child and do the best for him; official stigma is to be washed away. Strict procedures would be antithetical to such a non-retributive process. The process, in fact, would be wholly civil, simply an extension of the equity court's traditional jurisdiction over neglected children. Not so exuberantly stated, the theory was nonetheless thriving handsomely in 1969: "The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process . . ." in disallowing jury trial.[11]

The argument is that aside from weighing down the juvenile proceeding with a criminal-trial aura, the presence of the jury would cramp the judge's flexibility in the essential "whole-child" analysis. Contentiousness would be promoted. The cherished informality that engenders a sense of cooperation and does not overly frighten the child would be destroyed. Implicit in this argument is the notion that the traditional secrecy of the

N.Y.2d 196, 198, 247 N.E.2d 253, 254, 299 N.Y.S.2d 414, 416, *prob. juris. noted sub nom. In re* Winship, 396 U.S. 885 (1969); Commonwealth v. Johnson, 211 Pa. Super. 62, 70-71, 234 A.2d 9, 13-14 (1967). On March 31, 1970, the United States Supreme Court, deciding *In re Winship*, reversed the New York court and held that the Constitution requires as high a standard of proof in juvenile courts as in courts trying adults. N.Y. Times, Apr. 1, 1970, at 24, col. 1.

[10] 387 U.S. at 75 (dissenting opinion). The phrase is Justice Harlan's, used in the specific context of *Gault*, but typical of the "theorist" approach.

[11] *In re* W., 24 N.Y.2d 196, 203, 247 N.E.2d 253, 257, 299 N.Y.S.2d 414, 420 (1969). The theorists are not at all chary of quoting the old cases. The successful dissent to the majority's decision in *DeBacker* at the state level, for example, quoted Laurie v. State, 108 Neb. 239, 242-43, 188 N.W. 110, 111 (1922), *quoting* Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 664-65, 79 N.W. 422, 426-27 (1899):

> "'The proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right.'"

183 Neb. at 472-73, 161 N.W.2d at 514. For an explanation of why the dissent was successful under Nebraska law, see note 5 *supra*.

juvenile proceeding would be compromised by the presence of a jury, thus increasing the stigma felt by the child. Presumably, the argument goes, the jury is an inadequate fact-finder—at least, no better a fact-finder than the judge. And the question is put: Could there be any petty-serious distinction made as called for by the rationale of *Duncan*? Juveniles may normally be committed to a training school for an indefinite period, not to exceed their minority, even though the given offense if committed by an adult might involve a maximum sentence of less than six months. Finally, it is argued that the jury's inefficiency would promote delay at great economic cost and also at great cost in terms of crippling the more immediate implementation of the theory.

> It takes no imagination to prophesy that the increase in percentage of jury trials could easily delay a case for several years, which in the case of growing children whose personalities and learning change daily, is much more critical than in the case of adults.[12]

This note will attempt to show that each of these arguments against the jury fails; it will not attempt affirmatively to argue on behalf of the jury as an institution. Trial by jury is not "the mainstay and bulwark upon which truth and liberty rest"[13] nor "the most cherished right awarded to man."[14] But *Duncan v. Louisiana* stands as a constitutional mandate, however strong or weak its logical underpinnings. If the juvenile proceeding is not meaningfully different from the adult proceeding in its form or consequences, *Gault* and *Duncan* demand that trial by jury be granted when requested.

The fundamental analytical blunder of the contra-jury theorists has been the failure in their reasoning to separate the adjudicatory from the dispositional aspects of the juvenile proceeding; as will be shown later, the need for flexibility exists primarily on the dispositional side where the jury has no place. Another error, or perhaps a knowing technique for avoiding confrontation of the real issues, has been the intoning of catch-phrases such as "parens patriae" or "civil, not criminal." "Form [has] swallowed substance, and semantics [has] disposed of the constitutional rights of juveniles . . . ."[15] The Supreme Court indicated in *Gault* that it is not tricked by these words:

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[12] Brief for Appellee at 12, DeBacker v. Brainard, 396 U.S. 28 (1969).
[13] *In re* Rindell, 2 BNA CRIM. L. REP. 3121 (Providence, R.I., Fam. Ct. 1968).
[14] *Id.* at 3126.
[15] DeBacker v. Brainard, 183 Neb. 461, 466, 161 N.W.2d 508, 511 (1968).

