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# THE STANDARD OF PROOF IN JUVENILE PROCEEDINGS: *GAULT* BEYOND A REASONABLE DOUBT

*James Hillson Cohen**

*After all, what we are striving for is not merely "equal" justice for juveniles. They deserve much more than being afforded only the privileges and protections that are applied to their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progress of future generations.*

—Chief Justice Earl Warren[1]

SINCE the United States Supreme Court handed down its landmark decisions dealing with the rights of youths in juvenile court proceedings, *Kent v. United States*[2] and *In re Gault*,[3] there has been widespread discussion among the commentators concerning the effect of those cases on various aspects of such proceedings.[4] Not only did those decisions apply several specific constitutional protections to youths accused of a crime, but they also raised questions concerning what other safeguards must constitutionally be assured to juveniles, and they served to create among courts and commentators a greater awareness of the nature of juvenile proceedings. As a result, there has been a re-examination of many of the policies underlying the denial to youths accused of a crime of procedural safeguards which are accorded to adults. One of those safe-

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1. Address to the National Council of Juvenile Court Judges, JUV. CT. JUDGES J., Fall 1964, at 14, 16.

2. 383 U.S. 541 (1966). In *Kent* the Supreme Court held that a juvenile court could not "waive" a juvenile to an adult hearing without a full investigation. The Court also implied, without deciding, that many of the procedural safeguards guaranteed by the Constitution to criminal defendants were constitutionally required for children as well.

3. 387 U.S. 1 (1967). In *Gault* the Court held that the fourteenth amendment requires states to provide various procedural safeguards for juveniles who are charged with delinquency. The Court specifically held that juveniles must be (1) given sufficient notice to prepare a defense to the charges, (2) advised of the right to counsel, including assigned counsel, (3) advised of the right to remain silent, (4) afforded the right of confrontation, and (5) given the right of cross-examination.

4. *See, e.g.*, Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U. L. REV. 62 (1969); Michael & Cunningham, *From Gault to Urbasek: For the Youth the Best of Both Worlds*, 49 CHI. B. RECORD 162 (1968); Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527 (1968); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583 (1968); Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558 (1968); Note, *What Happened to Whittington?*, 37 GEO. WASH. L. REV. 324 (1968).

guards is the requirement that a conviction of a criminal offense be established by proof which leaves no reasonable doubt in the mind of the fact finder.

In a sense, it is misleading to refer to the application of the criminal standard of proof—proof beyond a reasonable doubt—as a constitutional safeguard, for the Constitution does not specifically refer to the requisite burden of proof in criminal cases, and the Supreme Court has never been directly presented with the question whether the application of the higher standard is constitutionally required in criminal proceedings.[5] But several Supreme Court opinions do suggest that an individual cannot be deprived of his liberty unless there is proof beyond a reasonable doubt;[6] and it may therefore be safely assumed, as it is in this Article, that due process requires the higher standard in adult criminal cases. It should not, however, be thought that the only focus of the Article is on the constitutional requirements for juvenile cases; indeed, this Article is primarily concerned with policy considerations and with the question whether such considerations indicate that the higher standard should be applied in juvenile proceedings even if it is not constitutionally required.

Some of those who have studied the question of the appropriate standard of proof in juvenile proceedings have determined that the "preponderance of the evidence" standard—the standard applied in civil cases—is sufficient, and that the criminal standard should not be

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5. Michael & Cunningham, *supra* note 4, at 166.

6. *E.g.*, Speiser v. Randall, 357 U.S. 513, 525-26, *reh. denied*, 358 U.S. 860 (1958); Holland v. United States, 348 U.S. 121, 131 (1954); Leland v. Oregon, 343 U.S. 790, 795-96, *reh. denied*, 344 U.S. 848 (1953); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 487-88 (1895); Dunbar v. United States, 156 U.S. 185, 199 (1895); Hopt v. Utah, 120 U.S. 430, 439-41 (1886); Miles v. United States, 103 U.S. 304, 312 (1880); Lilienthal's Tobacco Co. v. United States, 97 U.S. 237, 266 (1878). *See also* Brooks v. United States, 164 F.2d 142, 143 (5th Cir. 1947); Shaw v. United States, 357 F.2d 949, 960 (Ct. Cl. 1966); Virgin Islands v. Torres, 161 F. Supp. 699, 700 (D.V.I. 1958); People v. Licovoli, 264 Mich. 643, 646, 250 N.W. 520, 522 (1933); People *ex rel.* Schubert v. Pinder, 170 Misc. 345, 346, 9 N.Y.S.2d 311, 312 (Sup. Ct. 1938); State v. Dantonio, 18 N.J. 580, 582, 115 A.2d 35, 42 (1955); Egan v. United States, 287 F. 958, 967 (D.C. Cir. 1923).

In *Speiser v. Randall*, the Court said, in dictum:

> There is always in litigation a margin of error representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—the margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

357 U.S. at 525-26.

applied in such cases.[7] Others have suggested that the standard-of-proof question is unimportant since the particular standard which is required will seldom, if ever, make a difference to the outcome of a case.[8] The first of these views is the subject to which the bulk of this Article is addressed; the second can be rebutted by the observation that in at least two recent cases youths were found to be delinquent by judges who specifically stated that their conclusions would have been different if the higher standard had been applicable.[9]

At the present time, those who advocate the application of a civil standard of proof in juvenile proceedings have considerable support, for in most jurisdictions a youth may be determined to be delinquent and subjected to a significant deprivation of liberty in the interest of rehabilitation if it is shown by a preponderance of the evidence that he committed a delinquent act.[10] In some states, however, the criminal standard is required, either by statute[11] or by judicial interpretation,[12] in some types of juvenile proceedings. If the position of

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7. *E.g.*, TASK FORCE ON JUVENILE DELINQUENCY OF THE PRESIDENT'S COMMN. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 40 (1967) [hereinafter TASK FORCE REPORT]. *But see* Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387, 412 (1961); Rappoport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach*, 1958 WASH. U. L.Q. 123, 149-51; Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L.C. & P.S. 339, 344 (1921); Recent Case, *Where a Juvenile Is Charged with Misconduct Which Would Be Criminal if Committed by an Adult the Misconduct Is To Be Proved by a Preponderance of the Evidence*, 37 U. CIN. L. REV. 851 (1968); Note, *Juvenile Courts: Applicability of Constitutional Safeguards and Rules of Evidence to Proceedings*, 41 CORNELL L.Q. 147, 153 (1955); Recent Development, *Preponderance of the Evidence Upheld as Applicable Standard of Proof in Juvenile Delinquency Adjudications*, 44 ST. JOHN'S L. REV. 101 (1969); Recent Development, *New York Retains the Preponderance of Evidence Standard of Proof in Juvenile Delinquency Proceedings*, 20 SYRACUSE L. REV. 1009 (1969).

8. Paulsen, *supra* note 4, at 551-52.

9. *In re* Bigesby, 202 A.2d 785, at n.1 (D.C. App. 1964); W. v. Family Court, 24 N.Y.2d 196, 206, 247 N.E.2d 253, 260, 299 N.Y.S.2d 414, 423 (Chief Judge Fuld, dissenting), *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969). It does appear to be true, however, that some juvenile court judges apply the criminal standard of proof even if they are not required to do so. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 795 (1966).

10. *See, e.g.*, NEB. REV. STAT. § 43-206.03(3) (1943); N.Y. FAMILY CT. ACT § 744(b) (McKinney Supp. 1969). In some jurisdictions, such as the District of Columbia, the preponderance standard has been a product of judicial interpretation, without specific statutory expression.

11. *See* note 128 *infra*.

12. *See* notes 57-80 *infra* and accompanying text. The Council of Judges of the National Council of Crime and Delinquency has endorsed a third view—that the criminal standard is appropriate for some cases, but that for other cases the appropriate standard is proof "by clear and convincing evidence." *See* notes 130-32 *infra*

those states is accepted—and that view appears to be the sounder one —a separate question arises as to the particular proceedings to which the standard applies, for surely in some of the cases which come before juvenile courts it should not be required that the youth's acts be proved beyond a reasonable doubt.[13]

As a minimum, it can be said that if a state is willing—or if all states are constitutionally required—to adopt the criminal standard of proof in juvenile proceedings, then that standard must be applied to all juvenile cases which would be felony cases if an adult were the defendant, and which could result in a serious deprivation of the youth's liberty through a prolonged detention. The objections to denying an accused delinquent the higher standard cannot be met by applying it on a basis that is any less broad. But it would be even more desirable to apply the higher standard to all juvenile cases involving acts which would be classified as crimes if committed by adults. Such an approach would prevent the possibility that the application of the criminal standard could be avoided by the simple expedient of charging the youth with a misdemeanor and then, on a showing of a preponderance of the evidence, subjecting him to a significant deprivation of liberty.[14] However, small steps must precede large ones, and for the present it is enough to hope that the criminal standard will be accepted for application to those juvenile cases which potentially involve a serious deprivation of liberty and which would be felony cases if an adult were the defendant.

## I. THE NEED TO SAFEGUARD THE LIBERTY OF THE YOUTH

### A. *The Special Nature of Juvenile Proceedings*

Persuasive policy considerations indicate that the criminal standard of proof should be applied in juvenile proceedings, and there is also reason to believe that the application of that standard is constitutionally required. Unfortunately, the Supreme Court has not yet

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and accompanying text. A similar position is urged in Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT 91, 103 (1967).

13. A finding of delinquency may, for example, result from conduct which is not so antisocial as to require detention, but which is sufficiently contrary to what is thought to be proper behavior for children that it is desirable to examine the conduct in a juvenile court. In those cases, such as truancy, it should not be required that the child's acts are proved beyond a reasonable doubt. *See* TASK FORCE REPORT 25, 26. *See also* notes 75, 107 *infra* and accompanying text.

14. This situation might arise if a case with facts identical to those of *Gault (see* note 51 *infra)* were tried in a jurisdiction which required proof beyond a reasonable doubt, but applied that standard only to cases which would be felony cases if an adult were involved.

passed upon the constitutional question,[15] and the vast majority of the states have not yet been persuaded by the policy considerations.

Most of the states which continue to apply the civil standard of proof do so on the basis of two views as to the nature of juvenile proceedings. First, juvenile proceedings are viewed as having a beneficial nature, since any confinement of juveniles is not directed toward retribution, but rather toward rehabilitation.[16] It is argued that since the result of a "conviction" in a juvenile proceeding is beneficial to the youth "convicted," the criminal standard of proof should not be applied. The need to find and to treat delinquents is thought to be greater than the need to punish criminals, and thus a lesser standard of proof is thought to be justified in delinquency cases.

The second view which is often used to support the application of a lower standard of proof in juvenile proceedings is derived from the existence of statutory provisions which are designed to prevent the undesirable classification of juveniles as "criminals."[17] In the District of Columbia, for example, specific statutory language indicates that a finding of delinquency is not intended to have the same stigmatizing effect as a criminal conviction:

> An adjudication upon the status of a child in the jurisdiction of the court does not operate to impose any of the civil disabilities ordinarily imposed by conviction, and a child is not deemed a criminal by reason of an adjudication. An adjudication is not deemed a conviction of a crime. . . .[18]

Where such statutes exist, it is argued that since precautions have been taken to avoid the possibility that delinquents will be classified as criminals, it is not necessary to provide juveniles with criminal safeguards at trial.

