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Burden of Proof in Juvenile Proceedings, The

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attempt to analyze per se violations which are not per se illegal, two commentators have been prompted to lament: "We would . . . like to register a plea for more readily comprehensible court decisions."[44]

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The Burden of Proof in Juvenile Proceedings

George Santana, fourteen, was tried for rape in juvenile court, The jury, by a preponderance of the evidence, found that George Santana had committed the act of rape and was a delinquent child.[1] The court of civil appeals reversed, holding that under *In re Gault*[2] delinquency must be proved beyond a reasonable doubt.[3] *Held, reversed*: In a juvenile proceeding, due process does not require that the delinquency of the juvenile be proved beyond a reasonable doubt. *State v. Santana*, 444 S.W.2d 614 (Tex. 1969).

I. Criminal Versus Civil Burdens of Proof

In all American jurisdictions criminal guilt must be proved beyond a reasonable doubt.[4] This rule is based upon the Anglo-American concept of personal liberty as a most important element in a free society.[5] Because the consequences of a criminal conviction are so severe, resulting in damage to reputation, future livelihood, career, and loss of liberty or life,[6]

[44] Baldwin & McFarland, *Some Observations on "Per Se" and Tying Arrangements*, 6 ANTITRUST BULL. 433 (1961).

[1] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964):

> The term 'delinquent child' means any female person over the age of ten (10) years and under the age of eighteen (18) years and any male person over the age of ten (10) years and under the age of seventeen (17) years:
> (a) who violates any penal law of this state of the grade of felony;
> (b) or who violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense may be by confinement in jail;
> (c) or who habitually violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense is by pecuniary fine only;
> (d) or who habitually violates any penal ordinance of a political subdivision of this state;
> (e) or who habitually violates a compulsory school attendance law of this state;
> (f) or who habitually so deports himself as to injure or endanger the morals or health of himself or others;
> (g) or who habitually associates with vicious and immoral persons.

[2] 387 U.S. 1 (1967).

[3] Santana v. State, 431 S.W.2d 558 (Tex. Civ. App. 1968).

[4] For a comprehensive list of cases, see H. UNDERHILL, CRIMINAL EVIDENCE § 51 (4th ed. 1935).

[5] F. JAMES, CIVIL PROCEDURE § 7.6, at 251 (1965). *See also* Spieser v. Randall, 357 U.S. 513, 525-26 (1958). The reasonable doubt standard seems to have had its origin no earlier than the latter part of the eighteenth century. At first it was applied only in capital cases, but there was no "fixed phrase" of "beyond reasonable doubt." "A clear impression," "upon clear grounds," and "satisfied" are the earlier phrases, and then "rational doubt" came into use. J. WIGMORE, EVIDENCE § 2497, at 317 (1940). The phrase first appeared in the high-treason cases tried in Dublin in 1798. May, *Some Rules of Evidence*, 10 AM. L. REV. 642, 658 (1876). The rule was enlarged upon by Starkie in 1824, when the reaction in the public mind against the atrocities of the penal code was at its height. The result of the evidence must be proved to the "exclusion of all reasonable doubt." 1 T. STARKIE, LAW OF EVIDENCE 477 (1837).

[6] H. UNDERHILL, CRIMINAL EVIDENCE § 7 (4th ed. 1935).

a heavy burden of proof has been imposed upon the prosecution.[7]

Various efforts have been made to define "beyond a reasonable doubt." One that has been quoted many times is the statement made by Chief Justice Shaw of Massachusetts in *Commonwealth v. Webster*:[8] "[T]he evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment."[9] Definitions differ from jurisdiction to jurisdiction, but all convey basically the same idea.[10]

The typical burden of proof standard for civil cases is by a preponderance of the evidence. The "extreme caution and the unusual positiveness of persuasion"[11] demanded in criminal trials is not required. The difference between the two standards cannot be reduced to a mathematical formula, but the reasonable doubt requirement is considered to be the more conclusive standard. The reasonable doubt test impresses upon the trier of fact the necessity of reaching a decision which is free of any suspicions, while the preponderance of the evidence test allows doubts to exist in the mind of the trier of the fact, and merely asks the trier to weigh the evidence and to support the side which best convinced his mind of the truth of the matter.[12]

