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Jury Trials for Juveniles: Rhetoric and Reality

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In 1215 the framers of the Magna Carta rejected the power of the King to control a freeman's liberty in the absence of a trial by jury of his peers.[1] Today, almost eight centuries later, California juveniles are denied this same basic right to a jury trial. The fate of youths who have allegedly committed criminal acts and face confinement of indeterminate duration is in the hands of a single judge or juvenile court referee.

The denial of this right to a jury trial because of the offender's age is only a recent innovation. Under English common law, a child accused of a crime was presumed capable of forming the requisite criminal intent and was subject to the same sanctions and procedural safeguards as adult criminals.[2] This practice was carried over to the United States where, until the turn of the century, juveniles enjoyed the same constitutional protections as their elders.

The significant change came in 1899 when social reformers and womens' organizations lobbied and agitated the first Juvenile Court Act into existence.[3] The Illinois Juvenile Court System was based on the *parens patriae* concept;[4] the state, as surrogate parent, would do what was necessary to help the child, and, if a criminal act were alleged, the function of the court was to rehabilitate rather than to punish the offender.[5] The normal procedural protections were deemed superfluous;[6] indeed they would interfere with the proper functioning of the juvenile court, which required an informal, non-adversary atmosphere in order to be effective.[7]

The great enthusiasm which heralded the birth of the juvenile court

1. *But see* Duncan v. Louisiana, 391 U.S. 145, 151 (1968), which notes that some historians disagree with the theory that the Magna Carta was the origin of the jury trial.
2. *In re* Gault, 387 U.S. 1, 16-17 (1967); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) [hereinafter cited as Mack].
3. E. LEMMERT, SOCIAL ACTION AND LEGAL CHANGE, 37 (1970) [hereinafter cited as LEMMERT]; Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984, 984 (1976) [hereinafter cited as Simpson].
4. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10 [hereinafter cited as Handler].
5. *In re* Gault, 387 U.S. 1, 15-16 (1967).
6. Simpson, *supra* note 3, at 987.
7. Mack, *supra* note 2, at 120; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 28 (1967) [hereinafter cited as TASK FORCE REPORT].

system in Illinois[8] spread rapidly. California enacted its first Juvenile Court Act in 1903.[9] However, the juvenile court system was not subjected to critical judicial scrutiny until relatively recently.[10] Not a single case involving the juvenile court system reached the United States Supreme Court during the 65 years that followed the Illinois Act. From the opinion in the first case, *Kent v. United States*,[11] it is clear that concern about the injustices resulting from the lack of procedural safeguards had grown in the interim. In *Kent*, the Court found it to be a denial of due process to transfer a juvenile to the adult court system without a hearing and the effective assistance of counsel.[12] The Court turned a critical eye to the dreams of the rehabilitators. It was becoming clear that the system's theoretical justification, lessened recidivism, was a goal which was perhaps not being attained,[13] and that the price exacted in terms of procedural rights denied to juveniles was too dear.

In re Gault[14] followed one year later. The due process, or fundamental fairness, standard announced in *Kent* was held to require that juveniles must be notified of the charges against them, that they must have a right to counsel, a right to confront and cross-examine witnesses against them, and a privilege against self-incrimination.[15] As justification for the procedural reforms, the *Gault* Court emphasized the failure of juvenile courts to rehabilitate,[16] and challenged the intellectual basis of the *parens patriae* concept as presenting "historic credentials . . . of dubious relevance."[17]

The pendulum swing towards increased procedural protections continued in *In re Winship*,[18] when the Court required the standard of proof in a juvenile case beyond a reasonable doubt instead of a preponderance of the evidence.[19] But the swinging stopped. *McKeiver v. Pennsylvania*[20] held that a jury trial was not mandated by the due process/fundamental fairness standard.[21] The *McKeiver* Court made it clear, however, that states were free to use juries if they chose[22] and encouraged them to experiment further.[23]

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8. LEMMERT, *supra* note 3, at 27-28.
9. CAL. STATS. 1903, c. 43, §20, at 44.
10. This was due partly to the dearth of appeals from juvenile court adjudications. Some states did not allow appeals. California did, but between 1906 and 1960 a total of only about 115 appeals were pursued. *See* LEMMERT, *supra* note 3, at 78; TASK FORCE REPORT, *supra* note 7, at 4.
11. 383 U.S. 541 (1966).
12. *Id.* at 554.
13. As reported in the REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 773 (1966), 61 percent of the juveniles referred to the Juvenile Court in the District of Columbia, in 1965 had previously been referred at least once.
14. 387 U.S. 1 (1967).
15. *See id.* at 26-57.
16. *Id.* at 22.
17. *Id.* at 16.
18. 397 U.S. 358 (1970).
19. *Id.* at 364.
20. 403 U.S. 528 (1971).
21. *Id.* at 545.
22. *Id.* at 553.
23. *Id.* at 547.

This comment echoes that encouragement. The California Supreme Court has not considered a juvenile's claim to jury entitlement since 1924. In *In re Daedler*,[24] the court considered the case of a minor charged with murder and held that the California Constitution did not require a jury trial since the processes of the juvenile court were not penal in character.[25] Because the juvenile court law has changed so drastically since that time, the continued validity of that holding is questionable.[26] Additionally, society has changed in the last fifty years, and constitutional analysis has evolved as well.[27] The denial of a jury trial right to California juveniles accused of a crime has never been subjected to the strict scrutiny test called for under modern equal protection analysis.[28] That analysis is the function of this comment.

It will first be established that the right to a jury trial is a fundamental right, and, thus, the strict scrutiny test applies. The argument that juveniles are not entitled to claim that right because the juvenile court proceedings are not penal will then be discussed. Following this, the state's interests served by the denial of a jury trial: confidentiality; informality; and judicial economy will be examined to determine whether any of those interests may be termed compelling, and if so, whether alternative means of advancing them are available. The benefits that may reasonably be expected to flow from the jury trial will then be discussed. The juvenile court system continues to evolve, and it is hoped that this comment will aid the architects of that system in guiding its evolution.

THE NATURE OF THE JURY TRIAL RIGHT—IS IT FUNDAMENTAL?

Equal protection principles were utilized by the California Supreme Court in *People v. Olivas*[29] in requiring that youthful misdemeanants not be deprived of personal liberty for periods longer than their adult counterparts.[30] In *Olivas*, the court, after remarking on its independent power to find a higher standard required by the California Constitution than would be required under the federal constitution,[31] declared personal liberty to be a fundamental interest.[32] It is urged that the California Court should utilize that same equal protection approach with respect to juvenile jury trials.

24. 194 Cal. 320, 228 P. 467 (1924).
25. *Id.* at 332, 228 P. at 472.
26. *See* CAL. STATS. 1915, c. 631, §1, at 1225 for the prior law which lumped juveniles accused of committing a crime with orphans, vagrants, incorrigibles, truants, and habitual pool players. Thus, in *Daedler*, 194 Cal. at 325, 228 P. at 469, the court relied heavily on *Ex parte* Ah Peen, 51 Cal. 280 (1876), a case dealing with a child who came before the juvenile court because his parents were unknown. Current juvenile court law distinguishes minors charged with criminal violations from others who may be declared wards of the court. CAL. WELF. & INST. CODE §§600-602. This comment is concerned only with the right to a jury trial of minors accused of a crime.
27. Katz, *Juveniles Committed to Penal Institutions—Do They Have a Right to a Jury Trial?* 13 J. FAM. L. 675, 688 (1973-74).
28. Simpson, *supra* note 3, at 995 n. 66.
29. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).
30. *Id.* at 257, 551 P.2d at 389, 131 Cal. Rptr. at 69.
31. *Id.* at 246, 551 P.2d at 381, 131 Cal. Rptr. at 61.
32. *Id.* at 251, 551 P.2d at 384, 131 Cal. Rptr. at 64.

The fourteenth amendment to the United States Constitution and Article I, Section 7 of the California Constitution forbid the denial of equal protection of the laws to any person. These provisions have been interpreted to require that a state show a rational basis for the legislative classifications it seeks to make.[33] A stricter scrutiny is applied, however, if a statute affects a fundamental interest or employs a suspect classification.[34] When a classification is subjected to strict scrutiny, the state must demonstrate that it has a compelling interest that is being advanced, and that there are no less constitutionally burdensome alternatives available.[35]

There are three sources that guarantee a jury trial. The sixth amendment of the United States Constitution guarantees an accused a jury trial in all criminal prosecutions.[36] Article I, Section 16 of the California Constitution secures the jury right "to all,"[37] and the California Legislature has provided for a jury trial in almost all cases of civil commitment.[38] In adult cases, courts describing the rights derived from each of these sources have characterized the jury trial right as a fundamental interest.