Neither of these views justifies the application of a civil standard of proof in juvenile proceedings. First, it is questionable whether juvenile cases should be thought different from criminal cases merely

15. The Court has, however, indicated that it will soon decide the question. W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969).

16. *See, e.g.*, W. v. Family Court, 24 N.Y.2d 196, 197-98, 247 N.E.2d 253, 254, 299 N.Y.S.2d 414, 415-16, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969); *cf. In re* Gault, 387 U.S. 1, 21 (1967).

17. *See, e.g.*, W. v. Family Court, 24 N.Y.2d 196, 200-02, 247 N.E.2d 253, 255-57, 299 N.Y.S.2d 414, 417-19, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969); *cf. In re* Gault, 387 U.S. 1, 23 (1967).

18. D.C. CODE § 16-2308(d) (1967). *See* text accompanying note 86 *infra*. *See also* NEB. REV. STAT. § 43-206.03(5) (1943); N.J. STAT. ANN. § 2A:4-39 (1952); N.Y. FAMILY CT. ACT §§ 782-84 (McKinney 1963).

because the confinement of juveniles is rehabilitative in nature; by now it is universally recognized that criminal confinement is also intended, at least in part, to have rehabilitative effects.[19] In fact, however, it is highly doubtful that the treatment accorded delinquents does serve significant rehabilitative ends. As is the case with treatment in adult penal institutions, institutions which house delinquents often fail to provide an adequate form of treatment.[20] As the Supreme Court observed in *Kent v. United States*:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.[21]

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19. *See, e.g.*, State v. Arenas, 453 P.2d 915, 918 (Ore. 1969). Although the court refused to require the adoption of the adult standard of proof in determinations of delinquency, it noted:

> . . . Aspects of the juvenile law which at its inception made it substantially different from the criminal law are now also present in the criminal law as it exists today in Oregon. Today in the criminal law as well as in the juvenile law the court attempts to find out as much as possible about the individual defendant before making any disposition of the case. In the criminal law as well as the juvenile law the court makes a disposition which is most likely to rehabilitate the individual and permanently remove him from the ranks of crime.

20. *See In re* Gault, 387 U.S. 1, 26 (1967); TASK FORCE REPORT 7-9; PRESIDENT'S COMMN. ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 665-76, 686-87, 773 (1966). *See also* A. PLATT, THE CHILD SAVERS (1969). The inadequate treatment which institutions provide for delinquents was recently commented on by Joseph R. Rowan, former federal delinquency consultant and now director of the John Howard Association of Illinois, in testimony before the Juvenile Delinquency Subcommittee of the Senate Judiciary Committee. Mr. Rowan

> emphasized his opinion that treatment of delinquents in institutions for children was no better, and probably more negligent, than in most adult prisons. He called juvenile institutions "crime hatcheries" where children are tutored in crime if they are not assaulted by other inmates or the guards first.

Wash. Post, March 7, 1969, § A, at 11, col. 1. His testimony was given stark affirmation by a recent account in the *Washington Post* which reported on the charges made by the Justice Department that "overseers of an Alabama juvenile home 'freely and excessively' administer corporal punishment to 440 Negro Youngsters." Wash. Post, Nov. 9, 1969, § A, at 3, col. 1. President Nixon, on November 13, called on Attorney General Mitchell to institute a major prison reform drive in America. In a companion statement to his directive, Mr. Nixon noted: "In an appalling number of cases, our correctional institutions are failing." After citing a study indicating approximately a forty per cent recidivism rate among adult criminals, President Nixon indicated that the repeater rates were even greater among persons under twenty, "and there is evidence that our institutions actually compound crime problems by bringing young delinquents into contact with experienced criminals." Wash. Post, Nov. 14, 1969, § A, at 2, col. 3. And as recently as November 22, 1969, former Associate Justice Abe Fortas specifically attacked the practice of confining juveniles to institutions from which most, he said, "emerge as confirmed criminals . . . with improved skills as burglars, sex offenders, dope addicts, and the like." Wash. Post, Nov. 23, 1969, § A, at 23, col. 1. *See also* an excellent series of fifteen articles by Howard James on the need for reform in this area, appearing in successive issues of the *Christian Science Monitor* between March 30, 1969, and July 7, 1969.

21. Kent v. United States, 383 U.S. 541, 555 (1966).

More important, there is good reason to doubt that the post-adjudicatory consequences of a finding of delinquency are really beneficial for the delinquent, since many of those consequences are, at best, only slightly different from the consequences of a conviction in a criminal trial. For example, the records of juvenile proceedings are often made available to potential employers, notwithstanding statutory prohibitions against such practices; and the effect of having been found guilty in a judicial proceeding can therefore be just as harmful to the juvenile as it is to the criminal.[22] As early as 1946, in *Jones v. Commonwealth*,[23] the Supreme Court of Virginia indicated its awareness that the consequences of a judgment of delinquency do not differ significantly from the consequences of a criminal conviction. The court said:

> The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment rear its ugly head to destroy his opportunity for advancement and blast his ambition to build up a character and reputation

22. *See* PRESIDENT'S COMMN. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967): "A juvenile's adjudication record is required by the law of most jurisdictions to be private and confidential; in practice the confidentiality of those reports is often violated." Furthermore, "[s]tatutory restrictions almost invariably apply only to court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers." *In re* Gault, 387 U.S. 1, 24 (1967).

Recent interviews by members of the District of Columbia Legal Aid Society indicate the ways in which juvenile delinquency records are made available to those individuals who are interested in examining them. The Department of Social Services of the District of Columbia assumes, for example, that there is an "ongoing court order" permitting the disclosure of information to any social agency. Similarly, the Department routinely exchanges information with schools on the assumption that the schools will keep the material confidential. Interview with Edgar J. Silverman, Director, Dept. of Social Services, Juvenile Court for the District of Columbia, Nov. 5, 1969. If a delinquent is aided through a governmental agency such as the Job Corps—as will be the case with many delinquents—his record may be directly available to employers, since such an agency will often feel compelled to reveal the youth's record to any prospective employer. Interview with Miss Susan Best, Job Corps, District of Columbia, Nov. 3, 1969. Some employers also require, as a condition of employment, that applicants sign a waiver authorizing the release of juvenile records to the employer. Interview with Officer Evans, Hack Inspection Office of the District of Columbia, Nov. 5, 6, 1969; Interview with Chief Petty Officer Fortier, U.S. Navy, Nov. 4, 1969.

A finding that a youth is delinquent may also have a serious effect on a juvenile's ability to obtain a college education, because such a youth will often not be recommended by his secondary school, and because the existence of a juvenile conviction will lessen a youth's chances of being admitted to a college. Interview with Mr. Brown, Director of Admissions, Howard University, Nov. 5, 1969.

23. 185 Va. 335, 38 S.E.2d 444 (1946).

> entitling him to the esteem and respect of his fellow man. . . . Guilt should be proven by evidence which leaves no reasonable doubt.[24]

Justice Musmanno of the Pennsylvania Supreme Court has expressed a similar point of view: "To say that a graduate of a reform school is not to be 'deemed a criminal' is very praiseworthy, but this placid bromide commands no authority in the fiercely competitive fields of everyday life."[25] Finally, the Supreme Court of the United States has also expressed doubt that, under modern circumstances, it is realistic to assert that no taint of criminality attaches to a finding of delinquency. In *Gault,* the Court observed that it was disconcerting that the term delinquent had come to have "only slightly less stigma than the term 'criminal' applied to adults."[26]

Thus, the evidence does not support the view that juvenile correctional institutions are successful as centers for rehabilitation, nor does it indicate that the stigma of criminality can be avoided by avoiding the term "criminal." It is clearly unsound to maintain an early-twentieth-century view of the nature of the treatment afforded juveniles or to be concerned over labelling a juvenile a criminal, if maintaining that view and being concerned over that label result in the denial of criminal safeguards at juvenile proceedings even though the actual consequences of a conviction in a juvenile court are almost as harmful to the youth as are the consequences of a criminal conviction.

Even if the consequences of a juvenile conviction were significantly different from those of a criminal conviction, the application of a lower standard of proof in juvenile proceedings would not be justified. The validity of that assertion becomes clear when one realizes that applying a criminal standard of proof in juvenile proceedings does not require that the treatment of delinquents be made nonrehabilitative, and it does not make it any more likely that a criminal stigma will attach to delinquents. As the Supreme Court emphasized in *Gault,* extending procedural safeguards to juveniles in no way interferes with the "commendable principles relating to

24. 185 Va. at 341, 38 S.E.2d at 447.

25. *In re* Holmes, 379 Pa. 599, 612, 109 A.2d 523, 528-29 (1954) (dissenting opinion).

26. 387 U.S. 1, 23-24 (1967). A noted sociologist and authority in the field of juvenile delinquency has remarked:

> delinquency carries a stigma quite comparable to that attached to the criminal status. In many cases the adjudication and other related experiences may be a more severe psychic blow to the child than criminal conviction is to the adult.

P. TAPPAN, CRIME, JUSTICE AND CORRECTION 392 (1960).

the processing and treatment of juveniles separately from adults."[27] It is also important, as the Court noted in *Gault*, to be aware of the historic reasons for the existence of special proceedings for juveniles. The early-twentieth-century reforms in legislation dealing with juveniles were the result of concern with abuses in the manner in which convicted juveniles were treated. The reformers were not interested in ensuring that all delinquents be sent to correctional institutions; rather, they were anxious to ensure that those juveniles who were sent to institutions were given treatment which would be beneficial to them.[28] Thus, the historical reasons for the existence of special juvenile proceedings in no way conflict with requiring the application of the criminal standard of proof in adjudicatory hearings for youths accused of committing a criminal offense; treating delinquents beneficially does not require that a civil standard of proof be used to determine who shall be treated.

All of the above arguments indicate that the maintenance of the beneficial distinctions between juvenile proceedings and criminal proceedings does not require that a lower standard of proof apply in juvenile cases. It remains to be seen whether there is sufficient need for the higher standard that it should be required, either under the Constitution or for policy reasons.

The most important reason for extending the higher standard of proof to juvenile cases is that when a juvenile is found to be delinquent, he faces a considerable loss of personal liberty. The importance of this consideration is indicated by the Supreme Court's decision in *Gault*, which was influenced in large part by the realization, confirmed by objective studies, that "whether it be called punishment or rehabilitation, the juvenile delinquent's confinement is no less a loss of liberty than the adult criminal's."[29]

Perhaps no court has more powerfully characterized the restraint imposed on the liberty of an incarcerated juvenile than Judge DeCiantis of the Rhode Island Family Court:

> The individual liberty of a juvenile is restrained once he is committed to an agency or to the training school. He is supervised, guarded, and punished. He has no choice. He must obey the rules and the orders given to him while he is at the training school. He

27. 387 U.S. 1, 22 (1967).

28. *See* Parker, *Some Historical Observations on the Juvenile Court*, 9 CRIM. L.Q. 467, 476 (1967). Despite the laudable objectives of these reformers, the effectiveness of rehabilitation in juvenile institutions has been seriously questioned. *See* note 20 *supra* and accompanying text.