In Texas, the standard of proof in a juvenile proceeding has been that delinquency need be proved only by a preponderance of the evidence.[13] The reason for the utilization of this typically civil test is that jurisdiction over juvenile offenders has been transferred from criminal courts to civil courts,[14] and therefore civil rules of procedure are applied.[15]

II. In re Gault and the Burden of Proof

In re Gault[16] afforded the United States Supreme Court an opportunity to take a hard look at the juvenile court system. The court recognized that being adjudged a juvenile delinquent creates a stigma only slightly less than that of a criminal, and that the so-called benefits of secret proceedings are "more rhetoric than reality."[17] Information concerning these proceedings is often furnished to the military, the Federal Bureau of Investigation, government agencies, and "even to private employers."[18] Moreover, when a child is committed to an institution, whether it is called a

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[7] 30 Am. Jur. 2d *Evidence* § 1170 (1967).

[8] 5 Cush. 295 (Mass. 1850). *See also* Commonwealth v. Costley, 118 Mass. 1 (1875).

[9] 5 Cush. at 320.

[10] J. Wigmore, Evidence § 2497, at 317 (1940).

[11] *Id.* § 2498, at 325.

[12] F. James, Civil Procedure § 7.6 (1965).

[13] State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948), *error ref. n.r.e.*; Cantu v. State, 207 S.W.2d 901 (Tex. Civ. App. 1948); Robinson v. State, 204 S.W.2d 981 (Tex. Civ. App. 1947).

[14] Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 1 (1964).

[15] State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955); Steed v. State, 143 Tex. 82, 183 S.W.2d 458 (1944); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

[16] 387 U.S. 1 (1967).

[17] *Id.* at 24.

[18] *Id.*, citing Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775, 784-85 (1966), and National Crime Commission Report 87-88 (1966). *See also* Ketcham, *The Unfilled Promise of the Juvenile Court*, 7 Crime & Delin. 97, 102-03 (1961).

"reform school," "receiving home," or an "industrial school," it is confinement very similar to an adult prison.[19] Both juveniles and adults are confined for long periods of time and their companions are inmates whose crimes range up to murder. Furthermore, juvenile commitment is indefinite in nature and may exceed the maximum penalty that could be assessed an adult convicted of the same offense. For these reasons the informal procedure in juvenile court that was meant to remove the criminal taint from the proceedings was held to be violative of due process.[20] Specifically, the Court found that Gault's right to due process had been infringed by failure to accord him: (1) notice of charges; (2) counsel; (3) privilege against self-incrimination; and (4) the opportunity for cross-examination and confrontation.[21] The Court observed, "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[22]

Notwithstanding the breadth of the opinion, confusion has arisen over the extent of the protection determined in *Gault*. One of the points of controversy is the appropriate burden of proof. The Supreme Court did not expressly hold that the burden of proof should be beyond a reasonable doubt as in adult criminal trials, but it did hold that certain fundamental rights cannot be denied to juveniles. Consequently, some jurisdictions have found the higher burden of proof to be one of those rights, and thus impliedly required by *Gault*.[23] A greater number, however, have continued to follow the pre-*Gault* standard, holding that since it was not expressly decided by the Court, the greater standard is not constitutionally required.[24]

Preponderance of the Evidence Rule. The Court of Appeals for the District of Columbia has consistently adhered to the civil rule.[25] The court has held that the application of the "strictly criminal law concept of guilt beyond a reasonable doubt" to juvenile proceedings "would be both unnecessary and improper."[26] This is apparently because such a standard runs counter to the congressional establishment of a "professionally staffed, specialized court, equipped with broad powers to implement the rehabilitative purposes of the Juvenile Court Act."[27]

In *State v. Arenas*[28] the Oregon supreme court also held that the beyond a reasonable doubt standard was not required by *Gault*. The court