First, in *Duncan v. Louisiana*[39] the United States Supreme Court made the sixth amendment jury trial guarantee applicable to the States through the fourteenth amendment.[40] The *Duncan* Court stated: "the right to a jury trial in serious criminal cases is a *fundamental* right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction."[41]

Second, the right to a jury trial under the California Constitution was termed fundamental in *People v. Superior Court*.[42] In sustaining an order of mistrial where one juror had equivocated when asked whether he consented fully and voluntarily to the verdict,[43] the California Supreme Court declared: "The [California] Constitution guarantees the *fundamental* right to a unanimous jury verdict."[44]

Third, the California Supreme Court characterized the statutory jury trial right as fundamental in *In re Gary W.*,[45] and found no compelling state interest in denying the protection of that right to a California Youth Author-

33. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969).
34. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971); *In re* Antazo, 3 Cal. 3d 100, 111, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970); Castro v. State, 2 Cal. 3d 223, 234-36, 466 P.2d 244, 251-53, 85 Cal. Rptr. 20, 27-29 (1970).
35. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971); *In re* Antazo, 3 Cal. 3d 100, 111, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970); Castro v. State, 2 Cal. 3d 223, 234-36, 466 P.2d 244, 251-53, 85 Cal. Rptr. 20, 27-29 (1970).
36. U.S.CONST. amend. VI.
37. CAL. CONST. art. I, §16.
38. CAL. WELF. & INST. CODE §§3050, 3051, 3108, 5302, 5303, 5350(d), 6318, 6321.
39. 391 U.S. 145 (1968).
40. *Id.* at 149.
41. *Id.* at 154 (emphasis added).
42. 67 Cal. 2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967).
43. *Id.* at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329.
44. *Id.* at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329 (emphasis added).
45. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

ity ward who had been civilly committed as the result of a non-jury trial.[46] The court found the purpose of the commitment did not change the fundamental nature of the right:

> The right to jury trial in an action which may lead to involuntary confinement of the defendant, *even if such confinement is for the purpose of treatment is . . . fundamental.*[47]

From such unambiguous language it would be difficult to contend that the jury trial right was less than fundamental. Thus, in an equal protection analysis the strict scrutiny test must be applied,[48] and a legislative classification denying the right to jury trial to juveniles must serve some compelling state interest and be necessary to the furtherance of the state's purpose before the classification may be upheld. Before proceeding with an equal protection analysis, it will first be necessary to determine whether any of the jury trial guarantees are applicable *to juveniles*.

THE SCOPE OF THE JURY TRIAL RIGHT— DOES IT INCLUDE JUVENILES?

Denial of the fundamental right of jury trial to juveniles has been upheld on the ground that juries are inconsistent with the philosophy of the juvenile court.[49] Rehabilitation is the central theme of the juvenile court system, and courts have feared the damaging effects of juries on the confidentiality and informality of the proceedings.[50] An added, unexpressed concern may have been fears of an increased administrative burden.[51] These are the state interests that may be advanced in support of a denial of the jury trial right. Since the right in question has been established as fundamental, equal protection analysis calls for an examination of these interests to determine whether they are compelling, and if so, whether less constitutionally burdensome alternative means of advancing them are available.[52] That part of the equal protection analysis will be postponed temporarily and a more semantic argument will be dealt with first: whether juveniles can be denied the jury trial right because juvenile proceedings are non-criminal, since the constitutional jury trial rights are only applicable in criminal cases.

46. CAL. WELF. & INST. CODE §§1800-1803 empower the Youth Authority to petition the court of commitment for an order directing the Youth Authority to retain control over a dangerous ward beyond the date on which his release would otherwise be mandatory. Since Gary W. was originally committed to the Youth Authority by a juvenile court, it was a juvenile court, in the absence of a jury, that found him to be dangerous and ordered him to remain subject to Youth Authority control for an additional two years. The legislature had provided other persons who were civilly committed with a right to a jury trial, and the court extended the statutory civil committment jury trial right to cover persons subject to additional confinement under CAL. WELF. & INST. CODE §§1800-1803.

47. 5 Cal. 3d at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9 (emphasis added).

48. *See* Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

49. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

50. *Id.*

51. Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?* 57 CORNELL L. REV. 561, 567 (1972).

52. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

This section will first evaluate the juvenile court proceeding to determine whether the non-criminal label can validly be applied. Second, a claim by juveniles to the statutory civil commitment jury trial right will be analyzed. Last, a historical examination of the scope of the California constitutional jury trial right will be made in order to determine whether juveniles accused of a crime come within its purview.

A. The Application of the Constitutional Criminal Jury Trial Right

The sixth amendment jury trial right is, by its terms, limited to criminal prosecutions.[53] Since the California Constitution has no such limitation on its face, the right is ostensibly guaranteed "to all."[54] However, the courts have implied a limitation to criminal cases.[55] Thus, since a jury trial was meant to be guaranteed only in criminal prosecutions, juveniles have been denied jury trials on the sole basis that the processes of the juvenile court are not criminal in character. The characterization of the juvenile court as noncriminal is questionable, however, and it is contended that the constitutional criminal jury trial right should include juveniles within its scope.

Accepting for the moment the proposition that the right to a jury trial under both the federal and California constitutions is limited to criminal actions, the task becomes one of finding realistic support for the idealistic notion that juvenile court trials are not criminal prosecutions. In fact, the purposes, the consequences, and the trappings of juvenile court hearings are closely akin to criminal prosecutions.

In its most recent review of juvenile court procedures, the United States Supreme Court agreed that the purposes of juvenile hearings are comparable to the purposes of criminal trials. In *Breed v. Jones*[56] the Court failed to find a "persuasive distinction"[57] between California's jurisdictional hearing[58] and a criminal prosecution, "each of which is designed 'to vindicate [the] very vital interest in enforcement of criminal laws,' "[59] and held that the protection against double jeopardy applied to juveniles.[60]

It is becoming recognized that the lofty rehabilitative ideals attributed to the juvenile court reformers are not the social purposes that the juvenile system serves. Rather, as with adult systems, juvenile systems are concerned with the goals of retribution, condemnation, deterrence, and in-

53. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

54. "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST. art. I, §16.

55. *In re* Daedler, 194 Cal. 320, 332, 228 P.467, 472 (1924); *see* People v. Feagley, 14 Cal. 3d 338, 350-51, 535 P.2d 373, 380-81, 121 Cal. Rptr. 509, 516-17 (1975).

56. 421 U.S. 519 (1975).

57. *Id.* at 531.

58. The jurisdictional hearing is the juvenile court counterpart of the criminal trial, in that a determination is made as to whether the minor has violated the criminal laws. *See* CAL. WELF. & INST. CODE §§602, 701.

59. 421 U.S. at 531 *citing* United States v. Jorn, 400 U.S. 470, 479 (1971).

60. *Id.* at 529.

capacitation.[61] Perhaps at its inception the only purpose of the juvenile system was to render aid to children in need,[62] to rehabilitate them and transform them into productive members of society,[63] but the purposes the juvenile system serves today are broader than that, and are closer to the purposes of adult incarceration.

In 1976 the California Legislature passed AB 3121.[64] The legislation responds, in part, to what the lawmakers felt was a popular sentiment against the juvenile offender.[65] AB 3121 brings the District Attorney into the juvenile arena,[66] provides that those alleged to have committed certain violent crimes should be tried in the adult system (unless they can rebut the presumption of unfitness),[67] extends the period of jurisdiction that the Youth Authority may exercise over its wards,[68] and lowers the standard to be applied in detention hearings,[69] making it more likely that a juvenile will be detained before trial. Such changes are inconsistent with a benevolent, paternalistic *parens patriae* philosophy.[70]

The most revealing recent legislative changes were made to Welfare and Institutions Code Section 502, which sets out the purpose of juvenile court law. Prior to 1975 the purposes enunciated in this section evidenced an overriding concern for the minor. In that year the legislature added:

> (b) The purpose of this chapter also includes the protection of the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this Chapter.[71]

The "parent-state" further revealed non-parental motives in 1976 when Section 502 was again amended.[72] A change was made in subdivision (a) to permit removal of a minor from his home solely in the interests of public

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

62. *See* Mack, *supra* note 2, at 107.

63. *In re* Gault, 387 U.S. 1, 15-16 (1967).

64. CAL. STATS. 1976, c. 1071, at —.

65. Former President Ford has expressed his opinion:

> If they are big enough to commit vicious violence against society, they are big enough to be punished by society. Detention may not help the juvenile, but it will certainly help his potential victims.

L.A. Times, Sept. 28, 1976, pt. 1, at 5, col. 1; see note 70 *infra*.

66. CAL. WELF. & INST. CODE §650, *as amended,* CAL. STATS. 1976, c. 1071, § 20, at —; CAL. WELF. & INST. CODE §655, *as amended*, CAL. STATS. 1976, c. 1071, §23, at —; CAL. WELF. & INST. CODE §681, *as amended*, CAL. STATS. 1976, c. 1071, §26, at —.

67. CAL. WELF. & INST. CODE §707, *as amended*, CAL. STATS. 1976, c. 1071, §28.5, at —.

68. CAL. WELF. & INST. CODE §607, *as amended*, CAL. STATS. 1976, c. 1071, §13, at —.

69. CAL. WELF. & INST. CODE §628, *as amended*, CAL. STATS. 1976, c. 1071, §15, at —.

70. Highlighting this legislative mood is the fact that during the 1975-76 session only one bill was introduced which would have improved the treatment available to juvenile offenders. AB 2385, 1976 Regular Session. Many more were introduced which authorized harsher treatment: SB 234, 1975 Regular Session; SB 1598, 1975 Regular Session; SB 1694, CAL. STATS. 1976, c. 1070, at —; SB 1695, CAL. STATS. 1976, c. 1069, at —; AB 3121, CAL. STATS. 1976, c. 1071, at —.