> The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.[16]

Before other grounds for excluding the jury from the juvenile hearing are examined, a basic point—which will appear too obvious—must be made. One gets the impression from the cases that there is a fear that the unknowing juvenile will be forced into having a jury and thus will be unduly intimidated. "[T]he short answer is that if an accused juvenile and his counsel do not want a jury trial, they do not have to have one."[17]

The plea for informality fails to take into account the salutary effect that the solemnity of the courtroom has in increasing respect for the law.[18] Furthermore, the idea of informality in the courtroom or even the judge's chambers (where the judge "can on occasion put his arm around [the child's] shoulder and draw the lad to him")[19] is a hoax. The process may be less formal from the judge's point of view, but it is not the judge's "alienation" about which there is concern. The process cannot be informalized from a child's point of view.[20]

A noble aim of the juvenile court theory has been "to save [the child] from the brand of criminality, the brand that sticks to it for life . . . ."[21] Yet how much violation of secrecy is really going to occur

[16] 387 U.S. at 16.

[17] Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 23-24 (Dec. 1967) [hereinafter cited as Dorsen & Rezneck]. N.C. CONST. art. 1, § 13, guaranteeing trial by jury in criminal cases, has been interpreted to *require* trial by jury for all adults accused of any crimes except petty misdemeanors. State v. Holt, 90 N.C. 749 (1884). If a youthful offender is to be treated in the same way as an adult in regard to the right to trial by jury, as this note indicates *Gault* and *Duncan* require, then it may be argued that a North Carolina juvenile, in the same way as a North Carolina adult, will not be allowed to waive the jury. This argument has the advantage of consistency, but it also ensures that the judge can never play the role attributed to him by the theorists even when all parties are willing for him to attempt it.

[18] Dorsen & Rezneck 23.

[19] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) [hereinafter cited as Mack].

[20] [I]nformal handling appears informal only to the officials charged with execution of certain responsibilities; to those caught up in the net of the juvenile justice system, it is impressively authoritative and formal . . . . THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 10 (1967) [hereinafter cited as TASK FORCE REP.]. The Commission recognized this fact as one defect in its argument for extending discretion on the pre-judicial level.

[21] Mack 109.

by including twelve strangers in the juvenile adjudicatory process? Already exclusion of the general public from a juvenile hearing is discretionary with the judge, at least in North Carolina.[22] Moreover, the Court in *Gault* called the claim of secrecy, with regard to the perhaps more telling area of court records, "more rhetoric than reality."[23]

The possibility that some petty offenses might be tried by jury in juvenile court along with offenses serious by adult standards is certainly an unsubstantial reason for denying the right to jury. The maximum possible adult sentence could furnish one test for determining whether the given offense was serious or petty.[24] However, a juvenile offender when committed to a reformatory remains incarcerated at the discretion of the institution's administrators for a period that typically may not extend beyond the youth's eighteenth or twenty-first birthday. Gerald Gault, for example, could have been institutionalized for as many as six years since he was only fifteen years old at the time of his hearing; however, had he been an adult, he could not have received a sentence of more than two months.[25] In this sense, no offense committed by a youth is ever "petty."

To the fact-finding and economic arguments against the jury, the answer is that these may also be directed against the adult trial system; thus they were refuted in *Duncan*. In that decision the Court relied on a "recent and exhaustive study" by Messrs. Kalven and Zeisel,[26] which "concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them . . . ."[27] The efficiency-economy argument seems particularly inappropriate in a state such as North Carolina, which has one of the highest annual (adult) criminal jury trial rates in the nation.[28]

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[22] N.C. GEN. STAT. § 7A-285 (1969).

[23] 387 U.S. at 24. This observation is one further example of the disparity between theory and reality.

> In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal.

TASK FORCE REP. 9.

[24] The maximum adult sentence was accepted as the test by the losing, though majority, faction of the Nebraska Supreme Court in DeBacker v. Brainard, 183 Neb. 461, 469-70, 161 N.W.2d 508, 513 (1968).

[25] 387 U.S. at 8-9.

[26] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 494 (1966).