[19] *In re* Gault, 387 U.S. 1, 27 (1967).
[20] *Id.* at 30, citing Kent v. United States, 383 U.S. 541, 563 (1966).
[21] 387 U.S. at 10.
[22] *Id.* at 18.
[23] United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968); *In re* Urbasek, 232 N.E.2d 716 (Ill. 1968); De Backer v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968).
[24] *In re* M., 450 P.2d 296, 75 Cal. Rptr. 1 (1969); W. v. Family Court, 247 N.E.2d 253 (N.Y. 1969); State v. Arenas, 453 P.2d 915 (Ore. 1969); *In re* Ellis, 253 A.2d 789 (D.C. Mun. Ct. App. 1969).
[25] *In re* Ellis, 253 A.2d 789 (D.C. Mun. Ct. App. 1969); *In re* Wylie, 231 A.2d 81 (D.C. Mun. Ct. App. 1966); *In re* Bigesby, 202 A.2d 785 (D.C. Mun. Ct. App. 1964).
[26] *In re* Bigesby, 202 A.2d 785, 786 (D.C. Mun. Ct. App. 1964).
[27] *In re* Ellis, 253 A.2d 789, 791 (D.C. Mun. Ct. App. 1969), citing Creek v. State, 379 F.2d 106 (D.C. Cir. 1967).
[28] 453 P.2d 915 (Ore. 1969).

agreed that although the right to be found guilty beyond a reasonable doubt is not specifically stated in either the Oregon or the United States Constitution, "such right is one inherent in the Due Process Clause of both constitutions."[29] However, the court did not hold that this right should be extended to the juvenile, because such a decision would make it difficult to administer the juvenile system. It recognized that certain juvenile court procedures were valid subjects of criticism, but felt that "[i]t would be a serious error of judicial policy . . . to raise all aspects of such criticism to the immutable stature of constitutional deficiencies."[30]

Further reasons for retaining the preponderance of the evidence standard were furnished by the New York court of appeals in *W. v. Family Court.*[31] In New York the standard is expressly stated by statute and the court found that "the delinquency status is not made a crime; and the proceedings are not criminal."[32] The court apparently reasoned that the benefits of the statute far outweigh the detriments, and that since the statute labels the proceedings as civil, then only a civil standard of proof is required.[33]

The Supreme Court of California in *In re M.*[34] also held that *Gault* did not require the application of the beyond a reasonable doubt standard in juvenile proceedings. The court rejected the higher standard because it would "introduce a strong tone of criminality into the proceedings"[35] and would thus defeat the object of the juvenile system. Therefore, it found that this higher standard would be inappropriate in a juvenile court where "the proceedings are . . . conducted for the protection and benefit of the youth . . . ."[36]

Beyond a Reasonable Doubt Rule. The Supreme Court of Illinois adopted the criminal rule in *In re Urbasek.*[37] The court argued that "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 . . . ."[38] The court determined that it would not be consistent with due process and equal protection to provide two sets of rules based on age when the end result for both is the same.

In *United States v. Costanzo*[39] the United States Court of Appeals for the Fourth Circuit held that "a federal juvenile proceeding which may lead to institutional commitment must be regarded as 'criminal' . . . . No

[29] *Id.* at 917.
[30] *Id.* at 915-20.
[31] 247 N.E.2d 253 (N.Y. 1969).
[32] *Id.* at 257.
[33] *Id.*
[34] 450 P.2d 296, 75 Cal. Rptr. 1 (1969).
[35] 450 P.2d at 302-03.
[36] *Id.* at 303.
[37] 232 N.E.2d 716 (Ill. 1968).
[38] *Id.* at 719.
[39] 395 F.2d 441 (4th Cir. 1968).

verbal manipulation . . . can convert a four-year commitment following conviction into a civil proceeding."[40] The court concluded that a high degree of proof ranks as high as any other protection.[41]

In *De Backer v. Brainard*[42] four of the seven justices of the Nebraska supreme court felt that delinquency must be proved beyond a reasonable doubt and that the Nebraska statute[43] was unconstitutional. The apparent rationale of the court was that a proceeding which may result in institutional commitment is criminal rather than civil in nature. Therefore, the court decided that juvenile proceedings "are at least sufficiently criminal in nature that the constitutional rights involving due process in criminal cases must be applied."[44] However, because of a peculiarity of the Nebraska Constitution,[45] the statute prescribing the preponderance of the evidence standard is still in effect even though the majority of the court held it to be unconstitutional.