71. CAL. WELF. & INST. CODE §502, *as amended*, CAL. STATS. 1975, c. 819, at 1872.

72. CAL. WELF. & INST. CODE §502, *as amended*, CAL. STATS. 1976, c. 1071, §4, at —.

protection, without the regard for the minor's welfare which was formerly required by Section 502 (a). A further change included the following goals among the purposes listed in this subdivision: "to protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his own acts . . . ."[73] Thus, the purposes of juvenile law and criminal law coincide.

Additionally, the consequences of an adverse adjudication in adult and juvenile courts are comparable. After citing previous Supreme Court cases for the proposition that a juvenile proceeding was comparable in seriousness to a felony prosecution because of the deprivation of liberty and the stigma involved in both,[74] the *Breed* Court concluded:

> Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case [a California Juvenile Court jurisdictional hearing] from a traditional criminal prosecution.[75]

Either the adult or the juvenile court may deprive an accused of liberty for considerable periods and, even if the purpose of juvenile incarceration is perceived as treatment, such purpose is not sufficient to distinguish it from criminal proceedings.[76] Again, AB 3121 emphasizes the criminal nature of the juvenile system. The new legislation increased the time period during which the juvenile court may retain jurisdiction over certain "minors" to age 23,[77] and equalized the maximum period of physical confinement permitted in both the adult and juvenile systems.[78] As the age limits on juvenile court commitments are raised, and the sentences imposed by both courts are equalized, the distinction between the two systems becomes blurred.

A lasting criminal stigma is also associated with juvenile court involvement.[79] As Justice Musmanno observed in *In re Holmes*:[80]

> It is a . . . delusion to say that a Juvenile Court record does not handicap because it cannot be used against the minor in any court. In point of fact it will be a witness against him in the court of . . . society where the penalties inflicted for deviation from conventional codes can be as ruinous as those imposed in any criminal court, it will be a sword of Damocles handing over his head in public life, it will be a weapon to hold him at bay as he seeks a respectable and honorable employment.[81]

The military, the FBI, and civil service agencies consistently construe a

73. CAL. WELF. & INST. CODE §502, *as amended*, CAL. STATS. 1976, c. 1071, §4, at —.
74. Breed v. Jones, 421 U.S. 519, 530. (1975).
75. *Id.*
76. See text accompanying note 47 *supra*.
77. CAL. WELF. & INST. CODE §607, *as amended*, CAL. STATS. 1976, c. 1071, §13, at —.
78. CAL. WELF. & INST. CODE §731, *as amended*, CAL. STATS. 1976, c. 1071, §30, at —.
79. See text accompanying notes 100-113 *infra*; TASK FORCE REPORT, *supra* note 7, at 9.
80. 379 Pa. 599, 109 A.2d 523 (1954).
81. 379 Pa. 599, 612, 109 A.2d 523, 529 (1954) (Musmanno, J., dissenting).

juvenile court record as a criminal record, state laws to the contrary notwithstanding.[82]

Furthermore, when a minor is charged with a crime, many of the trappings of adult criminal proceedings are present. The minor has a right to compulsory service of process,[83] the payment of witness fees is within the court's discretion,[84] and the minor is entitled to court-appointed counsel.[85] Since January 1, 1977, the District Attorney acts as prosecutor,[86] and the rules of evidence as established by the California Evidence Code and judicial decisions govern the admission or exclusion of evidence in the juvenile proceeding.[87] On appeal, the case is assigned a criminal docket number, and, as with criminal cases, the minor is opposed by the Attorney General. Indigent minors have a right to appointed counsel[88] and a free transcript at the appellate level.[89]

Recently, the California Supreme Court in *People v. Feagley*[90] extended the state constitutional right to a unanimous jury verdict to persons civilly committed as mentally disordered sex offenders.[91] This right was extended despite the implied limitation of the jury trial right in the state constitution to criminal cases.[92] The court relied in part on the procedural similarities between civil commitment procedures and criminal trials, the fundamental nature of the jury trial right, and the comparability of the consequences of civil commitment and criminal incarceration.[93] This same reasoning is particularly applicable to juvenile commitment proceedings. If the court could find that the commitment of a mentally disordered sex offender was sufficiently "criminal" in nature for the constitutional jury trial guarantee to apply, it should conclude that the procedures whereby a juvenile is committed for having violated a criminal law also possess sufficient indicia of criminality.

B. The Statutory Civil Jury Trial Right As Applied in Civil Proceedings

As an alternative to maintaining that juvenile proceedings are criminal and that the constitutional jury trial rights apply, juveniles could argue that

82. Cashman, *Confidentiality of Juvenile Court Proceedings, A Review*, 24 JUV. JUST. 30, 36 (1973).
83. CAL. PEN. CODE §1330; CAL. WELF. & INST. CODE §664.
84. CAL. PEN. CODE §1329, CAL. WELF. & INST. CODE §664.
85. CAL. WELF. & INST. CODE §700.
86. CAL. WELF. & INST. CODE §650, *as amended*, CAL. STATS. 1976, c. 1071, §20, at —; CAL. WELF. & INST. CODE §655, *as amended*, CAL. STATS. 1976, c. 1071, §23, at —; CAL. WELF. & INST. CODE §681, *as amended*, CAL. STATS. 1976, c. 1071, §26, at —.
87. CAL. WELF. & INST. CODE §701, *as amended*, CAL. STATS. 1976, c. 1071, §27, at —.
88. CAL. CT. RULES, PRETRIAL AND TRIAL RULES §251 (1973).
89. CAL. WELF. & INST. CODE §800. This right is independent of the parent's financial status. Dana J. v. Superior Court, 4 Cal. 3d 836, 841, 484 P.2d 595, 598, 94 Cal. Rptr. 619, 622 (1971).
90. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).
91. *Id.* at 352, 535 P.2d at 381, 121 Cal. Rptr. at 517.
92 See text accompanying note 55 *supra*.
93. 14 Cal. 3d at 350-52, 535 P.2d at 380-81, 121 Cal. Rptr. at 516-17.

the juvenile proceedings are indeed civil in nature. If the proceedings are civil, a statutory jury trial right is the appropriate source of the minor's claim to jury entitlement. The legislature has created a right to a jury trial in almost all cases of involuntary commitment that follow an adjudication of status. The Lanterman-Petris-Short Act[94] provides for the involuntary commitment of persons who, because of mental disorders, are imminently dangerous or gravely disabled.[95] Related legislation encompasses the judicial commitment of mentally disordered sex offenders,[96] and still another portion of the Welfare and Institutions Code deals with the involuntary commitment of actual or potential narcotics addicts.[97]

In each involuntary commitment case the person detained is entitled to a jury trial; the sole function of the jury is the determination of whether the detainee is a person described by the applicable statute.[98] That is, the issue put to the jury is whether that person is gravely disabled, addicted to narcotics, or a mentally disordered sex offender.

If juvenile hearings are not to be classified as criminal, then they may be looked on as status determinations. When a minor is accused of criminal acts, the function of the juvenile court's jurisdictional hearing is to determine whether the minor is a person described by Welfare and Institutions Code Section 602:[99] "Any person who is under the age of 18 years when he violates any law . . . ."[100] The issue to be decided, then, is one of status; whether the juvenile is a person described by Section 602 of the Welfare and Institutions Code. This is the juvenile court euphemism for guilt. There is no provision in the Welfare and Institutions Code for the juvenile court to make a finding of guilt: the court can only determine whether the juvenile is a person described by the statute. In order to avoid the stigma of criminality, the law requires the juvenile court phrase its finding in terms which ring more of status than guilt. The statutory right to a jury trial in cases of status determination has been recognized as fundamental, and the right has been extended by the courts to status offenders other than those originally included in the legislative scope on the basis of equal protection.[101]

As mentioned previously,[102] the California Supreme Court has used an equal protection analysis to extend the statutory right to a jury trial to Youth Authority wards alleged to be ineligible for discharge because they are physically dangerous to the public.[103] Since the statutory right was deemed

94. CAL. WELF. & INST. CODE §§5000-5401.
95. CAL. WELF. & INST. CODE §5008.1.
96. CAL. WELF. & INST. CODE §§6250-6825.
97. CAL. WELF. & INST. CODE §3050 *et seq.*
98. CAL. WELF. & INST. CODE §§3050, 3051, 3108, 5302, 5303, 5350(d), 6318, 6321.
99. CAL. WELF. & INST. CODE §§701. See note 58 *supra* for a description of the jurisdictional hearing.
100. CAL. WELF. & INST. CODE §602.
101. *In re* Gary W., 5 Cal. 3d 296, 308, 486 P.2d 1201, 1210, 96 Cal. Rptr. 1, 10 (1971).
102. See notes 45, 46 *supra*.
103. See notes 45, 46 *supra*.

fundamental in *In re Gary W.* [104] the strict scrutiny test was applied. The state could produce no compelling interest to support its denial of the jury trial right to juveniles while granting it to others who were civilly committed. The court intimated the state would bear the same burden in cases dealing with similar types of discrimination.

