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When is a Criminal Trial Not a Criminal Trial? - The Case Against Jury Trials in Juvenile Court

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WHEN IS A CRIMINAL TRIAL NOT A CRIMINAL TRIAL?—THE CASE AGAINST JURY TRIALS IN JUVENILE COURT*

In May 1968, a juvenile delinquency petition charged appellant Joseph McKeiver, then 16 years of age, with robbery, larceny and receiving stolen goods.[1] At the time of the hearing McKeiver was represented by counsel[2] and requested a trial by jury. The request was denied, and upon the findings made by the Juvenile Court of Philadelphia that he had violated a law of the Commonwealth, McKeiver was adjudicated a juvenile delinquent.[3] On appeal the Superior Court affirmed without opinion.[4] The Supreme Court of Pennsylvania granted leave to appeal, and affirmed the lower court holdings that juveniles did not have a constitutional right to a jury trial in proceedings in which they were

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1 These offenses are felonies under Pennsylvania law. Pa. STAT. ANN tit. 18, §§ 4704, 4807, 4817 (1963).

2 At the hearing, McKiever's counsel stated that he had never seen McKeiver before and was in the midst of his first interview with him (despite the fact that counsel's office had been appointed five months earlier). Counsel was allowed five minutes for the interview.

3 The evidence at the hearing seemed rather weak and contradictory. The Commonwealth's evidence consisted mainly of the testimony of two of the three alleged victims who were robbed by a group of twenty to thirty youths. After being robbed the boys were taken to a park guard station by a passing motorist. After several minutes of preliminary questioning the boys were placed in a patrol car which cruised the area for a few short minutes when the victims spotted someone they thought was the boy who robbed them—the boy was Joseph McKeiver.

One boy described the robbery as a gang effort while the other testified that the thief acted alone. Both victims stated that the robber did not wear glasses, McKeiver has worn glasses since childhood. One who also testified that the robber gave his bicycle away also said that the robber rode a bicycle away from the robbery. The victims said that the robber rode a bicycle throughout the event, *yet* one stated he identified McKeiver by his characteristic walk.

4 *In re* McKeiver, 215 Pa. Super. 760, 255 A.2d 921 (1969).

adjudicated delinquents upon findings that they had violated a law of the Commonwealth.[5] On appeal the United States Supreme Court was faced with the narrow issue whether the due process clause of the fourteenth amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding. By answering this question in the negative the Court upheld the rulings of the lower courts and seemingly ended, at least for the present, the recent trend toward further expansion of juvenile rights.[6]

Development of the Issue

The issue presented by *McKeiver* and its companion cases has been very much in the public eye in recent years as one aspect of the overall problem of youth crime and juvenile justice. So significant were the facts concerning crime among this country's youngsters that the President's Commission stated that "America's best hope for reducing crime is to reduce juvenile delinquency and youth crime."[7] Despite the fact that the problem is receiving such great attention from the courts, it is by no means a new problem. The history of juvenile justice is a history of paradoxes and dilemmas.[8] Society has generally been torn between treating youthful offenders either as wayward children who must be rehabilitated or as criminals who must be punished.

Early English criminal law established a rebuttable presumption that any offender over the age of seven but under the age of fourteen was incapable of distinguishing between right and wrong. Any offender over fourteen was treated as an adult.[9] This prac-

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[5] *In re* McKeiver, 438 Pa. 339, 265 A.2d 350 (1970).

[6] 403 U.S. 528 (1971). It is necessary to note that in this decision the Supreme Court disposed of *McKeiver* as well as two other appeals. *In re* Terry 215 Pa. Super. 760, 255 A.2d 921 (1969) had been consolidated with *McKiever* by the Pennsylvania Supreme Court. *In re* Burrus 275 N.C. 517, 169 S.E.2d 879 (1969), was a case on writ of certiorari to the Supreme Court of North Carolina. For the purposes of this paper it will suffice that the reader be aware that all three cases presented the identical issue; *i.e.*, whether the due process clause of the fourteenth amendment assures the right to trial by jury in the adjudicative phase of a state juvenile deliquency proceeding.