29. Recent Case, *supra* note 7, at 853; *see In re* Gault, 387 U.S. 1, 27 (1967).

> cannot go home at will. He cannot do what he desires. He is a prisoner just as much as the adult in the state's prison. Not only is he deprived of his liberty, but he is also subject to . . . disciplinary measures accorded to adults and can be subjected to cruel and inhuman punishment which does exist. . . .
>
> With respect to the argument that confinement of a delinquent is not punishment, the court would like to point out that committing a boy who has been declared a delinquent to the Training School is not trotting him to Sunday school, to a World Series Game, or his favorite swimming hole . . . .
>
> I am convinced that unless there is a separation of civil process from criminal process, the system of juvenile methods will remain congested with many theories, philosophies and inflated dreams of social-minded reformers, which is detrimental to the juvenile in that it deprives him of his constitutional guarantees and individual liberty. All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally must be applied to a juvenile case, even including . . . a finding of guilt beyond a reasonable doubt, rather than by a preponderance of the evidence.[30]

Since a finding of delinquency does result in confinement—whatever purpose that confinement may be thought to serve—and a loss of liberty, it seems manifestly unfair and constitutionally unsound to permit such a finding to be made upon a showing of evidence which amounts to anything less than proof beyond a reasonable doubt. It is indefensible that a youth may be deprived of his liberty under a lesser standard of proof than that applicable to an individual who is slightly older, if at all, and who is tried as an adult for the same offense.[31] The enjoyment of liberty is too valuable a right to be treated as a factor of age.

Furthermore, the protections which *Gault* extended to youths who are charged with crimes seem to be incomplete unless the adult standard of proof is also extended to such youths. One of the most important aspects of the *Gault* decision was its holding that youths must be afforded the right against self-incrimination.[32] But if youths may be found to be delinquents upon proof by a preponderance of the evidence, then great pressures are placed upon the youth to testify in his own case. If the government need only persuade the juvenile court that it is "more probable than not" that the youth committed the offense, then the government may win even though its

30. *In re* Rindell, 2 CRIM. L. REP. 3121 (R.I. Family Ct. Jan. 10, 1968).

31. Under the provisions of most states, a juvenile may, under some circumstances and at the discretion of the juvenile court, be "waived" as a juvenile and tried as an adult. *See, e.g.*, D.C. CODE § 11-1553 (1967). The problem of waiver is discussed at greater length at notes 47-54 *infra* and accompanying text.

32. *See* note 3 *supra*.

case is not particularly convincing;[33] in such a situation a youth may, as a practical matter, be forced to sacrifice his right against self-incrimination in order to rebut a very weak case. If the youth exercises his constitutional right not to take the stand, and if he has no other evidence to support his case, his failure to introduce evidence may be treated as essentially similar to filing a demurrer—all the evidence which has been presented may be viewed in the light most favorable to the government.[34] It seems clearly inappropriate to accord youths the right against self-incrimination and then, in at least some cases, to render that right nugatory by applying the civil standard of proof in juvenile proceedings.[35]

Other considerations also lead to the conclusion that a higher

33. Trickett, *Preponderance of Evidence and Reasonable Doubt,* THE FORUM 76, 78 (1906):

> What those who have laid down the principle that "preponderance" of the evidence will justify and require a decision confirmable with it, have failed to realize, is that perception of the preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be sufficient to generate even the lowest degree of belief. To detect a preponderance of evidence . . . is neither to believe . . . nor to be logically required to believe . . . . It would be fatuous to affirm that a man ought to believe even faintly, everything the evidence for which is, in his opinion stronger than the evidence against it.

34. Although there are very few reported cases in which a defendant has failed to introduce any evidence, that situation did occur in White v. Soda Springs, 46 Idaho 793, 226 P. 795 (1928). The court in that case treated the defendant's failure to present evidence as equivalent to a demurrer. Although *White* was a civil case and did not involve criminal conduct, it appears that it would be applicable to juvenile proceedings so long as such proceedings are considered by the courts to be civil in nature.

35. In Yee Hem v. United States, 268 U.S. 178 (1925), however, the Supreme Court rejected such an argument. In that case, the defendant had been found guilty of concealing opium with knowledge that it had been illegally imported. The Government did not have to prove that the defendant had knowledge of the illegal importation, for the pertinent statute provided that such knowledge was to be presumed from the fact of possession. That same presumption is now contained in 21 U.S.C. § 174 (1964). The defendant argued that the effect of the presumption was to compel him to testify, since if he did not testify, an essential element of the crime would be presumed to exist. The Court rejected that argument:

> The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption . . . that is a misfortune which the statute under review does not create, but which is inherent in the case.

268 U.S. at 185.

In Leary v. United States, 395 U.S. 6 (1969), the Court held that the presumption at issue in *Yee Hem* was unconstitutional as applied to a defendant charged with illegal possession of marijuana. The Court's opinion, however, was concerned with the relationship between the presumed fact of knowledge of illegal importation and the proved fact of possession only when marijuana is the item possessed; the Court specifically left open the question whether the decision in *Yee Hem* has continuing vitality as applied to "hard" narcotics. 395 U.S. at 45 n.92.

Since the presumption in *Yee Hem* required a finding of guilt if evidence was not presented by a defendant, it is arguable that it is a more extreme case than the situation discussed in the text. If a youth does not present evidence, it is still possible that he will be found to be innocent even though the civil standard of proof is applied.

standard of proof should be applied in juvenile cases. For example, one of the reasons for the ineffectiveness of the treatment given delinquents is that correctional centers are overburdened.[36] By adopting the higher standard of proof, it is likely that fewer youths would be sent away for treatment and that the institutions would be able to perform better their function of rehabilitating. Indeed, adopting the criminal standard is the best possible means for reducing the burden on correctional institutions, since there would be a fairly high degree of certainty that only those who are in need of help would be sent to the institutions.

Some statistics from the District of Columbia illustrate the importance of this point. The District of Columbia Juvenile Court is suffering from an unprecedented increase in referrals.[37] It takes almost a year to bring a juvenile to trial and substantially longer in cases with jury trials. With the exception of intake screening, the juvenile court's social services—preparing disposition recommendations and providing supervision for probationers—come into play only after adjudication;[38] but at the end of fiscal 1969 the court's social staff of 31 persons was supervising 1,442 children on probation and preparing an additional 321 social studies for children whose cases had been adjudicated but not yet disposed of. The average case load per worker was 57.[39] Referring to rehabilitative resources available to convicted juveniles who have been committed to custody, the District of Columbia Juvenile Court's 1969 report noted: "[O]ne of the most urgent problems confronting the Court is the limited dispositional resources available to it."[40] For example, the Juvenile Court provides totally inadequate resources for drug-addicted juveniles and for emotionally disturbed children. It has only one youth probation house and that house is capable of housing only 15 probationers who are without a suitable home. Similarly, youths who are

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36. TASK FORCE REPORT 7-8. "In light of these conditions many experienced persons feel far too many children are being processed through the juvenile court, and too large a number of those are being sent to youth institutions." Wheeler, Cottrell & Romasco, *Juvenile Delinquency: Its Prevention and Control*, in TASK FORCE REPORT 409, 422.

37. That court disposed of 6,875 juvenile cases in fiscal 1969. *See* DISTRICT OF COLUMBIA JUVENILE COURT, ANNUAL REPORT 21 (1969) [hereinafter ANNUAL REPORT].

38. ANNUAL REPORT 7. In the report the court emphasized the need for more judges, due to a "severe backlog of cases and a serious delay in processing them." *Id.* at 17. It also cited the need for more probation workers, pointing out that the present case loads are "too high—almost double the standard case load recommended by national standard-setting agencies—to allow the necessary time to make probation a meaningful experience for the juvenile." *Id.* at 18.

39. *Id.* at 8.

40. *Id.* at 19.

committed to the Children's Center of the Department of Public Welfare are put into outdated programs supervised by an undermanned staff.[41]

The recidivism rate of juveniles also indicates the ineffectiveness of the rehabilitative treatment they receive. In 1966 the District of Columbia Crime Commission Report showed a 42 per cent recidivism rate within six months after institutional release.[42] The court's most recent figures show that 33 per cent of juvenile law offenders referred to court have had cases adjudicated on at least one previous occasion.[43] Of the 1,327 juvenile repeaters, 575 (43 per cent) were currently on probation, 289 (22 per cent) were under the supervision of the Department of Public Welfare following institutionalization, and 261 (20 per cent) were awaiting action of the court on a prior referral.[44]

These statistics illustrate the difficulties of merely one jurisdiction. They indicate that juveniles are receiving inadequate treatment as a result of meager resources available to the courts and the community. These same resources can provide the necessary processing and rehabilitation only if the number of juveniles which must be accommodated to the system is small. It would be a far better use of the resources to apply them only to youths whose need for them is clear—as determined by the same due process standards which apply to adults.

Furthermore, it is clear that the greatest incidence of delinquency is found in low-income urban areas.[45] Since it is individuals from these areas whom the nation is currently making great efforts to assist, it is particularly important that their future capacity as wage-earners not be jeopardized by a finding of delinquency[46] unless it is clear beyond a reasonable doubt that they are guilty of the offense charged.

Thus, persuasive arguments support the view that the criminal standard of proof should be applied in cases in which a youth has been charged with a criminal offense. The arguments usually given to support the contrary position—those based on the rehabilitative nature of juvenile proceedings and on the steps which have been

41. *Id.* at 19-20. *See also* Wash. Post, Dec. 7, 1969, § A, at 1, col. 1.

42. PRESIDENT'S COMMN. ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 709 (1966).

43. ANNUAL REPORT 28.

44. *Id.* at 41.

45. *See, e.g.*, H. WILENSKY & C. LEBEAUX, INDUSTRIAL SOCIETY AND SOCIAL WELFARE 183-92 (1965); Berg, *Economic Factors in Delinquency*, in TASK FORCE REPORT 305, 306.

46. *See* note 20 *supra*.

taken to avoid a stigmatizing effect—are not so convincing. The evidence indicates that those views are of questionable validity and that, even if they are valid, they do not require the application of a civil standard of proof. The reasons usually given for applying the preponderance standard are far outweighed by those supporting the application of the reasonable-doubt standard—the need to safeguard the juvenile's liberty, the need to lessen the workload of treatment institutions, and the need for special concern with youths from low-income urban areas. Accordingly, the latter standard should be adopted for determinations of delinquency in juvenile court proceedings.