Summary. The jurisdictions which have considered the issue subsequent to *Gault* and follow the preponderance of the evidence rule seem to have based their conclusions on the grounds that: (1) a higher standard of proof would create difficulties in the administration of the juvenile system's objectives; (2) juvenile proceedings are civil in nature and not criminal; and (3) *Gault* did not specifically require the higher standard. Conversely, the courts, which have adopted the beyond a reasonable doubt rule contend that if the proceeding can result in commitment, it is criminal in nature. Furthermore, although *Gault* did not expressly enumerate this standard as being constitutionally required, the full scope of the opinion sufficiently implies and justifies reaching the conclusion.

III. Who Gets the Benefit of the Doubt: Juvenile or State?

In *State v. Santana*[46] the Supreme Court of Texas declined to adopt the higher standard of proof. In reaching this decision the court reasoned from *Gault* that: (1) the Texas juvenile system is being properly administered and does not deny the juvenile his constitutional rights; (2) the Supreme Court in *Gault* did not find juvenile proceedings to be criminal or civil but *sui generis*; and (3) *Gault* did not expressly decide the burden of proof issue.

The Texas court contended that the Texas juvenile system is being properly administered and is not one of the jurisdictions criticized by the *Gault* Court. It pointed out that in a delinquency proceeding the juvenile is afforded all of the procedural safeguards specifically enumerated in *Gault* while still applying civil rules of procedure.[47] Furthermore, Texas goes

[40] *Id.* at 444.
[41] *Id.*
[42] 183 Neb. 461, 161 N.W.2d 508 (1968).
[43] Neb. Rev. Stat. art. 2, § 43-206.03 (Supp. 1967).
[44] 183 Neb. 461, 466, 161 N.W.2d 508, 511 (1968).
[45] Neb. Const. art. 5, § 2, requires a concurrence of five justices to hold a statute unconstitutional.
[46] 444 S.W.2d 614 (Tex. 1969).
[47] Johnson v. State, 401 S.W.2d 298 (Tex. Civ. App. 1966), Renya v. State, 206 S.W.2d 651

further than most states by making a jury trial available.[48] Therefore, Texas is in full compliance with the due process standards of *Gault*. However, this reasoning does not resolve the burden of proof issue. The Texas system may be laudable when compared to other states, but this does not obviate the necessity of requiring the higher standard of proof, if due process so demands.

The Supreme Court of Texas reasoned that *Gault* "declined to announce that [juvenile proceedings] were either criminal or civil courts, rather recognizing that they were *sui generis*."[49] Thus, *Gault* only requires that the appropriate rules to be applied in the proceedings are those that guarantee fundamental fairness. But, the Texas court apparently did not consider the higher burden of proof to be required by fundamental fairness.

The Texas court also relied heavily on the fact that the Court in *Gault* did not expressly pass upon the burden of proof issue.[50] Even though *Gault* did not expressly enumerate the reasonable doubt standard as a requirement in a juvenile hearing, it did list certain rights which heretofore were applicable only to adult criminal trials. In requiring recognition of these rights for juvenile proceedings the Court said, "The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[51] The beyond a reasonable doubt standard is an established principle of due process for criminal trials.[52] As a principle of due process the *Gault* decision may be requiring that it too should be extended to the juvenile proceeding, since this hearing may result in commitment, and as the Court pointed out, imprisonment is criminal in nature regardless of the label placed upon the proceeding.