[7] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967) [hereinafter CRIME IN A FREE SOCIETY]. It is difficult to draw a clear picture of the scope of juvenile delinquency on a national level. The statistics drawn by *Crime in a Free Society* etch the rough outline of the growing problem. The group of children ranging in age from 11 to 17 years old while representing 13.2% of the population are responsible for *half* the arrests for serious property crimes such as burglary, larceny and motor vehicle theft. The arrest rate for these crimes is higher for the 15 to17-year-old group than it is for any other age group in society.

It should also be observed that the trend is not indicative of a decrease. On the contrary, in the five years between 1960 and 1965, arrests of persons under 18 years of age was up 52% for such violent crimes as willful homicide, rape, robbery, aggravated assault, larceny and burglary. The increment in arrests for the entire population over 18 was less than half that at 20%. For a further consideration of the paramount importance of this problem see also Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167 [hereinafter *The Constitutional Context*].

[8] *See generally* FOX, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

[9] W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 125 (5th ed. 1952).

tice was carried to the United States. The juvenile was entitled to the same constitutional protections assured to his elders, but he was traumatized by the criminal hearing and subsequent incarceration with murderers, rapists and thieves. Such a system of justice (if we can apply the word to such proceedings) was far from rehabilitating.

In 1899 the first Juvenile Court Statute[10] was adopted in Illinois: it was the incarnation of the philosophy of juvenile justice.[11] Under this system the goal was not punishment of the child but "what had best be done in his interest and the interest of the state to save him from a downward career."[12] The juvenile was to be treated at an informal adjudication rather than in a criminal prosecution.[13] As a result the rigid procedural requirements were discarded and the concept of *parens patriae* was adopted. Such "civil" procedure[14] was not subject to the requirements which placed restrictions on the state when it seeks to deprive a person of his freedom.[15]

Although it is true that "for over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the juvenile court area,"[16] problems did exist. The situation was becoming so blatantly unjust that Dean Pound was prompted to say, in 1937, that "the powers of the Star Chamber were a trifle in comparison with those of our juvenile courts."[17] Slowly it was becoming clear that unlimited discretion on the part of juvenile courts could lead to the unjustifiable and arbitrary usurpation of due process of law in the name of juvenile justice. Perhaps the earliest observation of this was made for the Court by Mr. Justice Douglas in 1948, when he stated that "neither man or child can be allowed to stand condemned by

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[10] Act of April 21, 1899, Ill. Laws 131.

[11] The juvenile court system seems quite commonplace in today's legal structure. However at its inception one author called this system "a revolution in the attitude of the state toward its offending children. . . ." Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[12] *Id.* at 119-120.

[13] Judge Mack describes such informal hearings and their benefits:

> 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 courtroom 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 losing none of his judicial dignity, will gain immensely the effectiveness of his work.

Id. at 120.

[14] Judge Prettyman in Appendix A to his opinion in Pee v. United States, 274 F.2d 556, 561 (D.C. Cir. 1959) lists authorities from 51 jurisdictions showing that proceedings in juvenile courts are not criminal cases.

[15] The deprivation of these rights was not without its constitutional ramifications. Nevertheless, its constitutionality has been sustained in most instances. *See generally The Constitutional Context; see also* Waite, *How Far Can Court Procedure be Socialized Without Impairing Individual Rights*, 12 J. CRIM. L.C. & P.S. 339 (1922).

[16] 438 Pa. at 341, 265 A.2d at 352.

[17] Foreward to YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY xxvii (1937). For a more detailed discussion of the constitutional issues involved prior to the court's enunciation of expanded juvenile rights, see generally Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961).

methods which flout constitutional requirements of due process of law.[18] While at this early stage there was no explicit inclination toward treating juveniles with the same due process guarantees enjoyed by their elders, nevertheless the idea of due process requirements was present, albeit embryonic in form. Perhaps social consciousness was not as acute; perhaps the failings of the juvenile courts were not as blatant; perhaps those who led the movement felt that the still young juvenile court needed time to prove itself. For whatever reason, the Supreme Court convened and adjourned more than ten times before a significant decision concerning deprivation of basic due process at juvenile hearings was handed down. Even in 1962 the decision of the Court in *Gallegos v. Colorado*[19] was a weak echo of what was stated in *Haley*. To be sure no new ground was broken in *Gallegos*. However, the threshold proposition, that due process of law may not be disregarded in a criminal prosecution despite the fact that the defendant is a minor, was reaffirmed.