### B. *The Question of Waiver*

It may be argued that the existence of waiver provisions alleviates concern with the possibility that a youth will be deprived of his liberty without being proved guilty beyond a reasonable doubt. Under such provisions, juvenile courts have the power to waive jurisdiction over an accused delinquent so that he will be given an adult trial.[47] The juvenile court may have that power in all cases, but it is more typical for the existence of the power to depend either upon the age of the youth and the offense with which he is charged, or simply upon the offense with which he is charged.[48]

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47. TASK FORCE REPORT 24; Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 KAN. L. REV. 55, 56 (1969); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 793 (1966); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 310 (1967). It has been held that, in the absence of a statute which vests exclusive original jurisdiction in the juvenile court, a state has the right to prosecute a youth under the normal criminal law, thereby entitling him to the reasonable-doubt standard on the basis of the prosecution's decision. *See, e.g.*, Pritchard v. Downie, 216 F. Supp. 621 (E.D. Ark. 1963), *affd.*, 326 F.2d 323 (8th Cir. 1964); State v. Brinkley, 354 Mo. 151, 189 S.W.2d 314 (1945); Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958); Gerak v. State, 22 Ohio App. 357, 358, 153 N.E. 902 (1920):

> The statutes conferring jurisdiction on the common pleas court have always included the right to try "whoever" commits a felony, which, of course, includes minors. That court has long exercised such jurisdiction, such statutes have not been specifically amended in this particular, and there can be no question that the common pleas court still has jurisdiction to try minors, as well as adults, who commit felonies, unless the provisions of the Juvenile Court Act limit such jurisdiction. As has been said, that act does not expressly limit such jurisdiction of the common pleas court; neither does it confer such jurisdiction upon any other court.

48. TASK FORCE REPORT 24. *See also* Schornhorst, *supra* note 4, at 592; Mountford & Berenson, *supra* note 47, at 56-61. Relatively few procedural steps or substantive standards have ever been delineated for transfer of jurisdiction from a juvenile to an adult criminal court. Ketcham, *supra* note 4, at 336. *See* NATIONAL COUNCIL OF JUVENILE COURT JUDGES, DIRECTORY AND MANUAL, 301-46 (1963). If no criteria for waiver are delineated in the applicable statute, their formulation is a task for the juvenile court. *See, e.g.*, Kent v. United States, 343 F.2d 247 (D.C. Cir. 1965), *revd.*, 383 U.S. 541 (1966).

To the extent that the youth may request the exercise of the power of waiver,[49] some of the purely constitutional objections to

When waiver has been accomplished, the court to which the child has been waived may have the opportunity to conduct the case as one of delinquency, as opposed to one under the general criminal law. *See, e.g.*, United States v. Caviness, 239 F. Supp. 545 (D.D.C. 1965). The burden is on the youth to petition the court for invocation of the delinquency procedures. *See, e.g.*, United States v. Anonymous, 176 F. Supp. 325 (D.D.C. 1959).

49. Under almost all statutes, however, waiver is at the discretion of the court. *See* Schornhorst, *supra* note 4, at 597 nn.87-92; Mountford & Berenson, *supra* note 47, at 56. *See, e.g.*, Lyon v. Commonwealth, 204 Va. 375, 131 S.E.2d 407 (1963); State v. Van Buren, 29 N.J. 548, 150 A.2d 649 (1959); State v. Doyal, 59 N.M. 454, 286 P.2d 306 (1955). In the District of Columbia, for example, the court has discretion, after a full waiver hearing, to waive or not to waive the youth to the district court. D.C. CODE § 11-1553 (1967). There appears to be no case which suggests that the youth has attempted to elect to be waived. *But cf.* State v. Lindsey's Interest, 78 Idaho 241, 300 P.2d 491 (1956), in which a seventeen-year-old was held to have waived treatment as a juvenile delinquent by his assertion of certain constitutional rights and by his "right to be prosecuted under the criminal law." The reason that youths do not even try to get waived may be that in most instances in which waiver is a real possibility, conviction in the federal court for the alleged offense is probable under any standard, but the age of the boy or the nature of the crime indicates that there would be a greater deprivation of liberty from a conviction in the district court than would result from a finding of delinquency in the juvenile court.

It should not be forgotten that the wide discretion given the juvenile court judge to waive jurisdiction over the juvenile gives rise to the problems discussed in the text even if no action is taken by the youth. It seems to make little sense that the judge is entitled to grant or deny a constitutional protection solely on the basis of his unfettered discretion to waive or not to waive, since, as a practical matter, that discretion is exercised on the basis of a rudimentary finding that the youth is "bad" enough to warrant exposure to the more formal procedures of the adult court. Moreover, if the juvenile court has the discretion to waive the child to an adult criminal proceeding, it logically follows that its decision not to waive jurisdiction is also based on an exercise of discretion, even though the juvenile court may be entitled to try the youth by a statutory grant of exclusive jurisdiction. Therefore, if the youth charged may not demand, as of right, that he be treated as a juvenile—assuming he has met the statutory requirements, such as age—neither should he be compelled against his will to be tried under juvenile court procedures if he chooses to stand trial in the conventional manner, especially when a claimed constitutional right is at stake. *Cf.* People v. Erickson, 273 N.Y.S.2d 7 (Courtland County City Ct. 1966).

The question whether a juvenile should be able to elect to be tried as an adult goes to the very basis of the waiver statute itself. It is probable that the statute is designed not to protect the juvenile, but to protect society. Under that view, the judge is to make a determination as to whether the juvenile's conduct is such that he should be treated as a criminal. *Cf.* People v. Yeager, 55 Cal. 2d 374, 389, 350 P.2d 261, 270, 10 Cal. Rptr. 829, 838 (1961). But this view raises significant problems. How can the judge decide that the juvenile should be tried as an adult because of the crime with which he is charged unless the judge assumes that the juvenile is in fact guilty of committing the acts of which he is accused. *See* Green v. United States, 308 F.2d 303, 304 (D.C. Cir. 1962). In fact, upon transfer to an adult court with proper jurisdiction, the juvenile court, by statute, may be required to assert, among other things, that there is probable cause to believe him guilty of the charged offense. *See, e.g.*, Marks v. State, 69 Okla. Crim. 330, 102 P.2d 955 (1940). Exactly what happens at a waiver proceeding is unclear; but it is doubtful that the judge considers only the past conduct, independent of the pending charges, in making the waiver determination. The more typical result is that the judge considers various factors and gives particular weight to the pending charges. *Cf. Yeager*, 55 Cal. 2d at 389, 350 P.2d at 270, 10 Cal.

applying the lesser standard of proof in juvenile proceedings are answered, since the right to due process of law is at least available. Although the availability of special juvenile proceedings must be sacrificed to obtain the application of the higher standard of proof, requiring that sacrifice may be permissible since the youth has no foundation for a constitutional claim that, because of his age, he has a right to a special proceeding.[50] Nevertheless, the existence of waiver provisions should not be viewed as a defense to the objections which have been raised in this Article, because such a view is so unsound

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Rptr. at 838. *See* TASK FORCE REPORT 78, app. B, Table 5. Upon the youth's being waived to the district court, however, society offers him the benefit of all the procedural protections accorded to adults. The resulting situation is paradoxical: the judge has decided that, in society's interest, the juvenile should be treated as an adult because of his criminal acts; yet society thereafter offers the youth greater procedural protection, including the "beyond a reasonable doubt" standard of proof. It appears, then, that the waiver statute may operate to protect the juvenile's interest more than it protects the interest of society. Accordingly, the juvenile should be able to elect to have that protection.

50. It is arguable, however, that if youths have a constitutional right to the application of the higher standard, then it is impermissible to force a youth to sacrifice juvenile proceedings in order to obtain the higher standard, since the state may not impose conditions on the grant of constitutional rights. *Cf.* Spevack v. Klein, 385 U.S. 511 (1967); Griffin v. California, 380 U.S. 609 (1965). These cases, however, appear to be distinguishable from the case of the youth who is forced to sacrifice a juvenile hearing in order to obtain the application of a higher standard of proof. Both of the above cases involved a Hobson's choice—the defendant in *Griffin,* for example, had been given the choice of taking the witness stand or having his failure to take the stand commented upon to the jury. Thus, the defendant's choice was one between evils; certain harmful consequences resulted from the assertion of a constitutional privilege. But in the case of the waiver statute, a harmful consequence is not imposed as a result of the exercise of a constitutional right. Rather, a beneficial procedure, which is not constitutionally required, must be sacrificed if the youth is to obtain the application of the higher standard of proof. This distinction appears to be more than a semantic one, especially since it is not at all clear that an adult trial is necessarily more harmful to a youth than is the juvenile proceeding which he must sacrifice. In any event, a court to which a youth has been waived may consider conducting the case as one of delinquency as opposed to one under the general criminal law. *See, e.g.,* United States v. Caviness, 239 F. Supp. 545 (D.D.C. 1965).

In Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968), however, a three-judge district court rejected the apparent distinction between sacrificing a beneficial procedure and exposing oneself to harmful consequences. That case involved a juvenile defendant who was given a choice, under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033 (1964), between being tried as an adult with a jury trial and being tried as a juvenile without a jury. The court held that the juvenile defendant had a constitutional right to a jury trial and that it was not constitutionally permissible to present him with an option to waive it in favor of juvenile proceedings:

> The alternatives presented exert strong pressure on any juvenile defendant to waive his Sixth Amendment right. Though he may well prefer to have the trier of facts be a jury of twelve, the cost of such an election is very nearly prohibitive. Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed for choosing to assert it, any waiver may be said to have been extracted in an impermissible manner.

280 F. Supp. at 1000-01.

from a policy standpoint that it makes one doubt the good faith of those who urge it. In effect, to urge such a defense is to accept the view that it is entirely proper to barter with the defendant over his constitutional rights. It is inconsistent for a state to recognize the desirability of special proceedings for youthful offenders, but to be willing to provide them for only those juvenile defendants who allow the state to take away their right to the application of the higher standard of proof.

Moreover, even if the youth has a significant voice in determining whether waiver powers will be exercised, thereby removing some of the purely constitutional objections to applying the civil standard of proof in juvenile proceedings, it is unsound for the exercise of the waiver power to determine which standard of proof will be applied. The reasons for that unsoundness are illustrated by a hypothetical situation in which a seventeen-year-old youth is apprehended while committing a felony in the District of Columbia, and there is at least some question as to one factual issue in the case. Under a preponderance standard, it is certain that he will be convicted; whereas if proof beyond a reasonable doubt is required, the youth has a slight chance of obtaining an aquittal. But if the youth obtains a waiver to the district court where the higher standard of proof will apply, the maximum penalty which can be imposed on him will be substantially greater than the maximum period of detention—four years—which could result from his conviction in the juvenile court.[51] It is doubtful that in such a case the juvenile court judge should have

51. *See* D.C. CODE § 24-203 (1967). In some cases, however, the penalty which is possible in an adult proceeding may be less severe than that which is possible in a juvenile proceeding. For example, the maximum penalty for an adult convicted of attempted robbery in the District of Columbia is a fine of $500 and three years imprisonment. D.C. CODE § 22-290 (1967). For a sixteen-year-old youth, however, detention for five years is possible, since he may be held until majority. D.C. CODE § 24-203 (1967). Such situations are not as uncommon as might be thought. In *Gault*, for example, the fifteen-year-old defendant was convicted of making lewd telephone calls and was sent to a state reformatory until such time as he reached his majority. The penalty for similar misconduct by an adult would have been a fine of $5 to $50 or imprisonment for not more than two months. Indeed, one of the reasons for concern with juvenile proceedings is that commitment can usually extend until the youth reaches the age of twenty-one; there are few limitations on the power of the judge to impose such a "sentence." TASK FORCE REPORT at 5. In W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969), a twelve-year-old boy faces confinement for up to nine years for stealing $112; if he were an adult, he would enjoy greater protections in court and his conviction might conceivably result in his release after less than one year. *See* N.Y. PENAL LAW §§ 155.25, 70.15 (McKinney 1967); Recent Development, *Preponderance of the Evidence Upheld as Applicable Standard of Proof in Juvenile Delinquency Adjudications*, 44 ST. JOHN'S L. REV. 101, 109 (1969), and citations therein.

the discretion to decide whether the youth should be tried in the juvenile court, where a conviction is assured, or whether he should be given the advantage of the higher standard of proof in an adult proceeding, even though that proceeding might eventually result in a greater deprivation of the youth's liberty. If the election between types of proceedings is the youth's, he is forced either to subject himself to the risk of a substantial prison term in order to obtain the procedural safeguard, or to forgo the reasonable-doubt standard because there is less potential deprivation of liberty that could result from the juvenile court proceedings.