[27] 391 U.S. at 157.

[28] In the year 1955 there were 3,950 criminal jury trials in North Carolina; this number was exceeded only in Georgia (5,300), California (4,940), and Alabama (4,270). H. KALVEN & H. ZEISEL, THE AMERICAN JURY 502-03 (1966).

It is perhaps true that delay is a more serious matter with regard to juveniles than to adults, especially in light of the frightening upsurge of juvenile delinquency in the last decade[29] and the general belief that more "can be done with" a child than an adult if only he can be "got to" soon enough; but delay is endemic throughout the judicial system and is a serious blackmark against it no matter what the defendant's age. Against the economy argument must be balanced the constitutional right that is involved.[30] Moreover, gross delay may in the end be a good thing: perhaps the people and the legislatures will be forced to give more attention to these problems.

The theorists' intricate rationale against jury-inclusion in juvenile proceedings rests upon a tenuous foundation consisting of certain incorrect assumptions: that a juvenile court judge always uses his unhampered discretion in the most intelligent and benevolent way; that the dispositional alternatives open to a judge are genuinely rehabilitative; and that instituting the jury must necessarily deprive the judge of any flexibility with which he might sensitively employ rehabilitative plans, if available. These assumptions will be considered in turn.

One state court judge recoiled angrily against the statement in *Gault* that "the condition of being a boy does not justify a kangaroo court"[31]; he called this "an implied criticism of juvenile judges that is wholly unwarranted."[32] Other judges are not so defensive, but they exhibit a no less unqualified faith in the juvenile court judge.[33] However, the image of the amiable, well-meaning, tender-hearted, fatherly juvenile court judge is no more realistic than the conception of the judge as overworked, hardened, insensitive, and prosecution-oriented. The mere possibility of the latter is sufficient ground for requiring determination of guilt by a jury. This ancient reason for having trial by jury is no less compelling because the defendant is under the age of sixteen. To the contrary, it

[29] TASK FORCE REP. 1.

[30] *See In re* Rindell, 2 BNA CRIM. L. REP. 3121, 3125 (Providence, R.I., Fam. Ct. 1968).

[31] 387 U.S. at 28.

[32] DeBacker v. Brainard, 183 Neb. 461, 476, 161 N.W.2d 508, 516 (1968) (dissenting opinion). The judge declared, "I am not so naive as not to recognize that Kent, Gault, and Duncan point to the eventual destruction of the juvenile court acts existing in most of the states of the union." *Id.* at 480-81, 161 N.W.2d at 518. "But I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what [the United States Supreme Court] will eventually do." *Id.* at 482, 161 N.W.2d at 519.

[33] *See* Commonwealth v. Johnson, 211 Pa. Super. 62, 76-77, 234 A.2d 9, 16-17 (1967).

has been said that "juvenile judges have the most difficult job in the whole legal system"—a job demanding intelligence and empathy; yet it is a job generally without prestige.[34] Moreover, "[a]s often as not the judge acts as prosecutor—a depressingly unjust practice. Or he assigns the job to a probation worker who later is supposed to win the child's confidence to help him change his ways."[35] If a juvenile court has pre-judicial machinery for screening out numerous youthful offenders, those sent into court cannot but be "tainted" in the judge's eyes; a jury would not be as likely to feel such a prejudice.

If the juvenile justice system worked, the argument for exclusion of the jury from the hearing and, indeed, for deprivation of procedural due process generally, would seem much stronger—even though the argument is not stronger from a purely logical point of view. The inference from the court opinions opposing inclusion of the jury, even when they acknowledge a degree of failure in the system, is that it is successful to a greater or lesser degree. But the truth is startlingly the opposite.[36]

In 1909 Judge Mack described juvenile penal-corrective conditions prior to the inception of the theory of the juvenile justice system as follows:

> [I]nstead of the state's training its bad boys so as to make of them decent citizens, it permitted them to become the outlaws and outcasts

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[34] James, *Do Children Get Their Day in Court?*, The Christian Science Monitor, April 12-14, 1969, at 10, col. 4.

[35] *Id.*, col. 1.

[36] No discussion of juvenile delinquency would be complete without the much-quoted statement from the Supreme Court's first juvenile delinquency case, *Kent v. United States*:

> [T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children.