The court again failed to find compelling state reasons for denying status offenders the fundamental statutory right to a unanimous jury verdict in *People v. Feagley*.[107] Feagley was committed as a mentally disordered sex offender, a status not included in the Lanterman-Petris-Short Act. The jury unanimity required by the Lanterman-Petris-Short Act[108] was compared with the three-fourths jury verdict authorized in the commitment of mentally disordered sex offenders, and the court found the distinction to be a denial of equal protection.[109] If juvenile court procedures are civil in nature, and confinement of a juvenile is for the purpose of treatment, juveniles should also be able to claim the fundamental statutory right to a jury trial.

In the case of *In re Clarence B.*,[110] a juvenile argued that the statutory jury trial right should be extended to juvenile proceedings. The court rejected the equal protection argument advanced by the juvenile in that case stating that:

> This argument, however, fails to recognize an important distinction. In involuntary commitment proceedings of adults, the status of an individual is determined, i.e., whether or not a certain person is an addict, mentally disordered sex offender, or an imminently dangerous person. Juvenile proceedings are involved with guilt, i.e., whether or not a minor has violated the law . . . .[111]

What was most interesting about the opinion was the court's failure to apply the required strict scrutiny test to the reasons advanced by the state in support of the jury trial denial, and, most noteworthy, the rejection of the extension of the civil commitment jury trial right because the juvenile proceedings involve a guilt, not status, determination, and are thus criminal in nature. *In re Daedler* and its progeny reject the extension of the constitutional jury trial right because of the civil nature of the proceedings,[112] while

104. *In re* Gary W., 5 Cal. 3d 296, 306, 486 P.2d 1201, 1209, 96 Cal. Rptr. 1, 9 (1971).
105. *Id.* at 308, 486 P.2d at 1209-10, 96 Cal. Rptr. at 10.
106. *Id.*
107. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).
108. CAL. WELF. & INST. CODE §5303.
109. 14 Cal. 3d at 358, 535 P.2d at 386, 121 Cal. Rptr. at 522. The extension of the statutory jury trial right was one of two alternative grounds on which the *Feagley* court based its decision. See text accompanying notes 90-93 *supra*, for a discussion of the other alternative; the application of the California constitutional jury trial right.
110. 37 Cal. App. 3d 676, 112 Cal. Rptr. 474 (1974).
111. *Id.* at 680, 112 Cal. Rptr. at 475-76. The court also noted more traditionally cited state interests involved in witholding jury trials from juveniles. These arguments, that informality of the proceedings would be damaged by introduction of an adversarial atmosphere and a strong tone of criminality, will be discussed *infra*. See text accompanying notes 137-207 *infra*.
112. 194 Cal. 320, 332, 228 P. 467, 472 (1924).

the court in *Clarence B.* refused to extend the civil commitment right because the proceedings are criminal.[113] The elimination of such judicial inconsistency is a proper role for the California Supreme Court.

The United States Supreme Court has laudably eschewed the civil/criminal distinction in applying the due process,[114] self-incrimination,[115] and double jeopardy[116] guarantees to juvenile proceedings. It is urged that the California court do the same in applying the equal protection and jury trial guarantees. Constitutional rights should not depend on a a simplistic and inaccurate label. The jury trial right, be it constitutional or statutory, should extend to juvenile proceedings, be they civil or criminal.

C. *The California Constitutional Jury Trial Right Includes Juveniles Within Its Scope*

The United States Constitution clearly limits its provision of a jury trial right to criminal cases and common law litigants.[117] In contrast, the language of the California Constitution is much more inclusive:

> Trial by jury is an inviolate right and shall be secured to *all*, but in a civil case three-fourths of the jury may render a verdict.[118]

Such language does not on its face imply that the right to a jury trial is limited to criminal cases, and yet, it has been so interpreted.[119] An implied limitation and a questionable civil label attached to a juvenile court procedure which came into existence a half-century after the adoption of the state's constitution are not firm grounds for witholding a constitutional guarantee. This comment takes issue with the implication of a limitation which would exclude juveniles, and seeks here to determine the proper scope of that constitutional guarantee.

The California Supreme Court has indicated that the scope of the jury trial right is to be determined by a historical examination of the framer's intent. As the court has stated:

> The right to trial by jury guaranteed by the [California] Constitution is the right as it existed at common law at the time the Constitution was adopted . . . . It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political, or legal fact. . . . It is necessary,

113. This argument was advanced in Smith, *Jury Trials, The Juvenile Court, and the California Constitution From Specious Acorns Grow Trees of Injustice,* 50 L.A. BAR BULL. 142, 147 (1975). There the author referred to this situation as the "Catch 22" of juvenile law.

114. "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . ." *In re* Winship, 397 U.S. 358, 365-66 (1970).

115. *In re* Gault, 387 U.S. 1, 50 (1967).

116. Breed v. Jones, 421 U.S. 519, 529 (1975).

117. U.S. CONST. amend. VI.

118. CAL. CONST. art. I, §16 (emphasis added).

119. See text accompanying note 55 *supra*.

> therefore, to ascertain what was the rule of the English common law upon this subject in 1850.[120]

"The right is guaranteed as it existed at common law at the time the State Constitution was adopted and may not be abridged by act of the legislature."[121] If juveniles accused of crimes would have been tried to a jury at the time of the state constitution's adoption, they are entitled to the protection of a jury trial. In *In re Daedler*[122] the court traced the origin of the *parens patriae* concept to feudal times where first the *inquisitio post mortem*, then the courts of wards and liveries, exercised supervision over minors. The equity courts assumed jurisdiction over minors in 1660,[123] suggesting [124] jury trials were not available at that time since the Chancellor's decisions were made according to the conscience of the King without the assistance of a jury.[125]

The United States Supreme Court was convinced that history subsequently took another turn:

> At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and, in theory, to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults.[126]

In its historical analysis the Court relied on no lesser authority than Julian Mack, the chief spokesman for the *parens patriae* concept. As Mack had stated:

> Our common criminal law did not differentiate between the adult and the minor who had not reached the age of criminal responsibility . . . . The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law. . . .[127]

There is also evidence that the juvenile accused of a crime was tried to a jury subsequent to the adoption of the constitution. In *Ex parte Becknell*,[128] a 13-year-old accused of burglary was committed to Whittier State School on the basis of a grand jury finding. The California Supreme Court held that the order of commitment was void since: "The boy cannot be imprisoned as a criminal without a trial by jury."[129]

120. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 286-87, 231 P.2d 832, 835 (1951).
121. People v. Collins, 17 Cal. 3d 687, 692, 552 P.2d 742, 745, 131 Cal. Rptr. 782, 785 (1976).
122. 194 Cal. 320, 228 P. 467 (1924).
123. *Id.* at 324-25, 228 P. at 469.
124. Note that *Daedler* was not attempting to trace the historical development in order to ascertain whether juveniles had juries at the time of the adoption of the state constitution.
125. D.DOBBS, HANDBOOK ON THE LAW OF REMEDIES 31 (1973).
126. *In re* Gault, 387 U.S. 1, 16-17 (1967).
127. Mack, *supra* note 2, at 106.
128. 119 Cal. 496, 51 P. 692 (1897).
129. *Id.* at 498, 51 P. at 693. *But see Ex parte* Ah Peen, 51 Cal. 280 (1876), in which a sixteen year old was sent to industrial school without a jury trial, and the California Supreme Court declined to issue a writ of habeas corpus. It bears noting, however, that *Ah Peen* is not pertinent to the discussion at hand, and should be distinguished from *Becknell*, in that *Ah Peen* was not charged with a crime but was abandoned without known parents.

Criminal trials were held before a jury in the nineteenth century, whether the accused was an adult or a juvenile.[130] With the introduction of the juvenile court system, however, juveniles lost that protection. The legislature cannot so easily abrogate a constitutional right.[131] The New Mexico Supreme Court, in holding that a juvenile charged with violation of a criminal statute had a constitutional right to a jury trial, relied solely on a historical line of reasoning:

> We see no escape from the conclusion that at the time of the adoption of our constitution [1911] petitioner could not have been imprisoned without a trial by jury. This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to jury trial.[132]

D. Juveniles Should be Included in the Scope of the Jury Trial Right

The argument that juveniles should be denied jury trials because juvenile hearings are not criminal seems overly technical and weak. In fact the hearings are very much like a criminal trial;[133] the purposes and consequences of juvenile adjudications are also strikingly similar.[134] The implication that the California constitutional right does not include juveniles will not withstand an historical inspection. The civil label is inaccurate and the constitutional implication is wrong. Juveniles should not be denied a fundamental right on the basis of such reasoning.

A relatively unexplored avenue of attack is for the juveniles to concede the limitation of the constitutional rights to criminal cases, and the civil nature of the juvenile proceedings, then claim the civil commitment statutory jury trial right. Should the court decide juvenile hearings are criminal, the constitutional rights may be claimed;[135] if they are civil, the statutory right is applicable.[136] If both sources are claimed, the court will be forced to reason consistently. It will be impossible to sidestep the criminal jury trial claim by applying the civil label without conceding the validity of a claim to the statutory right to a jury trial in civil commitment proceedings.