It is clear that if juvenile courts are designed to deal with one type of individual and criminal courts are designed to deal with another, considerations such as these should have no place in determining whether a particular youth should be tried as an adult. The only way to eliminate these considerations from the waiver decision is to make the higher standard of proof applicable in all juvenile proceedings. The fundamental idea behind the existence of waiver provisions is sound—there are certainly some youths who are not in a position to benefit from specialized treatment as youths, and those individuals should be given an adult trial.[52] But to make the application of a lower standard of proof one of the consequences of remaining in a juvenile court operates to bring into the waiver decision considerations which should be irrelevant to it. The waiver process can properly serve its function—providing a means for discriminating between those juveniles who will benefit from specialized treatment and those who will not—only if all the factors to be weighed in arriving at the waiver decision pertain to making that discrimination. This result requires that the waiver decision be made without reference to the applicable standard of proof—a requirement which will be met only when application of the higher standard is required in juvenile cases.

This example also indicates the arbitrary nature of the decision which determines whether a particular youth will be given the benefit of the higher standard of proof. That standard is currently applied in cases involving some juveniles and denied in cases involving others, and the determination depends upon factors such as the defendant's age, the nature of the offense which he committed, and

52. TASK FORCE REPORT 24-25. This very reason has recently prompted the Justice Department to propose legislation for the District of Columbia that would turn over to adult courts all sixteen- and seventeen-year-olds charged with serious crimes of violence. Wash. Post, Nov. 19, 1969, § B, at 2, col. 3.

the disposition of the juvenile court judge.[53] Since there is no clear relationship between these considerations and the appropriate standard of proof for different cases, it seems arguable that the nonexistence of the higher standard in juvenile proceedings is unconstitutional as an arbitrary denial of equal protection for those youths who cannot be waived to adult courts.[54] Furthermore, considerations such as those enumerated above have no place in a preliminary decision which, because of the different standards of proof which apply in the different fora, may eventually make the difference between freedom and incarceration. The clearest way to eliminate those considerations is to eliminate the difference in the applicable standards by making the criminal standard of proof applicable to juvenile proceedings involving a determination of delinquency.

## II. Recognition of the Youth's Right to the Higher Standard

### A. *The Judicial Recognition*

Although most courts continue to classify juvenile proceedings as civil so that the higher standard of proof is inapplicable, some courts have recognized the essentially criminal nature of such proceedings and the necessity for according the same safeguards to youths that are accorded to adults. In 1927, for example, the New York Court of Appeals held, in *People v. Fitzgerald*,[55] that a juvenile could not be convicted on a quantum of evidence which would be insufficient to convict an adult.[56] In 1931, a lower court in New York followed the *Fitzgerald* decision in *In re Madik*,[57] a case involving an eleven-year old boy charged with arson. Although the court was fully aware that juvenile proceedings are conducted for the benefit of the youth as much as for the benefit of society, and that "the proceeding is not criminal in its character, but is like a suit in equity,"[58] the court did not think that this difference required the application of the civil standard of proof. The court followed the language of *Fitzgerald* which had noted the distinction between a conviction in a criminal

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53. *See* note 48 *supra.*

54. *See* note 75 *infra* and accompanying text; *cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942).

55. 244 N.Y. 307, 155 N.E. 584 (1927).

56. 244 N.Y. at 316, 155 N.E. at 587.

57. 233 App. Div. 12, 251 N.Y.S. 765 (1931).

58. 233 App. Div. at 14, 251 N.Y.S. at 767.

case and an adjudication of delinquency,[59] and which had asserted that "[t]he facts . . . of the charge must be proved against the child in the same way as if the charge were made against an adult . . . ."[60] Unfortunately, the *Madik* court did not provide an analysis of the rational process which led to its conclusion.

Although the New York Court of Appeals retreated in 1932[61] from the position which it had adopted in *Fitzgerald*, some New York courts have continued to recognize the need to apply the higher standard of proof in juvenile proceedings. In the 1949 case of *In re James Rich*,[62] a lower New York court was faced with the question of the appropriate standard of proof. That case involved a fifteen-year-old boy charged with the fatal stabbing of another boy. In discussing the burden-of-proof standard, the court remarked:

> The rule of law is that a charge of crime must be established beyond a reasonable doubt. If there is a reasonable doubt as to the perpetration of the crime, that reasonable doubt must be resolved in favor of the person charged with having committed the act. It is no less applicable to a child than it is to an adult. In this case, the doubt that I have is only as to the truth that was told; but in the last analysis, it is the result of speculation. And I have no right to speculate.[63]

In view of the justifications which are frequently given for applying a lesser standard of proof,[64] it is particularly significant that the court refused to indulge in such speculation despite its desire to rehabilitate the youth and despite its exclusive jurisdiction over him.[65]

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59. The Act under which the case was decided is the Children's Court Act of Buffalo, ch. 385, [1925] Laws of N.Y. 694.

60. 233 App. Div. at 14, 251 N.Y.S. at 767, quoting People v. Fitzgerald, 244 N.Y. 307, 315, 155 N.E. 584, 587 (1927).

61. People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied*, 289 U.S. 709 (1933). The court did not specifically refer to the applicable standard of proof.

62. 86 N.Y.S.2d 308 (Dom. Rel. Ct. 1949).

63. 86 N.Y.S.2d at 311. In its opinion, the court made specific reference to the *Lewis* decision, so it is clear that the court was not ignorant of that case. *See also* People v. Anonymous A, B, C, and D, 53 Misc. 2d 690, 279 N.Y.S.2d 540 (County Ct. 1967) in which the court held that the state had the "burden of proving beyond a reasonable doubt" that a sixteen-year-old boy had been guilty of stealing an automobile. *But see* W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969), in which the Court of Appeals specifically held by a 4-3 margin that the preponderance standard met the test of constitutional sufficiency in juvenile delinquency proceedings.

64. *See* text accompanying notes 15-31 *supra*.

65. Domestic Relations Court Act § 61, ch. 482, § 61, [1933] Laws of N.Y. 1056.

In New York, the enactment of the Family Court Act, *see* note 128 *infra*, has resulted in the application of the civil standard of proof in juvenile proceedings; ac-

In Virginia, the state supreme court has recognized that the nature of juvenile proceedings is such that the higher standard of proof is demanded by sound policy considerations. *Jones v. Commonwealth*[66] involved a violation similar to breach of the peace—the defendant allegedly threw a number of rocks and made loud noises in the late hours of the evening. A good deal of the evidence, however, was vague, confused, uncertain, and even contradictory. There was a pertinent Virginia statute, similar to those of many other states,[67] which provided that

> no power is given to the juvenile courts to convict any child of any crime, either misdemeanor or felony or to commit any child to any penal institution. Such court may only adjudge a child delinquent and commit him, not to a penal institution, but to the State Board of Public Welfare, which board is given power to make proper disposition of the child.[68]

Despite this explicit mandate, and despite the court's realization that the statute dealing with juvenile courts required a liberal construction in order to accomplish its beneficial purposes, the court recognized the basically criminal nature of the trial. Accordingly, the court took the position that a conviction of delinquency requires that "[g]uilt should be proven by evidence which leaves no reasonable doubt."[69]

Thus, courts in Virginia and New York were persuaded purely by policy reasons that youths, like adults, could not be found guilty without proof beyond a reasonable doubt. In more recent years, after the decisions in *Kent* and *Gault* brought into open view the general question of procedural safeguards at juvenile proceedings, several other states have acknowledged the nature of the deprivation of liberty that results from an adjudication of delinquency. Accordingly, although most states have not yet adopted the higher standard of proof, there has been an increasing realization that, because of the detention to which a juvenile may be subjected if he is convicted, and because of the attendant stigma, the criminal standard of proof must be adopted for his protection. That conclusion is strengthened

cordingly, the cases discussed in the text are of interest because of the views which the courts took, rather than because of their specific holdings.

66. 185 Va. 335, 38 S.E.2d 444 (1946). *See also* Mickens v. Commonwealth, 178 Va. 273, 16 S.E.2d 641 (1941).

67. *See* note 18 *supra* and accompanying text.

68. VA. CODE ch. 78, § 1910 (1942).

69. 185 Va. at 342, 38 S.E.2d at 447.

by the fact that the beneficial purposes of a juvenile court proceeding are in no way defeated by the adoption of the higher standard.

One of the most important recent decisions which deals with the burden-of-proof standard is the Illinois case of *In re Urbasek*.[70] In that case, an eleven-year-old boy was charged with murder. When the Illinois Court of Appeals had considered the case in 1966,[71] the United States Supreme Court had decided *Kent* but not *Gault*, and the Illinois court ruled that the higher standard of proof was not applicable to juvenile proceedings. But when the Illinois Supreme Court heard the case, *Gault* had been decided; and in light of the "transcendent spirit" of *Gault*, the court upset the finding that the boy was delinquent.[72] The state supreme court acknowledged that the defendant had not been denied any of the specific rights which *Gault* had extended to the adjudicatory stage of the juvenile court practice,[73] but it held that application of any standard lower than "beyond a reasonable doubt" would dilute the effect of the guarantees which *Gault* had assured for juveniles and would not be consonant with the due process or equal protection clause.[74] Moreover, the court held that it would not be constitutionally permissible to use a standard of proof lower than the criminal standard in a proceeding that could subject a child to a loss of liberty equal to or greater than that which might be imposed on an adult for the commission of the same act.[75]

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70. 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

71. 76 Ill. App. 2d 375, 222 N.E.2d 233 (1966).

72. 38 Ill. 2d 535, 541, 232 N.E.2d 716, 719 (1967).

73. 38 Ill. 2d at 540, 232 N.E.2d at 719:

> While . . . the respondent . . . was denied none of the rights [which *Gault* had held to be required, under due process of law, for juvenile court proceedings], it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged.

74. 38 Ill. 2d at 541, 232 N.E.2d at 719.

75. 38 Ill. 2d at 542, 232 N.E.2d at 719-20:

> Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive a minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults.

The Illinois Court made clear that its decision would neither weaken the unique benefits of the Illinois Juvenile Court Act nor require that the criminal standard be applied in cases involving a violation of an ordinance—a violation leading to a fine. As to the latter point, the court noted that such cases involve no "possible loss of liberty for years," and that they should therefore be treated differently from delinquency cases. 38 Ill. 2d at 543, 232 N.E.2d at 720. *See also In re* Smith, 326 P.2d 835 (Okla. Crim.