The Recent Approach

The first reaction of the Supreme Court to the complete discretion enjoyed by the juvenile court, unfettered by due process requirements, did not come until very recently. The reaction was registered in *Kent v. United States*.[20] While still not directly on the mark of rights of juveniles in juvenile court, the Court did move perceptibly further in *Kent* than it had previously gone. *Kent* stood for the proposition that a juvenile court, before entering an order waiving its exclusive jurisdiction and authorizing a minor to be prosecuted in a regular criminal proceeding, must employ procedural regularity sufficient in each case "to satisfy the basic requirements of due process and fairness. . . . [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony."[21]

Law does not develop in a vacuum. To the layman *Kent* might have appeared to be a relatively unimportant decision in the movement toward the expansion of juvenile rights. However, seasoned observers of the Court could discern the philosophical underpinnings which supported the opinion in *Kent*.[22] Indeed, Mr. Justice Fortas, writing for the majority in *Kent*, went beyond

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[18] Haley v. Ohio, 332 U.S. 596, 601 (1948). *Haley* did not specifically involve the issue of a juvenile being adjudicated at a hearing but rather of a 15-year-old who was tried for murder and convicted in a state criminal prosecution. The basic issue was whether a confession obtained from the appellant was admissible. The Court said it was inadmissible not because appellant was a juvenile but because anyone tried in a criminal prosecution is entitled to basic due process.

[19] 370 U.S. 49 (1962). Gallegos was 14 years old. All other facts are similar to those in *Haley*.

[20] 383 U.S. 541 (1966).

[21] *Id.* at 553-554. The Court conceded the fact that the Juvenile Court had great discretion in determining whether it should retain jurisdiction over a child or should waive such jurisdiction. Yet such discretion is not absolute and the Juvenile Court may not consider the "critically important" question of whether a child shall be deprived of the special protection of the Juvenile Court Act, D.C. CODE § 16-2308 (Supp. III, 1964), without a full investigation of the facts.

[22] In his article, Professor Paulsen puts the impact of *Kent* into perspective:

> Though the Court's opinion in Kent does not actually hurl constitutional thunderbolts at the nation's juvenile courts and police prac-

the narrow issue of waiver of jurisdiction and expressed the broader fear that

> there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[23]

And so it was that in 1966 the effect of *Kent* combined with the previous dearth of decisions from the Court and the undeniable weight of the evidence,[24] attesting to the scope of the problem of juvenile offenders on a national level. These forces could all be seen to accentuate the broken dreams so handsomely embodied in the juvenile court movement at the turn of the century and to expose the failure of the Supreme Court to pass definitively on the question of constitutional guarantees in juvenile hearings. In 1967 the Court handed down its landmark decision in the area of juvenile justice—*In re Gault*.[25]

Seen from a jurisprudential angle, *Gault* was merely the logical progression of the ideas expressed in *Kent*. While *Kent* stated that the juvenile court judge's exercise of the power of the state as *parens patriae* was not unlimited, *Gault* more candidly stated that "under our Constitution, the condition of being a boy does not justify a kangaroo court."[26] Gault, then age 15, was charged with "Lewd Phone Calls" in the referral report. He was taken into custody without notice to his parents. His mother, after visiting the detention home where Gerald was confined, was orally advised of the charge against her son and that he would have a hearing the following afternoon. On the hearing day a petition was filed making no reference to the reasons for the legal action. The petition was not shown to the boy. At the hearing no one was sworn and the complainant was not present. *The arresting officer attested that the boy's confession was made in the absence of his parents, without an attorney and without being advised of his rights.* Following this hearing Gerald Gault was confined to the Arizona State Industrial School for the period of his minority (6 years) unless sooner discharged by due process of law.[27] The facts in this case realized the fears expressed by Justice Fortas in *Kent*.[28] Juveniles such as Gault were being deprived of their constitutional rights under the guise of solicitous care. *In re Gault* held that while the essentials of due process to which a juvenile

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tices respecting juveniles, it does raise a warning of turbulent weather ahead.
The Constitutional Context at 183.

[23] 383 U.S. at 556.

[24] *See* note 7 *supra*.