THE STATE'S INTERESTS

The semantic argument that the scope of the jury trial right does not extend to include juveniles within its coverage has been considered. Since the right denied to juveniles has been established as fundamental,[137] equal

130. *In re* Gault, 387 U.S. 1, 16-17 (1967); Mack, *supra* note 2, at 106.
131. See text accompanying note 121 *supra*.
132. Peyton v. Nord, 78 N.M. 717, 724, 437 P.2d 716, 723 (1968).
133. See text accompanying notes 53-93 *supra*.
134. See text accompanying notes 53-93 *supra*.
135. See text accompanying notes 53-93 *supra*.
136. See text accompanying notes 94-116 *supra*.
137. See text accompanying notes 36-48 *supra*.

protection calls for the state to bear the burden of establishing that its interests are compelling.[138] The philosophical and practical grounds that the state can advance for denial of the right will now be examined.

The rationale that courts have used for denying the right to a jury trial to juveniles focuses on the impact the jury trial is expected to have on the juvenile system. It is feared that informality, supposedly essential to the rehabilitative process, will be destroyed and that the juvenile court will become adversarial and assume a criminal tone. It is also argued that exposure to juries will destroy the confidentiality of juvenile proceedings, resulting in a criminal stigma being cast upon the minor. Very practical fears of increased administrative burdens and dollar costs may be the unspoken motivation behind many judicial opinions. These interests will be examined to determine whether they may be termed compelling, and, if so, whether alternative means of advancing them may be available. If the state interests are not compelling, or less burdensome alternatives are available, the denial of the jury trial right to juveniles is unconstitutional.[139]

A. Confidentiality

A mistake made early in life should not brand one permanently. Many people whose later lives are respectable have experimented with unlawful conduct during their adolescence,[140] and an indelible stamp of criminality applied at this early stage could block opportunities in socially acceptable endeavors. The stigma of criminality attached to a youth could become a self-fulfilling prophecy.

The elimination of a criminal stigma was central to the concept of the social reformers who instituted the juvenile court system.[141] Confidentiality was to be preserved in the private atmosphere which supposedly surrounded the juvenile court, and in the secrecy of the court's records.[142]

Courts have been protective of the confidentiality of the juvenile system. They have relied, in part, on the adverse effects they feared juries would have on this characteristic in denying the right to a jury trial,[143] and utilized the impact on confidentiality as a critical factor in balancing the desirability of an advisory jury.[144]

It must now be determined whether the state's interest in confidentiality is compelling and whether less burdensome methods of protecting that interest exist. This comment does not advocate abandoning the preservation of

138. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).
139. *Id.*
140. *See* Simpson, *supra* note 3, at 1004.
141. Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 548 (1957).
142. Mack, *supra* note 2, at 109.
143. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971); *In re* Clarence B., 37 Cal. App. 3d 676, 681, 112 Cal. Rptr. 474, 476 (1974).
144. People v. Superior Court, 15 Cal. 3d 271, 285, 539 P.2d 807, 816, 124 Cal. Rptr. 47, 56 (1975).

confidentiality as a goal, but seeks to weigh the state's interest in preserving confidentiality against the juvenile's claim to a fundamental right. The degree to which confidentiality and avoidance of stigmatization is preserved in the current operation of the juvenile system is pertinent to an evaluation of the state's interest in protecting these characteristics from further encroachment. If the present efforts at confidentiality are weak and ineffectual, then perhaps the state cannot maintain that its interest is so great that it may be termed compelling. If the state has not plugged leaks in the secrecy of the present system, then the claim that it has a compelling interest in this facet of the juvenile system is bloated. If a criminal stigma inevitably results from a juvenile proceeding, despite the best efforts of the state, then those efforts are in reality meaningless. The effort may be laudable, but if it is doomed to failure then the interest promoted is not compelling.

As with so many of the idealistic hopes of the architects of the juvenile court system, the promises of confidentiality have not been kept. Although efforts are made to keep court records confidential,[145] some social elements have a genuine need to know the information contained in those records in order to protect themselves and to function properly. Others inevitably learn of the minor's brush with the law and will not forget.

Employers, for instance, have an obvious need to know the character of those in whom they place their trust. It is not surprising to learn that the pressures employers may be expected to exert on those who can facilitate efforts to learn the character of prospective employees have sometimes been fruitful.[146] Similarly, the FBI and the military have genuine needs for character information, and are in an even better position than potential employers to exert the required pressure.[147] Recognition of such legitimate needs may lead one to inquire whether confidentiality is really so socially desirable.

Occasionally, the juvenile himself is forced to reveal his past. The military enlistment forms which require the applicant to consent to a full investigation are sometimes interpreted by the court as consent to disclosure of juvenile court records.[148] Threats of court-martial and dishonorable discharge for false responses are often sufficient to compel disclosure from the recruit. The standard employment application form providing for immediate discharge for the provision of false information also effectively short-circuits the juvenile court's efforts at keeping records confidential.

California's efforts at preserving confidentiality go one step further than those of most states in providing that a juvenile may, under certain condi-

145. CAL. PEN. CODE §851.7; CAL. PEN. CODE §1203.45: CAL. WELF. & INST. CODE §781.
146. *In re* Gault, 387 U.S. 1, 24 (1967).
147. *Id.*
148. Sussman, *The Confidentiality of Juvenile Court Proceedings: A Review*, 24 JUV. JUST. 30, 35 (Aug. 1973).

tions, have his juvenile record expunged.[149] But an extra step is also required on the juvenile's part, and that step is not always taken.[150] The procedure may be complicated and require the assistance of an attorney, but even simple proceedings are often not followed since the initiative of the party concerned is required, and that may be lacking.[151]

The efforts of the courts to protect the youth from a criminal stigma really only attacks part of the problem. Contacts with the juvenile court result in a stigmatization which seems impossible to avoid. The youth's neighbors, friends and relatives inevitably know of the adjudication, and may have a closer knowledge of the fact situation involved than the court. These are the people with whom the juvenile has the most contact, and it is in this community that the stigma will cost him most dearly.[152] The police know too, and this knowledge is translated into heightened surveillance of the youth,[153] resulting in a higher likelihood of his re-involvement with the authorities.[154]

A juvenile who appeals an adverse juvenile court decision may risk the limited protection the secrecy of the court records provides him, in that the use of the juvenile's name in a published decision is wholly within the discretion of the appellate court judge.[155] If the court records are kept confidential, but an identifying appellate decision is publicized, the purpose of the secrecy is thwarted.

In light of the ineffectiveness of these attempts to preserve confidentiality and avoid stigmatization, it is unlikely a court would classify the state interest as compelling. The United States Supreme Court has recognized the weakness of the confidentiality argument: "This claim of secrecy, however, is more rhetoric than reality."[156]

The interest in confidentiality is really an interest of the minor which the state in its *parens patriae* role is asserting on his behalf in order to deny the juvenile a constitutional right. It is the minor, not the state, who risks the feared stigmatization. It may be argued that a properly informed and counseled minor should be able to waive his interest in confidentiality if a jury trial would serve his interests better.[157]

149. CAL. PEN. CODE §851.7; CAL. PEN. CODE §1203.45; CAL. WELF. & INST. CODE §781.

150. A recent study revealed that only a small percentage of juveniles from disadvantaged areas actually qualify to have their records sealed either because they were unaware of this possibility or were blocked by the complexity and rigidity of the existing law. STAFF STUDY BY SENATE DEMOCRATIC CAUCUS, THE KEY THAT LOCKS THE RECORDS OPENS THE DOOR, GUIDE TO SEALING JUVENILE COURT RECORDS 1 (1973).

151. TASK FORCE REPORT, *supra* note 7, at 93.

152. TASK FORCE REPORT, *supra* note 7, at 92-93.

153. *Id.*

154. *Id.*

155. Telephone conversation with Robert E. Formichi, Reporter of Decisions, Supreme Court of California, San Francisco, Calif., Jan. 10, 1977.

156. *In re* Gault, 387 U.S. 1, 24 (1967).

157. A waiver power is already held by the minor. CAL. WELF. & INST. CODE §676 allows the minor to request that members of the public be admitted to his hearing. A noted juvenile law authority, Professor Monrad G. Paulsen supports the view that a properly advised child should

The weakness of this state interest in confidentiality is coupled with the availability of a simple alternative. Jurors may be sworn to secrecy, and the true name of the juvenile need not be revealed to them. The contempt sanction will serve to limit the adverse effect on confidentiality.

Confidentiality of juvenile court hearings is a noble goal. But the efforts at preservation of confidentiality fall far short of the goal. Military and civilian employers, the youth's neighbors and friends, and the police all have access to information sources which result in an effective stigmatization of the child. Still, the courtroom proceedings should be kept as confidential as possible. Since the swearing of jurors to secrecy would mean that a jury trial would have only a minimal impact on the confidentiality of the proceedings, the claim of confidentiality cannot be termed compelling, and will not support the witholding of a fundamental right.

B. Informality

Rehabilitation is the central theme of the juvenile court philosophy.[158] The juvenile court system was instituted in reaction to the harsh treatment to which juveniles, incarcerated with adult criminals in nineteenth century penal institutions, were subjected.[159] Instead of receiving the same punishment meted out to adults, juveniles under the juvenile system would be "corrected," imbued with work habits, and made into productive, contributing members of society.[160]

The rehabilitative process was not to be postponed until the minor reached a correctional institution; it was to begin in the courtroom. The child was not to feel he was being dealt with as a criminal, but that the parent-state was taking him under its protective wing and guiding his future.[161] In order to achieve this impact on the child, the normal courtroom atmosphere would have to be altered. As Julian Mack wrote in 1909:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while

be able to waive the confidentiality of the hearing if a public trial is desired. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 186. For further discussion, see note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775, 794 (1966).