Similarly, a majority of the Supreme Court of Nebraska has ruled, in *DeBacker v. Brainard*,[76] that the criminal standard of proof is constitutionally required in a juvenile court proceeding.[77] The case involved a seventeen-year-old boy who was charged with the crime of forgery. If the youth had been charged under the general criminal laws, the penalty for the offense would have been imprisonment for between one and twenty years and a fine of up to 500 dollars. The four judges who felt that the higher standard should be adopted in delinquency cases were persuaded that

> . . . a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. To the extent that those provisions

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App. 1958), in which the court decided that, for purposes of establishing the requisite burden of proof in a determination of delinquency, a youth must be accorded all the safeguards of a criminal trial if an unfavorable determination might result in detention amounting to "grave" consequences. The clear implication of that holding is that when grave consequences might result from a finding of delinquency, the determination must be made on the basis of the "beyond a reasonable doubt" standard. The court noted:

> We are of the opinion rules of procedure in a juvenile proceeding, where the life and liberty of the juvenile delinquent are at stake, should be measured by the gravity of the situation and the exigencies the case may impel. The ordinary rules established and the regular processes provided to produce evidence and to aid the court in testing and weighing it are not to be scrapped because the proceeding is a summary one and findings of facts must not rest upon hearsay . . . . Certainly a juvenile should be subjected to no less protection than an adult. The law throws every safeguard around the rights of an accused and his enjoyment of those rights.

326 P.2d at 829. *See also* People *ex rel.* Rodello v. District Court, 436 P.2d 672, 676 (Colo. 1968), in which the court remarked that the application of the reasonable-doubt standard would not convert a juvenile proceeding into a criminal one.

76. 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed*, 38 U.S.L.W. 4001 (U.S. Nov. 12, 1969).

77. Four judges, comprising a majority of the court, were of the opinion that it was unconstitutional to permit a finding of delinquency upon proof which was not beyond a reasonable doubt. But since the Nebraska constitution provides that no legislative enactment may be held unconstitutional except by a concurrence of *five* judges, NEB. CONST. art. V, § 2, the lower court's finding of delinquency using the lighter standard was affirmed. *DeBacker* also involved the question whether jury trials are constitutionally required for juveniles; on that issue, too, only four of the seven judges ruled that the jury trial guarantee extended to juveniles, and consequently the trial court's decision denying a jury trial was affirmed. On November 12, 1969, the United States Supreme Court dismissed the appeals in the *DeBacker* case. DeBacker v. Brainard, 38 U.S.L.W. 4001 (U.S. Nov. 12, 1969). Justice Douglas joined by Justice Black dissented from that decision:

> The idea of a juvenile court certainly was not the development of a juvenile criminal court. It was to have a healthy specialized clinic, not to conduct criminal trials in evasion of the Constitution and Bill of Rights. Where there is a criminal trial charging a criminal offense whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play.

38 U.S.L.W. at 4004.

of the Juvenile Court Act incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void.[78]

In the federal courts there have been very few recent judicial pronouncements dealing with the applicable standard of proof in juvenile proceedings. The most significant of the cases that have been decided is *United States v. Costanzo,*[79] a Fourth Circuit decision dealing with a seventeen-year-old youth who had been charged with illegal interstate transportation of an automobile. The court held that the higher standard of proof must be applied in juvenile proceedings if those proceedings are to have constitutional validity:

> Our precise question then is whether for purposes of the required quantum of evidence . . . a federal juvenile proceeding which may lead to institutional commitment must be regarded as criminal. We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. . . . The Government's burden in a juvenile case, therefore, is to prove all elements of the offense "beyond a reasonable doubt," just as in a prosecution against an adult. We see a compelling similarity between the enumerated safeguards due a juvenile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other.
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> . . . .
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> . . . It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same.[80]

78. 183 Neb. at 471, 151 N.W.2d at 513.

79. 395 F.2d 441 (4th Cir. 1968). Prior to this decision, another federal court had been faced with the question whether a proceeding under the Federal Juvenile Delinquency Act required proof of guilt beyond a reasonable doubt. Paige v. United States, 394 F.2d 105 (5th Cir. 1968). That court did not decide the question, since it was of the opinion that the proof was not sufficient under either the civil or the criminal standard. *See also* Reed v. Duter, 6 CRIM. L. REP. 2081, 2082 (7th Cir. Sept. 18, 1969), in which the court suggested that "under *Gault,* there can be no constitutionally permissible discrimination between the adult prisoner and the juvenile defendant held in state custody." The court remarked further that:

> Gault must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty, all constitutional safeguards of the Fifth and Sixth Amendments to the Constitution of the United States which apply, by operation of the Fourteenth Amendment, in criminal proceedings.

80. 395 F.2d at 444. The court also noted:

> For nearly two centuries this higher standard of proof required in criminal cases

But not all of the recent cases are in accord with *Urbasek, Costanzo,* the four-judge majority of *DeBacker,* and the other decisions which have held that the adult standard is required.[81] The Supreme Court of Ohio has recently refused to hold that the due process clause requires the recognition of the higher standard in juvenile proceedings, although the court did require that delinquency be proved by clear and convincing evidence. In *In re Agler*[82] a sixteen-year-old boy was charged with the malicious destruction of three farm tractors, an act which would have been a felony punishable by detention in the state reformatory if it had been committed by an adult. Witnesses were unable to testify as to the specific damage inflicted by the youth, and the juvenile court had found the boy delinquent apparently under the civil standard of proof.[83] The court of appeals affirmed the trial court's opinion and rejected the youth's contention that he could be found delinquent only upon proof beyond a reasonable doubt. That court arrived at its decision because it felt constrained to decide the case in accordance with Ohio's legal precedent.[84] In doing so, the court emphasized the civil nature of juvenile proceedings.[85] When the Supreme Court of Ohio de-

has been recognized as a basic procedural safeguard and has been adopted by virtually every jurisdiction in this country. See IX, Wigmore on Evidence, § 2497 (3d ed., 1940, Supp. 1964); see also McCormick, Evidence § 321 (1954). The Supreme Court has termed the Government's obligation to prove every element of the offense beyond a reasonable doubt "a settled standard of the criminal law." Holland v. United States, 348 U.S. 121, 138 . . . (1954). In Brinegar v. United States, 338 U.S. 160, 174 . . . (1949), the Court observed that, "Guilt in a criminal cause must be proved beyond a reasonable doubt," and explained that requirement in Speiser v. Randall, 357 U.S. 513, 525-526 . . . (1957) . . . .

. . . *Gault* makes abundantly clear that "under our Constitution, the condition of being a boy does not justify a kangaroo court." In re Gault, . . . 387 U.S. at 28 . . . .

395 F.2d at 445.

81. *See* note 75, *supra.*

82. 249 N.E.2d 808 (Ohio 1969).

83. This conclusion as to standard of proof is only inferential, since the juvenile court judge's only relevant statement was "I don't think it is to be treated as you are treating it as a criminal proceeding." 15 Ohio App. 2d 240, 242, 240 N.E.2d 874, 875 (1968).

84. *See, e.g., In re* Whittington, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967), in which the Ohio court held that the preponderance standard was to apply because the rehabilitative goals of juvenile proceedings gave them a civil nature. The United States Supreme Court remanded *Whittington* for reconsideration by the state court in light of *Gault. In re* Whittington, 391 U.S. 341 (1968). Upon reconsideration, the Ohio Court of Appeals did not treat the quantum of proof issue. 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969).

However, the dissent in the court of appeals decision in *Agler* pointed out that it is questionable whether there was in fact any precedent binding on the court in that case. 15 Ohio App. 2d at 249-50, 240 N.E.2d at 879-80.

85. 15 Ohio App. at 245, 240 N.E.2d at 877.

cided *Agler*, however, it refused to accept the classification of juvenile offenders as civil defendants and rejected the view that the preponderance standard is constitutionally consistent with, or adequate under, *Gault*. The court held that

> the full protection of alleged delinquents empirically demands a broader application of any rule regarding standard of proof. As noted by the *Gault* majority, long experience has shown that despite commendable efforts to the contrary, the suffering of a judgment of delinquency can have a lasting detrimental effect upon a child's future. This is not to say that the noble experiment has failed, but rather that one of the hopes attendant to its development has not been fully realized. For this reason, we conclude that any determination of a proper standard of proof in delinquency hearings must respond to the aspects of both deprivation of a child's liberty and the effect upon his future.
> . . . [W]e conclude that the burden of proof in those juvenile hearings which can result in the child's being adjudged a delinquent, irrespective of disposition, need not be beyond a reasonable doubt, but must be greater than a mere preponderance of the evidence. The standard of proof which lends itself most logically to this view of such proceedings, and which will best preserve the special nature thereof, is that of clear and convincing evidence of the truth of the allegations contained in the complaint.[86]

But unlike the *Agler* court, other courts which have recently refused to apply the higher standard have not conceded that it is constitutionally impermissible to base a youth's conviction of a criminal offense upon a mere preponderance of the evidence. A number of courts have taken the clear position that a preponderance standard is sufficient in juvenile proceedings.

In *State v. Santana*,[87] for example, the Texas courts dealt with a case involving a fourteen-year-old boy charged with rape. Although the court of appeals had held that the United States Constitution requires the state to prove an act of delinquency beyond a reasonable

86. 249 N.E.2d at 816. Prior to the Ohio Supreme Court's holding in *Agler*, another recent decision seemed to suggest that Ohio might be moving toward the adoption of the higher standard. *See In re* J.R., 46 Ohio Op. 2d 49, 50-51, 242 N.E.2d 604, 605-06 (Juv. Ct. 1968). *But see In re* Benn, 18 Ohio App. 2d 97, 247 N.E.2d 335, 337 (1969). In *Benn*, the court noted that it was affirming a case which

> exemplifies the fiction which allows the elision from "crime" to "delinquency" where a child is involved . . . . How long the illusion of non-criminality can be maintained under the legerdemain of a Juvenile Code status determination is a matter of some dubiety . . . . With deference, but reluctance, we conclude that juveniles in this state, whose status is tested on matters criminal in adults, have no right to a jury trial nor to have their condition measured by standards of proof "beyond a reasonable doubt." *"The condition of being a boy" still spells less procedurally than the condition of being a man in otherwise identical circumstances.* [Emphasis added.]

87. 444 S.W.2d 614 (Tex. 1969).

doubt in any proceeding which might result in the youth being institutionalized,[88] the Texas Supreme Court reversed the lower court and retained the civil standard.[89] After reviewing the split on this precise question in various state and federal courts, the court chose not to adopt the higher standard because "*Gault* does not require that the juvenile trial be adversary and criminal in nature."[90] The court asserted that the Supreme Court's decision in *Gault* had been reached because the facts in that case were "extreme." In refusing to extend the effects of that decision, the Texas court relied heavily on a Texas statutory provision which said that an adjudication of delinquency imposed none of the normal civil disabilities associated with criminal guilt and did not mean that the youth was deemed a "criminal."[91]

The California Supreme Court, too, has refused to adopt the higher standard of proof. In *In re M*,[92] the California Court considered a case involving a fifteen-year-old boy who was charged with involuntary manslaughter and who was declared to be a ward of the court. The court found that a 1961 California statute which had adopted the preponderance standard[93] was not "clearly, positively and unmistakably"[94] unconstitutional. It may have been significant that the case was not an attractive one for reversal; the evidence was

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88. 431 S.W.2d 558, 560 (Tex. Civ. App. 1968):

> [T]he underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proved beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions. We believe this is the clear and unmistaken effect of that decision. In so holding, we are in agreement with the interpretation of the *Gault* case by the Supreme Court of Illinois in *In re* Urbasek.