Significantly, the facts in *Santana* were not as extreme as in *Gault*. In *Santana* the maximum detention for a minor convicted of rape was seven years.[53] In the case of an adult the maximum punishment is death or life imprisonment.[54] In *Gault* the offense was making obscene phone calls. The penalty for such an offense was a maximum of six years detention for the

(Tex. Civ. App. 1947) (notice of charges); Lazaros v. State, 228 S.W.2d 972 (Tex. Civ. App. 1950), Ballard v. State, 192 S.W.2d 329 (Tex. Civ. App. 1946) (right to cross-examination and confrontation); Dudley v. State, 219 S.W.2d 574 (Tex. Civ. App. 1949), *error ref.* (right to counsel); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944) (right against self-incrimination).

[48] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964).

[49] 444 S.W.2d 614, 617 (Tex. 1969).

[50] *In re* Gault, 387 U.S. 1, 10-11 (1967): "We emphasize that we indicate no opinion as to whether the decision of that court (Arizona Supreme Court) with respect to such other issues (including beyond a reasonable doubt) does or does not conflict with requirements of the Federal Constitution."

[51] *Id.* at 18-19.

[52] Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

[53] TEX. PEN. CODE ANN. art. 1188 (1961): "One under age of fourteen at time the offense was committed cannot be convicted of rape or assault with intent to rape." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13(2) (1964): The court may order commitment "not extending beyond the time the child shall reach the age of twenty-one (21) years." This has been changed by TEX. PEN. CODE ANN. art. 30 (1967): "Section 1. No person may be convicted of any offense, except perjury, which was committed before he was 15 years of age . . . ."

[54] TEX. PEN. CODE ANN. art. 1189 (1961): "A person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five."

juvenile, but only a fine of $50 and two months in jail for the adult.[55] The unfairness of punishment was obvious in *Gault*, but the Supreme Court did not base its decision on the extreme facts. It was more concerned with the due process safeguards which were being denied the juvenile during the adjudicatory stage.

IV. Conclusion

The higher standard of proof need not create rigidity in the procedure, but would help make conclusive the decision that the youth was a delinquent and needed "treatment." The supreme courts of California and Oregon, cited in the *Santana* opinion, both stated that "the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system."[56] Texas allows a jury trial upon request in juvenile cases, but it does not provide this higher standard of proof.

Certainly, it is the concern of the juvenile court, as well as the criminal court, to protect against incorrect adjudications of guilt. The *Gault* decision enumerated requirements which mitigate against erroneous adjudications. The beyond a reasonable doubt standard also reduces the margin of error in determining guilt. *Gault* may not require the juvenile hearing to incorporate all of the rights enjoyed by the adult under due process, but it is apparent that there are certain fundamental rights which are essential to the fair administration of justice. Due to the controlling effect it may have on a hearing, a high burden of proof ranks high as a due process safeguard. If the juvenile courts could show results which would justify their flexible proceedings, then due process might have a double meaning for the minor and the adult, but as they exist today juvenile court objectives cannot justify an adjudication of delinquency on less evidence than necessary to find an adult guilty of a criminal offense. The direction of the juvenile courts on this issue could be determined by the United States Supreme Court in *In re Winship*.[57] The burden of proof question is the main issue in this New York case. The Supreme Court has noted probable jurisdiction,[58] but it may refrain from answering the question as it has in the past.[59] If it does settle this troubling point, for the best interests of the child and the state, the juvenile should be given the benefit of the doubt.

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[55] 387 U.S. 1 (1967).

[56] State v. Santana, 444 S.W.2d 614, 621 (Tex. 1969), citing *In re* M., 450 P.2d 296, 302, 75 Cal. Rptr. 1, 7 (1969); State v. Arenas, 453 P.2d 915, 919 (Ore. 1969).

[57] W. v. Family Court, 247 N.E.2d 253 (N.Y. 1969).

[58] *In re* Winship, 38 U.S.L.W. 3153 (U.S. Oct. 28, 1969).

[59] De Backer v. Brainard, 38 U.S.L.W. 4001 (U.S. Nov. 12, 1969); *In re* Whittington, 391 U.S. 341 (1968); *In re* Gault, 387 U.S. 1 (1967).