158. *In re* Gault, 387 U.S. 1, 15-16 (1967).
159. *Id.* at 15.
160. *Id.* at 15-16.
161. *Id.* at 15.

> losing none of his judicial dignity, will gain immensely in the effectiveness of his work.[162]

But the price exacted for this idealized courtroom atmosphere was to be high. The procedural protections guaranteed to adults would bring too much formality into the juvenile courtroom. Initially, neither the prosecuting attorney nor the minor's legal counsel was allowed into the juvenile court.[163] The child was not to have the fifth amendment protection against self-incrimination, since confession was deemed to be good for the child, and would aid in planning individualized treatment.[164] Confrontation and cross-examination of witnesses were not permitted.[165] Formal rules would be dispensed with in the interests of flexibility and informality.[166] A full-blown jury trial, of course, would destroy this informal atmosphere, increase the criminal tone of the proceedings, and place the child's fate in the outcome of the adversarial circus it was so important to avoid.[167] The reformers obviously had high hopes as to the amount of rehabilitation which could be accomplished in the courtroom. Nearly all of the constitutional safeguards which juveniles enjoyed when they were handled by the adult criminal system were sacrificed to achieve this air of informality.

The notion that the informality of juvenile proceedings is vital to the rehabilitative process is still very much alive today. It was basic to the United States Supreme Court's denial of the jury trial right in *McKeiver v. Pennsylvania*.[168] California cases reason similarly. In *In re Dennis M.*,[169] a Pennsylvania case[170] was cited with approval by the California court for the proposition that a jury trial would seriously limit the juvenile court's ability to function in a flexible and unique manner.[171] Although a jury trial was not at issue in *Dennis M.*, appellate courts have relied on the California Supreme Court's implication therein, that juries are not constitutionally required, to deny juveniles this right.[172] The courts reason that juries would add a strong tone of criminality to the proceedings, make it fully adversary, and overly formal.

These opinions make only perfunctory references to the impact of juries on formality. No court has examined the juvenile court to depict the

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162. Mack, *supra* note 2, at 120.
163. *In re* Gault, 387 U.S. 1, 10 (1967).
164. *Id.* at 50-51.
165. Simpson, *supra* note 3, at 987.
166. Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650, 657-59 (1972).
167. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971); *In re* Clarence B., 37 Cal. App. 3d 676, 679, 112 Cal. Rptr. 474, 475 (1974); *In re* Steven C., 9 Cal. App. 3d 255, 261, 88 Cal. Rptr. 97, 99 (1970); *In re* T.R.S., 1 Cal. App. 3d 178, 182, 81 Cal. Rptr. 574, 576 (1969).
168. 403 U.S. 528, 545 (1971).
169. 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).
170. Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967).
171. 70 Cal. 2d at 455-56, 450 P.2d at 302, 75 Cal. Rptr. at 7-8.
172. *In re* Clarence B., 37 Cal. App. 3d 676, 679, 112 Cal. Rptr. 474, 475 (1974); *In re* Steven C., 9 Cal. App. 3d 255, 261, 88 Cal. Rptr. 97, 99 (1970); *In re* T.R.S., 1 Cal. App. 3d 178, 182, 81 Cal. Rptr. 574, 576 (1969).

protected informal atmosphere. It would seem this much must be done before the state's interest in preserving it may be termed compelling, and this will now be attempted.

Even if the juvenile court was once an informal, friendly place, the changes since 1966 have had a severe impact on that characteristic. The United States Supreme Court cases alone have caused a serious erosion of informality. The requirement of a transfer hearing in *Kent v. United States*,[173] the requirement that the transfer hearing be held before a jurisdictional hearing in *Breed v. Jones*,[174] and the requirements of *In re Gault*:[175] a mandate of notice to the juvenile; extension of the self-incrimination right; and most particularly, the rights to counsel and to confront and cross-examine witnesses, have altered the flexibility and informality of the proceedings and added an adversarial tone.

From the youth's viewpoint, the proceedings appear both formal and fast; it is only the court officials who perceive them as being informal.[176] The proceedings in juvenile court are often arbitrary and summary. Hearings in Los Angeles in a year surveyed, for example, lasted only three minutes on the average.[177] It is difficult to comprehend how three minutes of informality will do much to rehabilitate an errant youth.

California has altered the juvenile court atmosphere to an even greater extent than required by the Supreme Court. As a result of recent legislative changes, the California juvenile court has lost the last vestiges of informality.[178] Welfare and Institutions Code Section 680 provides that except where there are contested issues of law or fact, the juvenile proceedings shall be in an informal, nonadversary atmosphere.[179] The existence of formalized rules would appear to work against the maintenance of flexibility and informality. However, in November 1976 the Judicial Council adopted a new set of juvenile court rules.[180] In addition to other changes, procedures were set out for granting immunity to witnesses,[181] for handling prehearing motions,[182] for establishing a factual basis for accepting admissions,[183] and the existing procedures for supplemental petitions and modifications were more clearly

173. 383 U.S. 541, 554 (1966).
174. 421 U.S. 519, 537-38 (1975).
175. 387 U.S. 1, 26-57 (1967).
176. TASK FORCE REPORT, *supra* note 7, at 10.
177. *Id.* at 94.
178. See text accompanying notes 179-195 *infra*.
179. CAL. WELF. & INST. CODE §680. The California Supreme Court has interpreted the legislative intent in adding the language "except where there is a contested issue of fact or law," to this statute as indicating a desire to tip the balance in the direction of the minor's due process rights and away from informality of procedure in contested cases. People v. Superior Court (Carl W.), 15 Cal. 3d 271, 279, 539 P.2d 807, 812, 124 Cal. Rptr. 47, 52 (1975). This is arguably a recognition that, in contested cases, informality is not a compelling interest.
180. Sacramento Press Journal, Nov. 22, 1976, at 1, col.4.
181. JUDICIAL COUNCIL OF CAL., PROPOSED JUVENILE COURT RULES, Rule 1342 (tent. adopt. 1976).
182. *Id.*, Rules 1341 and 1354(b).
183. *Id.*, Rules 1354 and 1364(d).

defined and established.[184] While the recognition by the Judicial Council of the need for uniformity and established procedure in the juvenile system is laudable, the written rules will inevitably impair the informality of the hearing.

The rules governing the admission and exclusion of evidence in juvenile court are also becoming more formalized. Before January 1, 1977, the only limitations placed on the admission of evidence in a juvenile court jurisdictional hearing were that the evidence be relevant.[185] AB 3121[186] changed that too. Previously the juvenile court judge was permitted to admit all relevant evidence, but a finding had to be based on evidence which would have been admissible in a criminal trial.[187] Now the rules of evidence, as determined by the Evidence Code and judicial decision, apply in full to the admission of evidence in a juvenile court.[188] The substantive impact of such a change may be meaningless since in the absence of a jury trial the judge is the sole trier of fact and he has probably been exposed to the evidence in ruling on its admissibility, but its collateral impact on the formality of the proceedings is apparent.

The most dramatic impact of recent legislation on the nature of the proceedings is the result of those provisions of AB 3121[189] which require the increased participation of the prosecuting attorney in juvenile court proceedings. Formerly, petitions alleging that the youth had committed a criminal act and, thus, was a person described by Welfare and Institutions Code Section 602 were initiated by a probation officer[190] whose decision not to prosecute was reviewable by the juvenile court.[191] With the enactment of AB 3121,[192] the ultimate decision to file a petition and prosecute is in the hands of the prosecuting attorney, and his discretion is not reviewable.[193] An even greater impact was made by the change which mandates that the prosecuting attorney represent the state in all proceedings under Welfare and Institutions Code Section 602. In the past, the law only permitted the district attorney to assist the probation officer in ascertaining and presenting the evidence, and then only with the consent or at the request of the juvenile court judge.[194] The new rule eliminates the probation officer from the proceedings and provides that in all hearings held pursuant to Section 602, the prosecuting attorney shall appear on behalf of the people of the State of California.[195]

184. *Id.*, Rules 1391-1393.
185. CAL. WELF. & INST. CODE §701 (amended 1976).
186. CAL. STATS. 1976, c. 1071, at —.
187. CAL. WELF. & INST. CODE §701 (amended 1976).
188. CAL. WELF. & INST. CODE §701, *as amended* CAL. STATS. 1976, c. 1071, §27, at—.
189. CAL. STATS. 1976, c. 1071, at —.
190. CAL. WELF. & INST. CODE §650 (amended 1976).
191. CAL. WELF. & INST. CODE §655 (amended 1976).
192. CAL. STATS. 1976, c. 1071, at —.
193. CAL. WELF. & INST. CODE §650, *as amended* CAL. STATS. 1976, c. 1071, §20, at —; CAL. WELF. & INST. CODE §655, *as amended* CAL. STATS. 1976, c. 1971, §23. at —.
194. CAL. WELF. & INST. CODE §681 (amended 1976).
195. CAL. WELF. & INST. CODE §681, *as amended* CAL. STATS. 1976, c. 1071, §26, at —.

With the child represented by one attorney, and the state represented by another, no valid claim can be made that the proceedings are non-adversarial. The impact of this change will certainly eliminate the last vestiges of informality from the juvenile court. One envisions both advocates arguing over some evidentiary rule while Julian Mack's idealized judge sits with his arm around the youthful felon's shoulder.