89. 444 S.W.2d 614 (Tex. 1969).

90. 444 S.W.2d at 622.

91. 444 S.W.2d at 616-17. Justice Pope, writing for three dissenters in *Santana*, interpreted *Gault* differently and disagreed that a lower standard of proof would in any way benefit the youth.

> The real question then is not what is best for Santana; it is whether the reasonable doubt standard in a proceeding of a felony grade which may lead to a deprivation of liberty, is a part of due process. . . .
>
> Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before *Gault* that the benefits of treatment accorded a juvenile are so helpful and beneficial to the juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self incrimination. The rights which *Gault* accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different.

444 S.W.2d at 628.

92. 450 P.2d 296, 75 Cal. Rptr. 1 (Sup. Ct. 1969).

93. CAL. WELF. & INSTNS. CODE § 701 (West 1966).

94. 450 P.2d at 305, 75 Cal. Rptr. at 10.

clear and the youth admited that he had accidentally killed the decedent with a gun which had been taken from an automobile which he had previously stolen and abandoned. The court took a very limited view of *Gault* and noted that the United States Supreme Court had taken "repeated pains to limit its holding . . ."[95] in that case. The California court concluded that

> . . . in the absence of a specific ruling on the issue by the United States Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard is valid and "no constitutional rights of the appellant have been infringed by the use of the preponderance of the evidence test to determine the truth of the allegation that he had committed a crime."[96]

In following the *Gault* statement that juvenile court hearings need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing,"[97] the California court refused to recognize the essentially criminal nature of a juvenile proceeding. After indicating that "the consequences of adopting the reasonable-doubt standard in juvenile court would perhaps be less drastic than adopting a jury system,"[98] it suggested that to adopt the higher standard would

> introduce a strong tone of criminality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. . . . [A]lthough certain basic rules of due process must be observed, [juvenile] proceedings are nevertheless conducted for the protection and benefit of the youth in question . . . . [T]he youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of the youth may well be served by a prompt factual decision at a level short of "moral certainty."[99]

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95. 450 P.2d at 299, 75 Cal. Rptr. at 4.

96. 450 P.2d at 305, 75 Cal. Rptr. at 10, 11.

97. 387 U.S. 1, 30 (1967).

98. 450 P.2d at 302, 75 Cal. Rptr. at 8.

99. 450 P.2d at 302-03, 75 Cal. Rptr. at 8. Judge Peters in dissent suggested that *Gault*

> stands for the proposition that a minor be afforded the same rights granted a defendant in a criminal case unless there are compelling reasons why such rights should not be granted, and that state decisions and statutes providing to the contrary are violative of the United States Constitution. This fundamental lesson

In *State v. Arenas*,[100] the Oregon Supreme Court treated the quantum-of-proof issue in much the same manner as did the California court. The case involved a sixteen-year-old boy who was charged with an assault with a dangerous weapon. Although the court admitted that an adult's right to be found guilty beyond a reasonable doubt when he is charged with a crime is one inherent in the due process clause of the Federal and Oregon Constitutions,[101] it noted that the requisite degree of proof "is closely related to the basic philosophy of juvenile law 'to deal with the child because he needs corrective treatment,' not because he is 'guilty' of a 'crime.' "[102] The court added:

> If the constitution requires that a juvenile cannot come within the jurisdiction of the court unless criminal conduct is proved beyond a reasonable doubt, the great juvenile experiment is over.[103]

The Oregon court felt particularly hesitant to adopt the adult standard because it felt that it could not consistently grant the higher standard of proof in juvenile proceedings involving criminal conduct

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> of the *Gault* decision is disregarded by the majority. Certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature . . . . Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation, and, as well, is contrary to the teachings of *Gault.*

450 P.2d at 309, 75 Cal. Rptr. at 14.

100. 453 P.2d 915 (Ore. 1969) (en banc).

101. *See* notes 5, 6 *supra* and accompanying text.

102. 453 P.2d at 918.

103. 453 P.2d at 919. Justice O'Connell, dissenting in *Arenas*, noted that

> . . . procedure designed to determine whether a child will be incarcerated is essentially criminal procedure. Since the procedure is criminal in nature there is as much reason to require the proof beyond a reasonable doubt in determining the guilt of a child as there is in determining the guilt of an adult.
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> Although the equal protection clause of the Fourteenth Amendment does not require an across-the-board similarity of criminal procedure for adults and children, that clause does require the child to have the same protection as an adult where the character of the procedure has no relationship to the ends that are served by dealing with a child in accordance with the commission of an act which is a crime if committed by an adult, the question of whether the child committed the act must be resolved by the trier of fact before the trial judge takes over and attempts to apply the theories of juvenile rehabilitation. It seems to me that this preliminary question of guilt should be determined by the same test whether the accused is an adult or a child . . . . Since the relaxation of the burden of proof subjects the child to the risk of incarceration it becomes an integral part of a criminal procedure which, according to the reasoning in *Gault*, must operate to protect the child to the same extent as it would an adult.

453 P.2d at 921.

and at the same time not extend a similar right to instances which did not involve the alleged comission of a criminal offense and which were part of the same statute.[104]

It is suggested that this last approach may be unduly restrictive. There would appear to be no reason why different standards could not be employed for noncriminal and criminal offenses, since convictions of the latter often result in prolonged periods of incarceration with hardened criminals in poorly staffed and inadequately equipped detention centers,[105] and since those convictions carry with them a profound stigmatizing effect.[106] Such a distinction has recently been recommended by the National Conference of Commissioners on Uniform State Laws and by the Children's Bureau of the Department of Health, Education, and Welfare's Social and Rehabilitative Service.[107]

Thus, the objections which the California and Oregon courts had—and which have been echoed elsewhere[108]—to imposing the higher burden of proof at the juvenile level are characterized by a perceived difference between the objective of juvenile proceedings and the objective of criminal proceedings. That position has been discredited elsewhere in this Article.[109] If the ideal of specialized treatment for juveniles without the stigma that attaches to criminals were one that could be achieved, the decisions in *In re M* and *Arenas* might be appropriate. But the rights of the juvenile should not be sacrificed for an ideal which is without substance.

In the District of Columbia, the courts have taken a position which is in accord with that taken by the California and Oregon courts. Before 1966, it had been accepted that the criminal standard

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104. 453 P.2d at 919-20.

105. *See* note 20 *supra* and accompanying text.

106. *See* note 22 *supra* and accompanying text.

107. UNIFORM JUVENILE COURT ACT § 29(b) (1968) and comment thereto, quoted at note 130 *infra;* CHILDREN'S BUREAU, SOCIAL & REHABILITATION SERVICE, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, LEGISLATIVE GUIDES FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 32(c), (d) (1969). *See also* notes 13, 75 *supra,* note 131 *infra.*

108. *See, e.g.,* W. v. Family Court, 24 N.Y.2d 196, 199, 202, 247 N.E.2d 253, 255, 257, 299 N.Y.S.2d 414, 417, 419, *prob. juris. noted sub nom. In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969), which dealt specifically with the burden-of-proof question:

> But 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 . . . . [T]he danger is that we may lose the child and his potential for good while giving him his constitutional rights.

Perhaps it is unsound to place too much weight on a few words, but one cannot help but wonder about the legitimacy of the New York Court of Appeals' concern with the results of giving to a juvenile "his constitutional rights." In *W. v. Family Court,* Chief Judge Fuld dissented from the majority opinion and adopted a view virtually identical to that advocated by Judge Peters in *In re M. See* note 99 *supra.*

109. *See* text accompanying notes 15-21 *supra.*

of proof was inappropriate in the District of Columbia Juvenile Court because the application of that standard was not a right which (1) stemmed from express statutory language,[110] or (2) was so "fundamental" that it could be inferred from the Juvenile Court Act,[111] or (3) was guaranteed in civil matters by the due process clause of the fifth amendment.[112] Relying upon the informal nature of juvenile proceedings, the District of Columbia courts had consistently denied the youthful offender the full panoply of constitutional safeguards available to the adult in criminal proceedings.

The United States Supreme Court's 1966 decision in *Kent* raised a hope that the District of Columbia courts might formally recognize the essentially criminal nature of juvenile court proceedings, but that hope was quickly snuffed out in *In re Elmore*.[113] In that case, a thirteen-year-old child was found to be a delinquent, and the District of Columbia Court of Appeals adopted a position quite similar to that taken in *In re M*:

> A delinquent child is neither considered nor treated as a criminal but as a person needing guidance, care, and protection. . . . The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act . . . . The investigation and court proceedings involving the determination of a child's delinquency are directed to the status and needs of the child, and the disposition thereof has as its goal not punishment but the rehabilitation and restoration of the child to useful citizenship. The end result is that a child should not be labeled a criminal, he is not punished as a criminal, and the proceedings against him should be far removed from the characteristics of criminal trial.[114]

The District of Columbia Court of Appeals has reaffirmed this position in four recent cases. One of those cases, *In re Wylie*,[115] involved a seventeen-year-old youth who was charged with a crime which was not a common-law felony and which therefore could not possibly have been waived to, and tried by, a federal district court

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110. *See, e.g.*, D.C. CODE § 16-2307 (1967) (right to jury trial on demand).

111. *See, e.g.*, D.C. CODE § 16-2302 (1967) (right to counsel and right to be so advised). *See also* Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); McDaniel v. Shea, 278 F.2d 460 (D.C. Cir. 1960).

112. *See* Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959); *In re* McDonald, 153 A.2d 651 (D.C. App. 1959).

113. 222 A.2d 255 (D.C. App. 1966), *modified*, 382 F.2d 125 (D.C. Cir. 1967).

114. 222 A.2d at 257-58. In this case, however, the court was not dealing with a youth who had committed a specific antisocial offense, but rather with one whose "habitual" course of conduct placed him beyond the control of his mother. *See* note 18 *supra* and accompanying text.

115. 231 A.2d 81 (D.C. App. 1967).

in which the reasonable-doubt standard would apply.[116] The court in that case summarily asserted that it would not deviate from its prior decisions.[117] Similarly, in *In re Ellis,*[118] the court felt constrained, as did the Ohio court of appeals in *Agler,*[119] to decide the burden-of-proof issue in accordance with its precedent. That case involved a fifteen-year-old boy who was charged with housebreaking. The evidence was clear; two policemen were on the scene at the time of the incident and actually heard glass being broken in a clothing store, and the youth was observed running away from the store carrying merchandise. The policemen testified that the boy had admitted being involved in the crime. At his trial the youth denied this admission, but he did indicate that he had told the policemen about two other youths who had been involved in the break. The court said:

> While we have not failed to follow the ruling of *Gault* in those cases where it clearly applies, *Gault* did not decide the question of the quantum of proof required in juvenile cases. We are therefore not persuaded at this time that we should apply the philosophy of *Gault* in order to predict what the Supreme Court might decide if faced with the same question. We are reluctant to condemn or abandon a long standing and useful practice unless the unconstitutionality of that practice is plain and manifest.[120]

Like *Wylie* and *Ellis,* the other two recent District of Columbia cases adhered to the preponderance standard,[121] but none of the four was an attractive case for overturning it.