383 U.S. at 556 (footnote omitted). The *Task Force Report* of the President's Commission on Law Enforcement and Administration of Justice leaves no doubt about the failure of the system:

> [T]he postulates of specialized treatment and resulting reclamation basic to the juvenile court have significantly failed of proof, both in implementation and in consequences. The dispositions available for most youths adjudicated delinquent are indistinguishable from those for adult criminals: Probation with a minimum of contact . . . or institutionalization in what is often, as a result of overcrowding and understaffing, a maximum security warehouse for youths. The vaunted intermediate and auxiliary measures—community residential centers, diversified institutions and institutional programs, intensive supervision—with which youth was to be reclaimed have come to pass only sporadically, hampered by lack of money, lack of staff, lack of support, lack of evaluation.

TASK FORCE REP. 23.

> of society; it criminalized them by the very methods that it used in dealing with them.[37]

His statement perfectly describes conditions today, long after implementation of the theory. Probational officers or juvenile counselors, where they exist, have "caseloads typically . . . so high that counseling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended"[38]; salaries being meagre, naturally the most intelligent and dynamic persons are not drawn into the field. State institutions for juvenile delinquents are regimented and often brutal[39] festering grounds for hardening youths unalterably into criminals.[40]

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[37] Mack 107. Judge Mack's conception of the ease with which juveniles could be rehabilitated was perhaps grossly overly optimistic. Yet he realized that

> despite the great ultimate financial saving to the state through this method of dealing with children, a saving represented by the value of a decent citizen as against a criminal, the public authorities are nowhere fully alive to the new obligations that the spirit as well as the letter of this legislation imposes upon them.

*Id.* 115. He was aware that the system could not work without meaningful rehabilitative alternatives, and he warned:

> If a child must be taken away from its home, if for the natural parental care that of the state is to be substituted, a real school, not a prison in disguise, must be provided.

*Id.* 114.

[38] TASK FORCE REP. 8.

[39] *See* James, *Do Children Get Their Day in Court?*, The Christian Science Monitor, April 12-14, at 9, col. 1.

[40] According to Mr. George F. McGrath, head of the New York City prison system:

> The public should be told that correctional agencies contribute enormously to the crime rate . . . . There is a direct relationship between the growing crime rate and our institutions.
>
> The people do not understand that. Public officials do not understand that. But it is unquestionably true.

James, *Reach a Child Early Enough*, The Christian Science Monitor, April 19-21, at 9, col. 3. Mr. Milton Luger, president of the National Association of State Juvenile Delinquency Program Administrators, has said: "[W]ith the exception of a relatively few youths, it [would be] better for all concerned if young delinquents were not detected, apprehended, or institutionalized. Too many of them get worse in our care." James, *"Too Many of Them Get Worse in Our Care,"* The Christian Science Monitor, April 26-28, at 9, col. 4.

> . . . Oliver J. Keller, who recently took over as head of the Florida Division of Youth Services [has said]:
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> "We are working in a terribly primitive field. Primitive. Punitive. Brutal. I don't like large institutions. I don't like what happens to children in them. One of my men says living in a training school is as cozy as living in a wash bay of a filling station. I agree. The child is returned to the streets with none of his family problems solved. And he's more sophisticated in crime."

*Id.*

Despite the imperfections of the present system of juvenile justice, without any doubt "the ideal of separate treatment of children is still worth pursuing."[41] Just as obviously, the traditional jury is not equipped to know the best dispositional alternatives for each individual child, no matter how effectively the opposing counsel argue for given dispositions. The fallacy in mourning the demise of the juvenile justice system because of the intrusion of the jury is in the failure to distinguish the adjudicatory, or "fact," and dispositional, or "whole-child," aspects of a proceeding.[42] A jury centers only upon the question of whether a specific act was committed. The Supreme Court was careful to make this distinction in *Gault*:

> [W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only . . . proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.[43]

As the Court explained:

> We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication.[44]

One more among the catalogue of reasons given for excluding the jury is that the jurisdiction of the juvenile court extends beyond juveniles who have committed adult crimes and includes suzerainty over juveniles who have violated laws peculiar to children (*e.g.*, truancy), who are dependent (because their parents are economically unable to take care of

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[41] TASK FORCE REP. 9.