The recent legislative changes, together with those already instituted by the Supreme Court, are at odds with the concept of informality. There is little, save the presence of a jury, which would differentiate a criminal proceeding from a juvenile court hearing. What remains to be determined is whether the state can successfully characterize its interest in the remnants of informality as compelling.

The first step in that determination is to question the value of the informal atmosphere. Since an informal courtroom is only a part of an entire program of rehabilitation, the value of that informality must be measured in the light of the experiences and successes of the state's rehabilitative efforts. There is ample evidence that the entire program of rehabilitation has been fruitless.[196] The rehabilitative efforts certainly have not achieved the successes the reformers originally envisioned. Courtroom informality is only a small part of a rehabilitation program that appears not to be working.

The value of informality as a rehabilitative tool is also open to question. There is a considerable body of opinion that informality is not as therapeutic as originally assumed.[197] To the child and his parents, an informal court appears to be a confused and bewildering place with unpredictable operations.[198] The impact of informality on the youth may be precisely opposite to that intended: distrust may result from what appears to the youth to be an arbitrary proceeding.[199]

The formality that has been so cautiously avoided in juvenile proceedings may, in fact, be more therapeutic and rehabilitative than the traumatizing effects of an informal adjudicatory hearing at which the accused is deprived of basic rights.[200] Juveniles today are sufficiently informed so as to be aware

196. In *Gault*, the Court relied on a study which revealed that the recidivism rate in the District of Columbia was over 60 percent. *In re* Gault, 387 U.S. 1, 22 (1967). Pearl West, Director California Youth Authority, in a lecture at University of the Pacific, McGeorge School of Law, Sacramento, California, on Oct. 26, 1976 estimated the recidivism rate of Youth Authority wards to be between 44.2 percent and 44.7 percent. Such statistics may, of course, be misleading. Since there is no control group, one cannot judge how the recidivism rate would be affected if all efforts at rehabilitation were abandoned.

197. Handler, *supra* note 4, at 19; Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 695 (1966), *citing* Studt, *The Client's Image of the Juvenile Court*, in JUSTICE FOR THE CHILD 200 (Rosenheim ed. 1962); Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650, 689 (1972) wherein numerous authorities are cited.

198. Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L.REV. 694, 695 (1966), *citing* Studt, *The Client's Image of the Juvenile Court*, in JUSTICE FOR THE CHILD 200 (Rosenheim ed. 1962).

199. Handler, *supra* note 4, at 19.

200. Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650, 689 (1972) wherein numerous authorities are cited.

of those rights.[201]

It seems plausible that a child who expects a formal hearing when charged with violating a criminal statute is more likely to gain respect for the legal system if those expectations are met.[202] Denying the juvenile procedural rights in the name of informality and rehabilitation serves only to encourage his cynicism.

Juvenile hearings are divided into two phases. At the jurisdictional phase the court makes a determination as to whether the minor has violated the criminal law as alleged.[203] The dispositional phase follows. This phase is concerned with what should be the proper treatment for the youth.[204] The jury need only be present at the jurisdictional, or guilt- determining phase; if so, the impact of a jury trial on the court's rehabilitative efforts would be lessened. The all-important dispositional phase would remain unaffected. The judge would have all the flexibility required to fashion a disposition suitable to the needs of the youth. The Court in *Gault*[205] regarded both the dispositional and pre-trial phases as flexible and adaptive to the special needs of the juvenile, and carefully limited its procedureal requirements to the jurisdictional phase of the hearing.[206] The jury's role could be similarly limited.

The jury's presence will concededly alter the courtroom atmosphere. In evaluating the impact of that alteration, one must remember that the juvenile court has been evolving. Legislative and judicial changes have created an already highly formalized, highly adversarial juvenile court.[207] Lawyers now represent both the state and the youth, and formalized rules must be followed. The theory that informality has rehabilitative effects is questionable, and, even if the premise is accepted, such significant changes have already occurred in the juvenile court system that informality is no longer to be attained. With such considerations, the state interest in preserving the informality remaining cannot be termed compelling.

C. *Administrative Burden*

The final state interest served by denial of jury trials, fears of increased

201. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 SUPP. CT. REV. 167, 186. It is interesting to note that in McKeiver v. Pennsylvania, 403 U.S. at 546, the Court relied on the TASK FORCE REPORT, *supra* note 7, at 38, which quoted a 1957 article by Professor Paulsen. At that time Paulsen was opposed to jury trials because of the formality expected to Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 559 (1957). But, as the California Supreme Court observed in People v. Superior Court, 15 Cal. 3d 271, 282 n.15, 539 P.2d 807, 815 n. 15, 124 Cal. Rptr. 47, 55 n.15 (1975), Paulsen has altered his oft-quoted views.

202. *See generally* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 186; Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice,* 38 BROOKLYN L. REV. 651, 689 (1972).

203. CAL. WELF. & INST. CODE §701.

204. CAL. WELF. & INST. CODE §702.

205. 387 U.S. 1.

206. *Id.* at 13.

207. See text accompanying notes 173-195 supra.

administrative burdens, is a very practical consideration. It is feared that the cost of juries will be prohibitive and that empaneling a jury will cause delay. Many juvenile courts are overcrowded and understaffed.[208] The courts operate on a limited budget and fear any new program that will increase expenses. Additionally, many juvenile hearings are summary proceedings as a result of heavy caseload pressures.[209]

Fears of increased expense and a greater backlog of cases may be the unexpressed rationale behind the denial of jury trials to juveniles. The plurality opinion in *McKeiver v. Pennsylvania*[210] alluded to such possibilities,[211] but the dissent dealt with the argument more fully, and refuted it by citing the experiences of courts in Denver and Michigan. The Denver and Michigan juvenile courts allowed juries,[212] but suffered no great administrative burden as a result.[213]

The administrative burden argument has never surfaced in a California case. This is perhaps a testimony to the inappropriateness of such considerations when a constitutional right is at stake. Nevertheless, the potential fears of cost and delay must be allayed.

Eleven states provide a jury trial by statute;[214] four more require juries as the result of a judicial ruling.[215] From the experiences of these jurisdictions, the extent of any increased burden may be estimated. These states have not been overburdened as a result of allowing juveniles a jury trial option.[216]

208. Note, *The Supreme Court 1970 Term,* 85 HARV. L. REV. 38, 118 (1971), *citing* CHALLENGE, *supra* note 61, at 80.

209. Note, *The Supreme Court 1970 Term,* 85 HARV. L. REV. 38, 118 (1971), citing TASK FORCE REPORT, *supra* note 7, at 94.

210. 403 U.S. 528 (1971).

211. 403 U.S. at 550.

212. *Id.* at 565.

213. *Id.*

214. COLO. REV. STAT. §19-1-106 (1973); IND. STAT. ANN. §31-5-2-1 (Burns 1973); MICH. COMP. LAWS §712A.17 (1970); MONT. REV. CODES ANN. §10-1220 (1974); NEW MEXICO STAT. ANN. §13-14-28 (Supp. 1973); OKLA. STAT. ANN. 10 §1110 (West Supp. 1974-75); S.D.COMPILED LAWS ANN. §26-8-31 (1976); TEXAS CIV. STAT. ANN. art. 2338-1(13)(b) (Vernon 1971); W. VA. CODE §49-5-6 (1966); WYO. STAT §14-115.24 (Supp. 1975).

215. John Doe v. State, 487 P.2d 47 (Alaska 1971) and, R.L.R. v. State, 487 P.2d 27 (Alaska 1971); State *ex rel.* Shaw v. Breon, 244 Iowa 49, 55 N.W.2d 565 (1952); State v. Jackson, 503 S.W.2d 185 (Tenn. 1973); Arwood v. State, 62 Tenn. App. 453, 463 S.W. 2d 943 (1970); *see Ex parte* State *ex rel.* Simpson, 288 Ala. 535, 263 So.2d 137 (1972) (advisory jury only).

216. In 1970, in anticipation of the Supreme Court's decision in *McKeiver*, the National Juvenile Law Center surveyed forty-four courts in eleven jurisdictions which authorized jury trials. Eleven of the forty-four had never had a jury trial, and of the remaining courts, only five had more than five jury trials in the preceeding two years. In the jurisdiction having the greatest experience with jury trials, the District of Columbia, the number of jury trials had never exceeded 2 percent of the total number of cases heard. The chief reason so few juries are required is that in most cases the juvenile confesses, or there are no real factual issues in dispute.

All courts surveyed which had actually conducted a jury trial agreed that juries created no backlog on the juvenile court docket. Also, the jury trial did not generally result in longer periods of pre-trial detention, so that the impact of a delay on rehabilitation was minimal.

Other surveys have produced similar results. The one exception appears to be the experiences of the District of Columbia. Congress repealed the juvenile's right to jury trial in the District of Columbia in order to alleviate the backlog which had developed. This action is contradicted by the specific finding in the above mentioned survey as to the number of jury trials actually conducted there and suggests that other factors might have been responsible for the delays. Burch & Knaupp, *The Impact of Jury Trial Upon the Administration of Juvenile Justice*, 4 CLEARINGHOUSE REV. 345 (1970).