[25] 387 U.S. 1 (1967). For a broader discussion of this significant decision *see generally* Dorsen & Rezneck, Gault *and the Future of Juvenile Law*, 1 FAMILY L. Q. 1 (1967) [thereinafter Dorsen & Rezneck]; Ketcham, *Guidelines from* Gault: *Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967); Lefstein, *In re* Gault, *Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967); Miller, *The Dilemma of the Post* Gault *Juvenile Court*, 3 FAMILY L.J. 229 (1969); Polier, *The* Gault *Case: Its Practical Impact on the Philosophy and Objectives of the Juvenile Court*, 1 FAMILY L.Q. 47 (1967); Note, 14 HOW. L.J. 150 (1968); Note, 8 J. FAMILY L. 416 (1968).

[26] 387 U.S. at 28.

[27] This offense, if committed by an adult is "punishable by a fine of not less than five nor more than fifty dollars, or by imprisonment in the county jail for not more than two months." ARIZ. REV. STAT. ANN. § 13-377 (1956).

[28] 383 U.S. at 556.

is entitled are not commensurate with all the rights and privileges to which an adult is entitled, nevertheless, certain fundamental guarantees must be met. While not defining what such guarantees are, the Court did assure to juveniles the following basic rights: adequate notice of the charges, the rights to counsel, confrontation and cross-examination and the privilege against self-incrimination.[29] Disdaining even the grant of these limited rights, Mr. Justice Stewart strongly dissented from the majority. Espousing the philosophy of the early juvenile justice reformers, he felt these rights were both unnecessary burdens to the juvenile court system as well as a step backward toward making juvenile proceedings resemble criminal trials, the very situation which motivated the reformers to establish a juvenile court almost one hundred years ago.[30] The Court, however, left many conspicuous questions unanswered, obviously intending to have them answered on a case-by-case basis.[31] In 1970 a New York case, *In re Winship*,[32] gave the Court an opportunity to further its expansion of rights guaranteed to juveniles.

The Court held that a New York statute,[33] which required any determination at the conclusion of an adjudicatory hearing to be based on a preponderance of the evidence rather than on the reasonable-doubt standard, was unconstitutional.[34] The opinion concluded that the reasonable-doubt standard of proof was as much a matter of due process as were the constitutional safeguards applied in *Gault*. With this decision the reasonable-doubt standard became another of the essentials of due process and fair treatment which *Gault* required be met.[35] With no concrete definition as to what constitutes an essential element of due process, "court-watching" became an avocation of some attorneys who were awaiting decisions on such questions

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[29] The Court expressly limited itself to the issues presented and indicated no opinion as to whether the decision of that (Arizona Supreme) court with respect to such other issues (viz. the right to a transcript of the proceedings and the right to appellate review) does or does not conflict with the requirements of the Federal Constitution.
In re Gault, 387 U.S. 1, 11 (1966).

[30] *Id.* at 78. (Stewart, J., dissenting). This concept did become the majority opinion in *McKiever*.

[31] *See generally* Dorsen & Rezneck, *supra* note 25.

[32] 397 U.S. 358 (1970).

[33] N.Y. FAMILY CT. ACT § 755(b) (McKinney 1963).

[34] While the line between the "preponderance of the evidence" standard and the "reasonable doubt" standard may seem to be indistinguishable, it is still noteworthy that the New York Family Court Judge made the distinction quite clearly.

> [H]e explicitly acknowledged that he was basing his findings of fact on the 'preponderance of the evidence' and frankly admitted that the proof fell short of establishing guilt or delinquency beyond a reasonable doubt.

24 N.Y.2d 196, 206, 247 N.E.2d 253, 260, 299 N.Y.S.2d 414, 423 (1969) (Fuld, Ch. J., dissenting).

[35] The ideas enunciated in the dissenting opinion of Stewart in *Gault* were repeated, in the dissent of the newly appointed Chief Justice, to the *Winship* majority. *Inter alia,* Chief Justice Burger said

> I dissent from further stait-jacketing of an already overly restricted system. What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.

397 U.S. at 376 (Burger, Ch. J., dissenting).

as whether there is a right to appeal from an adjudication of deliquency, whether there is a right to have a transcript or other record kept of the proceeding, whether the juvenile court judge must state the grounds for his findings when he is the trier of fact, whether juveniles are entitled to invoke the constitutional guarantee against unreasonable searches and seizures or whether juveniles are entitled to trial by jury.[36] Which of these rights are essential elements of due process and therefore required by *Gault?* Which are non-essential legal formalism and, therefore, at odds with the juvenile court philosophy? *McKeiver v. Pennsylvania* resolved the issue as to trial by jury for juveniles. It seems that the other issues will be resolved in due course.