Thus, the District of Columbia Court of Appeals has consistently failed to consider the potential deprivation of a youth's liberty and has maintained a traditional belief that there are some significant distinctions between a juvenile proceeding and a criminal trial. In *Ellis,* for example, the court noted that

> [h]earings held before the Juvenile Court remain civil in nature and differ significantly from their criminal counterpart. By statute, the

116. *See* D.C. CODE § 11-1553 (1967). *See also* notes 34-41 *supra* and accompanying text.

117. 231 A.2d at 84.

118. 253 A.2d 789 (D.C. App. 1969).

119. 15 Ohio App. 2d 240, 240 N.E.2d 874 (1968). *See* text accompanying note 84 *supra.*

120. 253 A.2d at 790.

121. *In re* Hill, 253 A.2d 791 (D.C. App. 1969), involved a sixteen-year-old boy who was charged with, and found guilty of, taking about three dollars from a thirteen-year-old boy. In that case, the court simply adopted its opinion in *Ellis.* The second case, *In re* Bumphus, 254 A.2d 400 (D.C. App. 1969), concerned a youth about sixteen years old charged with second degree murder and assault with a dangerous weapon. Both charges resulted from his killing his father. Again, the court merely adhered to *Ellis* and commented no further on the burden of proof issue.

> records of juvenile cases are not open to public inspection. Hearings are also closed to the public. Furthermore, a child adjudged delinquent is neither deemed nor treated as a criminal. No civil disabilities are imposed upon him and he is not disqualified from civil service. The purpose and rationale behind such safeguards and, indeed, the very procedure governing treatment of such juveniles is the care, needs and protection of the minor and his rehabilitation and restoration to useful citizenship. A flexible approach to juvenile proceedings is the best manner in which to achieve these ends.[122]

The court's ruling in *Ellis* was no more than a reiteration of its prior holdings that had emphasized the lack of necessity for, and the impropriety of, adopting the reasonable-doubt standard.[123] The decision in *Ellis* did emit a ray of hope, for it suggested that there was "no justification for abandoning or reversing [the prior doctrine] under the facts and circumstances of this case."[124] But that hope has not yet been realized.[125]

The approach taken by the California, Oregon, and District of Columbia courts clearly represents the majority view. After the emergence of the doctrine of "parens patriae,"[126] and until the profound changes wrought in juvenile cases by the decision in *Gault*, most courts accepted without question the assumption that juvenile proceedings were civil, not criminal, and that they were concerned solely with promoting the child's rehabilitation, not with punishing his criminality. It cannot be doubted that the intention in creating juvenile courts—to remove all taint of criminality from the child's unlawful activity—was laudatory. Accordingly, it was appropriate for the early decisions to find that the customary constitutional safeguards were unnecessary for, and inappropriate to, determining the best interests of the child.[127] But since the assumptions upon which this paternalistic view rests are largely unfounded, and since procedures preserving the essential fairness of a juvenile proceeding are not inconsistent with the goals of the juvenile court, the youth accused of a crime should and must now be accorded constitutional safeguards. The inequity of denying the higher standard of proof to juveniles cannot be allowed to persist merely because there once were idealistic notions of the capacity of juvenile courts to operate for the benefit of all who came before them.

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122. 253 A.2d at 790. *But see* notes 20, 22 *supra*.

123. *See In re* Wylie, 231 A.2d 81 (D.C. App. 1967); *In re* Bigesby, 202 A.2d 785 (D.C. App. 1964).

124. 253 A.2d at 791.

125. *See* note 121 *supra* and accompanying text.

126. State v. Dunn, 53 Ore. 304, 307, 99 P. 278, 280 (1909).

127. People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 355, *cert. denied*, 289 U.S. 709 (1932); *In re* McDonald, 153 A.2d 651 (D.C. App. 1959).

## B. *Legislative Action*

A few legislatures and legislative committees are, like courts, at last beginning to recognize the necessity for a criminal standard of proof in juvenile proceedings. Thus, at least five states have already adopted the "beyond a reasonable doubt" standard.[128] In addition, the Uniform Juvenile Court Act evidences a clear recognition that a delinquency proceeding is, in many essential respects, a criminal proceeding,[129] and the Act provides for the application of the criminal standard of proof:

> If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly, it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon.[130]

Furthermore, the 1969 guides promulgated by the Department of

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128. COLO. REV. STAT. § 22-3-6 (Supp. 1967); (MD. ANN. CODE art. 26, § 70-18(a) (Supp. 1969); N.J. COURT R. 5:9-1(f) (1969); N.D. GEN. STAT. ch. 27-20, § 29(2) (1969); WASH. JUVENILE COURT R. 4.4(b), as adopted by the Washington Judicial Council, effective January 10, 1969. The vast majority of the states, however, have statutes such as that of New York: "Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence." N.Y. FAMILY CT. ACT § 744(b) (McKinney Supp. 1969).

129. The Act defines a "delinquent child" as one who "has committed a delinquent act and is in need of treatment or rehabilitation." § 2(3). A "delinquent act" is defined as one which is "designated a crime under the law." § 2(2). In *Gault*, the United States Supreme Court specifically noted that, for purposes of the fifth amendment privilege against self-incrimination, juvenile delinquency proceedings which may lead to commitment to a state institution are criminal in nature: "To hold otherwise would be to disregard substance because of the feeble enticement of the civil label-of-convenience which has been attached to juvenile proceedings." 387 U.S. 1, 49-50. The prefatory note to the Act states in part:

> In both cases [*Gault* and *Kent*] the language of the opinions and the implications contained in them go beyond the specific holdings. They indicate that if the departures in juvenile court from criminal procedure are to be justified when delinquent conduct is alleged involving what for an adult would be a criminal act, the juvenile court proceedings and dispositions must be governed in fact by the objectives of treatment and rehabilitation. If the approach is a punitive one, these cases indicate that the procedure must adhere to the constitutional requirements which characterize a criminal proceeding.
>
> The Uniform Juvenile Court Act has been drawn with a view to fully meeting the mandates of these decisions. At the same time, the aim has been to preserve the basic objectives of the juvenile court system and to promote their achievement. In short, the Act provides for judicial intervention when necessary for the care of deprived children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure.

130. § 29(b). The Comment to this section asserts:

> More is required to sustain a finding of delinquency, unruly conduct, or deprivation than a preponderance of evidence. Since the child's liberty or the parent's right to his custody is involved, at least clear and convincing evidence should be required. The Illinois Supreme Court has recently held that implications of the *Gault* case require that proof must be beyond a reasonable doubt to support a finding of delinquency. This section follows the Illinois view in [some] cases, but adopts the "clear and convincing evidence" rule in [other] cases and in determining the need for treatment or rehabilitation.

Health, Education, and Welfare for the drafting of family and juvenile court acts also adopt the reasonable-doubt test for determinations of delinquency.[131] The Council of Judges of the National Council of Crime and Delinquency has not gone so far as to acknowledge the basically criminal nature of a juvenile proceeding, but it has recognized the seriousness of a hearing to determine a child's delinquency. Accordingly, in the Model Rules for Juvenile Courts, the Council rejected the preponderance standard and adopted the "clear and convincing evidence" standard of proof.[132]

These existing and recommended state statutes reflect a growing body of authority which recognizes that both policy and the Constitution compel the adoption of the higher standard of proof in order to safeguard the fundamental rights of a youth charged with committing a delinquent act. They indicate a recognition of what the Court so vigorously asserted in *Gault:*

> A proceeding where the issue is whether the child will be found to be "delinquent" and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[133]

## III. CONCLUSION

Although it is often said that juvenile proceedings are civil and not criminal in nature, it would be naive to accept such a statement without analyzing its underlying premises and, as a result of that acceptance, to deny youths the right to a presumption of innocence

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131. CHILDREN'S BUREAU, *supra* note 107, at § 32(c):

> If the court finds on the basis of a valid admission or a finding on proof beyond a reasonable doubt, based upon competent, material, and relevant evidence, that a child committed the acts by reason of which he is alleged to be delinquent, or in need of supervision, it may, in the absence of objection, proceed immediately to hear evidence as to whether the child is in need of care or rehabilitation and to file its findings thereon. In the absence of evidence to the contrary, evidence of the commission of an act which constitutes a felony is sufficient to sustain a finding that the child is in need of care or rehabilitation. If the court finds that the child is not in need of care or rehabilitation, it shall dismiss the proceedings and discharge the child from any detention or other temporary care theretofore ordered.

132. MODEL RULES FOR JUVENILE COURTS, rule 26, Comment (Final Draft 1968):

> While the ajudicatory hearing is noncriminal in nature, and therefore is not bound by the criminal procedure requirement of proof beyond a reasonable doubt, the serious nature of the adjudication demands that the allegations of the petition be proved by more than a mere preponderance of the evidence. The allegations should be demonstrated by clear and convincing evidence, which is the standard used in civil cases for issues of special gravity, such as fraud.

The council did, however, indicate an awareness that the criminal standard might be constitutionally required, for the Comment to Rule 26 added:

> Note. The United States Supreme Court has granted certiorari in a case in which the failure of the juvenile court to find a child delinquent "beyond a reasonable doubt" is assigned as error . . . . The Publication of the Rules will be held up to incorporate the holdings in the *Whittington* case.

*Whittington* is discussed in note 84 *supra.*

133. 387 U.S. 1, 36 (1967).

until proved guilty beyond a reasonable doubt. Certainly it is true that the goal of juvenile proceedings differs, as it should, from the goal of adult criminal proceedings. But the adoption of the "beyond a reasonable doubt" standard is in no way inconsistent with the rehabilitative purposes of juvenile proceedings. Convicted juveniles could, and, it is hoped, would, still be rehabilitated in institutions that separate them from hardened adult criminals. Thus, the distinct nature of juvenile proceedings should not impede the application of the higher standard of proof. It is true that if there were greater evidence of actual rehabilitation without any attachment to juveniles of the stigma of being "criminal," there would be less need for the application of the higher standard, because then the consequences of a conviction would be less detrimental to the youth. But that is not the case; rather, the poor institutional rehabilitation that is generally accorded juveniles and the stigmatizing effect of a finding of delinquency make it imperative that such a finding require proof beyond a reasonable doubt, at least when the youth is charged with acts which would be felonious if committed by an adult and which could result in prolonged incarceration. This higher standard of proof is necessary if we are to avoid the mistake of unnecessarily sending youths to institutions where youthful offenders often get the exposure that equips them to become lifelong criminals.

*Gault* held that "the hearing [in a juvenile court proceeding] must measure up to the essentials of due process and fair treatment."[134] But as one writer recently noted:

> If those specific due process rights which *Gault* guarantees to juveniles at the hearing stage are applied, without requiring the use of the higher standard of proof for a final determination of delinquency, then the net effect is still a loss of liberty without due process of law.[135]

If a youth's liberty is a value to which we are willing to attach importance, then the time has come to recognize that juveniles must be presumed innocent until they are proved guilty beyond a reasonable doubt.

134. 387 U.S. at 30.

135. Recent Case, *supra* note 7, at 855.