The available data suggest that the impact of granting jury trials to juveniles upon court administration would not be great. Still, some increase in cost may be expected, and some backlog may result. The Supreme Court has suggested, however, that considerations of cost and delay are inappropriate when dealing with constitutional rights:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.[217]

The unexpressed fears of increased administrative burdens remain unsubstantiated. It is unlikely that great expense or delay will result, and to the degree that the jury will burden the system, the price cannot be said to be too high for a fundamental right. The state interest in economy and efficiency is likewise not compelling.

D. The State has no Compelling Interest in Denying Jury Trials to Juveniles

The interests the state may be expected to advance in support of the denial of the fundamental jury trial right to juveniles have been examined. The interest in confidentiality is a valid concern, but a criminal stigma results from a juvenile adjudication despite the state's efforts to prevent it, and the negative impact of juries on confidentiality can be easily minimized by swearing jurors to secrecy. Informality is perhaps not such a valid goal. Informal hearings may convey to the youth the idea that the state thinks his fate is unimportant, and work counter to rehabilitative efforts. Even if we accept the goal of informality as valid, it seems incapable of achievement in light of the legislative and judicial changes which have taken place. The extra cost and delay incurred is an inappropriate consideration when constitutional rights are involved, and, judging from the experiences of sister states, is unlikely to be of great impact.

The classification of offenders on the basis of age may make sense for the purpose of determining the treatment they should be afforded (rehabilitation or punishment). However, age classification, used as the basis for denial of the jury trial right, is not supported by compelling reasons when the purpose of the hearing is the determination of whether or not the accused committed a crime. The classification will not withstand the strict scrutiny required by an equal protection analysis.

BENEFITS OF A JURY TRIAL

Juries bring an element of the community into the courtroom. It is this

217. Reid v. Covert, 354 U.S. 1, 14 (1957).

public participation in the judicial process that may be expected to temper the legal mind with a healthy dosage of common sense and human emotion.[218] Trial by jury is less likely to involve rigid legalistic determinations, and more likely to reflect current social mores.[219] Juries are less apt to enforce harsh and unjust laws. They will make findings of fact that will achieve a just result and disregard an outdated legal concept sooner than would a judge.

While these benefits are substantial, they are in reality, merely collateral. The concept of a jury trial was not the work of some social theoretician, it was born from distrust and fear.[220] After tracing the history of the jury trial, the United States Supreme Court in *Duncan v. Louisiana*[221] explained the underlying rationale:

> The guarantee of jury trial in the Federal and state Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgement of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[222]

Initially it was felt that juveniles were unlikely to be the victims of the type of judicial abuses which the jury system was designed to correct.[223] The reformers' image of the juvenile court judge was of a paternalistic figure whose interests centered at all times on what was best for the errant youth.[224] The ideal judge was part social worker, part philanthropist, part lawyer, and wholly devoted to helping children.[225] It was thought unlikely that political

218. Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873).
219. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
220. *Id.* at 155-156.
221. 391 U.S. 145 (1968).
222. *Id.* at 155-156.
223. Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 559 (1952).
224. *See In re* Gault, 387 U.S. 1, 24-25 (1967).
225. Mack, *supra* note 2, at 119.

pressures would be brought to bear against the accused juvenile, and, if they should, it was believed that such a judge would not be susceptible.

History tells a different story. Juvenile court judges, like their adult court counterparts, are not immune from political influence.[226] The *McKeiver* Court recognized that the superhuman judges originally envisioned have not evolved: "Too often the juvenile court judge falls far short of that stalwart, protective and communicating figure the system envisaged."[227] The special experience necessary to understanding the social and psychological factors involved is often lacking in politically appointed judges.[228] Indeed, sometimes even legal training is absent. In California it is possible the minor's case will be handled by a referee rather than a judge. The referee's qualifications may be considerably lower than those required of a judge.[229]

History has shown that juvenile courts are susceptible to the political and discriminatory abuses which the framers of the constitution feared would corrupt the adult criminal system.[230] The judicial officers who preside over the juvenile court have at times been incapable of resisting such external political pressures.[231] They cannot be expected to measure up to the qualifications originally envisaged, and sometimes lack even the minimal skills their jobs require.[232] The threat of judicial abuse in the juvenile court is real, and juries can be expected to buffer that problem. As the *Gault*[233] Court stated, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[234]

The shortcomings of judicial factfinding cannot be cured by resort to the appellate system. The juvenile court judge alone decides issues of credibility. No appeal lies from disbelief. Nor can purely arbitrary decisions ordinarily be overturned. The test on appeal is not "proof beyond a reasonable doubt," but whether "substantial evidence supports the conclusion of

226. Juveniles who had participated in civil rights demonstrations in the South were threatened with imprisonment and, as a condition of exoneration or release, were forced to promise that they would not participate in future civil rights activities. Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 707-708 (1966), *quoting* U.S. COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH 80-83 (1965). It has also been charged that California courts have become politicized. Smith, *Jury Trials, The Juvenile Court and the California Constitution: From Specious Acorns Grow Trees of Injustice,* 50 L.A.BAR BULL. 142, 148 (1975).

227. McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971). In a footnote the Court referred to a study reported in TASK FORCE REPORT *supra* note 7, at 7, revealing that half the juvenile court judges lacked undergraduate degrees, a fifth had received no college education at all, and a fifth were not members of the bar. 403 U.S., at 544 n.4.

228. Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 701 (1966).

229. *See* Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3, 6-7 (1967-68).

230. See note 226 *supra*.

231. *Id.*

232. *See* Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3, 6-7 (1967-68).

233. 387 U.S. 1.

234. *Id.* at 18.

the trier of fact."[235] It would seem that only the most blatant abuses will fail to meet this looser standard.

The jury may give more careful consideration to each case than would a judge who has seen similar cases countless times before.[236] The jury will introduce an atmosphere of fairness into the juvenile court and thus may enhance the youthful offender's rehabilitation. Finally, the very possibility that a jury may be convened will force judges to give more careful consideration to their cases, since the slightest suspicion of prejudice by either side will bring an end to jury waivers and an unmanageable workload on the courts.[237]

CONCLUSION

A complete equal protection argument, such as that suggested by this comment, has never been advanced in an attempt to secure jury trials for juveniles accused of committing a crime. The state has never been forced to subject its rationale for denying juveniles a jury trial to strict scrutiny. That scrutiny would be increased if the "ideal" juvenile could be found to attack the jury trial denial.

The minor in *People v. Superior Court*,[238] Carl W., was a good example of the type of juvenile possessing characteristics which would best counter the state's arguments. The court held that the empaneling of an advisory jury in that case was within the judge's discretion since the benefits to be expected outweighed the interests in confidentiality and informality.[239] Carl W. had been the subject of much prehearing publicity in which his name had been used,[240] so his interest in confidentiality was minimal. The charges against him were of a serious nature (murder), and the factfinding was expected to be difficult since as many as forty witnesses were expected to be called and the people's case was based largely on circumstantial evidence.[241] In deciding that an advisory jury was within the trial court's discretion, the court weighed the difficulty of the factfinding task and the seriousness of the charges against the extent to which the salutary effects of an informal hearing remained possible.[242]

When the California Supreme Court is faced with a minor's demand for a jury trial as a matter of right, it is to be expected it will find these same factors relevant. In *People v. Superior Court* the court declined to consider

235. People v. Reyes, 12 Cal. 3d 486, 497, 526 P.2d 225, 231, 116 Cal. Rptr. 217, 223 (1974); *In re* Roderick P., 7 Cal. 3d 801, 500 P.2d 1, 5, 103 Cal. Rptr. 425, 429 (1972).
236. H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 8 (1966).
237. Smith, *Jury Trials, The Juvenile Court and the California Constitution: From Specious Acorns Grow Trees of Injustice,* 50 L.A. BAR BULL. 142, 150 (1975).
238. 15 Cal. 3d 271, 539 P.2d 807, 124 Cal. Rptr. 47 (1975).
239. *Id.* at 284, 539 P.2d at 816, 124 Cal. Rptr. at 56.
240. *Id.*
241. *Id.* at 284, 539 P.2d at 815-16, 124 Cal. Rptr. at 55-56.
242. *Id.* at 284-285, 539 P.2d at 816, 124 Cal. Rptr. at 56.

the issue of jury trial by right, stating: "Our function, however, is not to discuss the law as it may be in the future."[243]

The California Supreme Court should be given an opportunity to engage in that discussion. The jury trial right is fundamental. The high court cannot, on the one hand, deny the close kinship of juvenile hearings to criminal trials in order to deny access to the right stemming from the state or federal constitution, without, on the other hand, conceding the validity of a claim to the statutory civil committment jury trial right. Alternatively, the court may choose to recognize that juveniles were meant to be guaranteed the right under the California Constitution.

The state must bear the burden of proving its interests are compelling. While the goals of confidentiality and informality are well meant, confidentiality has not been achieved and informality no longer exists. Fears of administrative burdens are an inappropriate justification, and have not been substantiated by the experiences of other states. Finally, the jury provides a valuable protection which is needed in juvenile courts.

The constitutional analysis is complete, the right denied is fundamental, and no compelling state interests can be advanced in support of its denial. The invidious classification which denies a fundamental right to juveniles should fall.

W. J. Keegan

243. *Id.* at 282, 539 P.2d at 815, 124 Cal. Rptr. at 55.