The Instant Case

To be sure, the precise issue—whether juveniles are constitutionally entitled to trial by jury in the adjudicative phase of a state juvenile court deliquency proceeding —had been presented to lower courts many times. The majority of these cases seem to have answered the question in the negative.[37] With the *McKeiver* appeal the issue was finally presented for resolution. Grounding the opinion on many different bases, Mr. Justice Blackmun, writing for the majority, concluded that trial by jury is not constitutionally guaranteed to juveniles.

A proper understanding of the very nature of the right to trial by jury is essential to a complete appreciation of the *McKeiver* decision.[38] The right to jury trial is embodied in the United States Constitution.[39] The nature of this constitutional guarantee is a matter of historical development through a long line of judicial decisions. Recently, in the companion cases of *Duncan v. Louisiana*[40] and *Bloom v. Illinois*,[41] a "skeletal history" was traced which gave "impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court."[42] *Duncan* was basi-

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[36] *See generally* Dorsen & Rezneck, *supra* note 25.

[37] The cases which have held that there is no constitutional right to trial by jury for juveniles are: *In re* Fucini, 44 Ill. 2d 305, 255 N.E.2d 380 (1970); *In re* D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970); *In re* Johnson, 254 Md. 517, 255 A.2d 419 (1969); Hopkins v. Youth Court, 227 So. 2d 282 (Miss. Sup. Ct. 1969); *In re* Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969); *In re* J.W., 106 N.J. Super. 129, 254 A.2d 334 (Juv. & Dom. Rel. Ct. 1969); *In re* Alger, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969); State v. Turner, 253 Ore. 235, 453 P.2d 910 (1969); Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. Ct. App. 1968); Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968); Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967). *Contra*, Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968); Saunders v. Lupiano, 30 App. Div. 2d 803, 292 N.Y.S.2d 44 (1st Dep't 1968).

[38] For an in depth discussion of the area of jury trials, see generally Comment, *Jury Trials in Criminal Prosecution: "Freedom Lives"*, 45 ST. JOHN'S L. REV. 304 (1970).

[39] U.S. CONST. amend. VI states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

[40] 391 U.S. at 145 (1968).

[41] 391 U.S. 194 (1968).

[42] 391 U.S. at 153-154. *Duncan* cited numerous decisions supporting the importance of the right to trial by jury.

cally concerned with a provision of the constitution of Louisiana which authorized a trial by jury only in cases in which conviction may result in hard labor or capital punishment.[43] The Court stated, *inter alia*, that

> [B]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which —were they to be tried in a federal court —would come within the Sixth Amendment's guarantee.[44]

Since Duncan would have been guaranteed a trial by jury if tried in a federal court, the Supreme Court reversed the Louisiana court's conviction. A cursory reading of the decision will indicate the thinking of the Court as to the overriding importance of trial by jury. Quoting from various decisions, the Court illustrated that the right to trial by jury was among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"[45] and is "basic in our system of jurisprudence"[46] and "is a fundamental right, essential to a fair trial,"[47] any crime which might result in a two-year incarceration was therefore a "serious crime."[48]

In the case of *Bloom v. Illinois* the question of trial by jury in criminal contempt proceedings was at issue. The court again asserted the basic role played by the jury trial in criminal prosecutions. Indeed, the Court suggested that a stronger argument for the necessity of jury trial can be made where a defendant should be protected "against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament."[49] The paramount importance of the jury trial is therefore clearly expressed in both *Duncan* and *Bloom*.[50]

In light of the preeminence given to the jury trial as a constitutional bulwark against faulty fact-finding, it becomes clear that the first obstacle which the Court had to overcome was its own recent decisions. However, labelling the juvenile proceeding a civil prosecution[51] obviated the need to

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[43] Appellant Duncan was tried on a charge of simple battery which is a misdemeanor and is punishable by a fine of not more than $300 or imprisonment for not more than two years, or both. Appellant was convicted and sentenced to serve 60 days in prison and to pay a fine of $150.