[42] Technically, both fact and whole-child analyses are adjudicatory, the dispositional being yet another step. However, the President's Commission on Law Enforcement and Administration of Justice has used the adjudication-disposition terminology.

> Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition proceeding, at which the juvenile's background is considered in connection with deciding what to do with him.

*Id.* 35.

[43] 387 U.S. at 13.

[44] *Id.* at 22.

them), or who are neglected (since their parents wilfully refuse to take care of them).[45] Partly because of this argument, the President's Commission's *Task Force Report*, written before *Gault* and *Duncan* were handed down, opposed the jury:

> Inequality and disparate decisions are invited by giving these formulae [neglect, dependency, incorrigibility, truancy, etc.] to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms.[46]

The simple answer to this objection is that since juries do not decide such matters in adult trials, they need not decide them in juvenile hearings. The marriage of *Gault* and *Duncan* would not require it.

So far as adjudication of guilt is concerned, there are no additional adjudicatory problems presented merely because the defendant is a child.

> The issues in the delinquency trial of a law violation are the same as in a criminal trial of the same offense. The jury function of weighing the evidence, evaluating the credibility of witnesses, and finding the facts are [*sic*] no harder with respect to whether a juvenile committed a criminal act than whether an adult did.[47]

It will still be argued, however, that since juvenile proceedings are wholly rehabilitative in spirit, the adjudication of the fact of guilt vel non is unimportant and irrelevant. The New York Court of Appeals said on March 6, 1969: "[A] child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court."[48] Of course, the major goal of the juvenile court movement was to get away from the mere "specific act" determination of the traditional criminal trial. But this last-ditch argument pays no heed to the quotidian realities of judicial technique. A child whom the juvenile court judge finds to be wholly innocent of any type of offense is not likely to be retained and sent through the remaining channels of the juvenile penal-corrective process simply because he has once come to

[45] The new North Carolina statute typifies the generally loose formulations. N.C. GEN. STAT. § 7A-278 (1969).

[46] TASK FORCE REP. 38. The Commission also opposed the jury on the basis of formality. It must be noted that the Commission was gravely skeptical over the possibility of youths being sent to training schools for acts that are not offenses when committed by adults. *Id.* 25-28.

[47] Dorsen & Rezneck 23.

[48] *In re* W., 24 N.Y.2d 196, 199, 247 N.E.2d 253, 255, 299 N.Y.S.2d 414, 417 (1969).

the judge's attention. The jury assailants are put in the position of arguing that a judge presented with four children—one innocent of any act, though peevish or melancholy; one guilty only of having parents who do not want him; one who has stolen a piece of candy; and one who has murdered the town's most distinguished citizen—will look only to each child's emotional and developmental needs in fashioning a plan for his behavior modification.

On the one hand, it cannot be denied that the act a child has committed is inseparable from the child's personality; his act has become a part of his personality in the eyes of all who view the child.

> However advanced our techniques for determining what an individual is, we have not approached the point at which we can safely ignore what he has done. What he has done may often be the most revealing evidence of what he is.[49]

On the other hand, neither can it be denied that the judge is the embodiment of society, and as such he must and will—even if not consciously—protect society from threatening conduct, no matter if that conduct is committed by a fourteen-year-old or by a twenty-four-year-old.

> While statutes, judges, and commentators still talk the language of compassion, help, and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders, too.[50]

Simply put, there is a punitive as well as a rehabilitative element in the juvenile process; to this extent the adjudication of the fact of guilt is important, and the jury has a place in the juvenile hearing.

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[49] TASK FORCE REP. 30, *quoting* ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 19 (1964).

[50] TASK FORCE REP. 8. The Commission accounted for nonrecognition of the punitive aspect of the juvenile process in the following way:

> One explanation of the general failure to admit the court's social protection function is, of course, the traditional view that the juvenile court must and does act always and only in the child's best interest, regardless of any interest society may have. A second and, perhaps, more significant reason lies in the fact that most juvenile courts are legislatively provided with mechanisms [*e.g.*, waiver to adult court] for evading the social protection responsibility in its . . . most public posture.

*Id.* 24.