[44] 391 U.S. at 149.

[45] 391 U.S. at 148, *quoting* Powell v. Alabama, 287 U.S. 45, 67 (1932).

[46] *Id.*, *quoting In re* Oliver, 333 U.S. 257, 273 (1948).

[47] *Id.*, *quoting* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

[48] *Duncan* stated that where a conviction *could* result in imprisonment of two years the fourth amendment guarantee is called into action. Only two years later, in Baldwin v. New York, 399 U.S. 66 (1970), the period of imprisonment needed to require trial by jury was reduced to six months.

[49] *Id.* at 202.

[50] Due to the fact that DeStephano v. Woods, 392 U.S. 631 (1968), had limited *Duncan* and *Bloom* to prospective application, an earlier appeal, DeBacker v. Brainard, 396 U.S. 28 (1969), which had presented the juvenile jury trial issue directly to the Court, was dismissed. In a per curiam decision, the opinion stated that as to DeBacker, whose juvenile court hearing took place prior to May 20, 1968, the date of the *Duncan* and *Bloom* rulings, *Duncan* and *Bloom* were inapplicable.

[51] *Cf.* note 14 *supra*.

attack the position of importance held by the right to trial by jury in criminal prosecutions. Since the juvenile proceeding has not been held to be a "criminal prosecution," there is no automatic application of the *Duncan* rule to such cases. The Court wisely observed, however, that the mere label of "civil" does not remove criminal aspects from such proceeding. The question cannot be solved simply by attaching the label of "civil" or "criminal" to a juvenile proceeding. Rather, the threshold question to be answered was asked in *Gault* and concerns ascertaining the precise impact of the due process requirement upon such proceeding.[52] "Fundamental fairness"—not the application of all protections guaranteed to criminal defendants—was the mandate of *Gault* and *Winship*. What then is the precise impact of jury trial upon a juvenile proceeding? *McKeiver* held that one cannot say that in our legal system the jury is a necessary component of fact-finding.[53]

Dispensing in this manner with the inherent necessity of trial by jury for a fair determination of facts, *McKeiver* then considered the impact of jury trial upon the juvenile court system. Here the Court discussed the procedural practicalities rather than the substantive realities. Mr. Justice Blackmun discussed at length the philosophy underlying the juvenile court. He acknowledged its shortcomings and problems but rejected the pessimism which threatens the very existence of the system of juvenile justice. He expressed the fear that the introduction of juries will

> [R]emake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.[54]

The Court also emphasized the conspicuous absence of any recommendation of the introduction of jury trial into juvenile proceedings by the report submitted by the President's Commission on Law Enforcement and the Administration of Justice.[55] While the report had been openly critical of the dismal failures of the American sys-

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[52] 387 U.S. at 14. The Court in *McKeiver* noted that while the privilege against self-incrimination had been imposed upon state criminal trials in Malloy v. Hogan, 378 U.S. 1 (1964), there was no automatic application of such privilege to juvenile trials through *Gault*. Rather, *Gault* considered the impact of this privilege upon the juvenile hearing before requiring it. The same was true of the rights of cross-examination and confrontation, guaranteed to state prosecutions by Pointer v. Texas, 380 U.S. 400 (1965) and Douglas v. Alabama, 380 U.S. 415 (1965). Again *Gault* considered the precise impact of such due process requirements upon juvenile hearings.

[53] 403 U.S. at 543. The Court conceded that "there is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts." *Id.* The Court cited *Duncan* in reasoning that not every criminal trial held before a judge alone is unfair. The Court also questioned the utter necessity of a jury for fact-finding integrity in view of *DeStephano's* limiting *Duncan* to prospective application, a limitation which the Court felt would never have been made were the integrity of the result at issue. The author feels that the majority in *McKeiver* chose to underrate the fundamental position given to jury trial by *Duncan*, 403 U.S. at 545.

[54] The dilemma is again obvious—give the child all the constitutional safeguards of an adversary proceeding or attempt to treat him informally and suffer the loss of basic rights as has been the experience of the past.

[55] TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter TASK FORCE REPORT].

tem of juvenile justice,[56] it nevertheless stated that "the ideal of separate treatment of children is still worth pursuing."[57] In addition, the Court reasoned that the benefits derived from a jury trial would be negligible when compared with the "traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial"[58] which would be the by-products of jury trials.[59] As a further authority, the Court notes that at least 29 states and the District of Columbia deny juveniles the right to trial by jury by statute,[60] while other states have denied this right by judicial decision.[61]

While the Court expresses great hope in the self-healing powers of the juvenile court, it is not naive. It realizes that there may be but a short time before hopes are dashed again. "Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."[62] The dissenters feel the disillusionment has arrived already.

In an extremely cogent and realistic dissent Justices Black, Douglas[63] and Marshall cut their way through the rhetorical smoke screen and saw the situation as it exists in all too many states.[64] In *McKeiver, Terry*

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[56] For an excellent expression of the chasm between theory and practice in the juvenile justice system see TASK FORCE REPORT 9.

[57] *Id.*

[58] 403 U.S. at 550.

[59] The Court obviously conceded that were any state to feel that a jury trial is desirable or even essential nothing would preclude it from injecting such a procedure into its juvenile courts.

[60] ALA. CODE tit. 13, § 369 (1958); ALASKA STAT. § 47.10.070 (Supp. 1970); ARIZ. REV. STAT. ANN. § 8-229 (1956) (repealed Laws 1970), ch. 223, § 1); ARK. STAT. ANN. § 45-206 (1947); DEL. CODE ANN. tit. 10, § 1175 (Supp. 1969-70); FLA. STAT. ANN. § 39.02(2) (1961); GA. CODE ANN. § 24-2420 (1970); HAWAII REV. LAWS § 71-41 (1968); IDAHO CODE ANN. § 16-1813 (Supp. 1969); IND. ANN. STAT. § 9-3215 (Supp. 1957); IOWA CODE ANN. § 232.27 (1969); KY. REV. STAT. § 208.060 (1962); LA. REV. STAT. § 13:1579 (1968); MINN. STAT. ANN. § 260.155 (1) (1971); MISS. CODE ANN. § 7185-08 (1942); MO. ANN. STAT. § 211.171 (6) (1962) (equity practice controls); NEB. REV. STAT. § 43-206.03 (2) (1968); NEB. REV. STAT. § 62.190 (3) (1967); N.J. REV. STAT. § 2A:4-35 (1952); N.Y. FAMILY COURT ACT §§ 164, 165 (McKinney 1963) and N.Y. CIV. PRAC. § 4101 (McKinney 1963); N.C. GEN. STAT. § 7A-285 (1969); N.D. CENT. CODE § 27-16-18 (1960); OHIO REV. CODE ANN. 2151.35 (Page 1968); ORE. REV. STAT. § 419.498 (1) (1968); PA. STAT. tit. 11, § 247 (1965); CODE OF LAW S.C. § 15,1095.19 (Supp. 1970); UTAH CODE ANN. § 55-10-94 (Supp. 1969); VT. STAT. ANN. tit. 33 § 651 (a) (Supp. 1970); WASH. REV. CODE ANN. § 13.04.030; D.C. CODE ANN. 16-2316 (a) (Supp. 1971).

[61] *In re* Daedler, 194 Cal. 320, 228 P. 467 (1924); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1823); *In re* Fletcher, 251 Md. 520, 248 A.2d 364 (1968); Commonwealth v. Page, 339 Mass. 313, 316, 159 N.E.2d 82, 85 (1959); *In re* Perham, 104 N.H. 276, 184 A.2d 449 (1962). While not conclusive, the Court felt the fact that when a practice is followed by such a number of states, it is worth considering "in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 403 U.S. at 548, *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[62] 403 U.S. at 551.

[63] When the issue of jury trials for juveniles was first presented to the Court in *DeBacker*, both Justices Black and Douglas refused to dismiss the appeal but considered the appeal on the merits and filed separate dissenting opinions. These dissents were, in a very real sense, an obituary for the juvenile justice system.

[64] The facts concerning the staffs of juvenile courts are nothing short of startling. The number of juvenile judges as of 1964 was listed as 2,987, of whom 213 are full-time juvenile court judges. See NATIONAL COUNCIL OF JUVENILE

and *Burrus* the issue had been whether they had violated a state criminal law. "Adjudiciation" as a deliquent could mean "confinement" in a state correctional institution[65] for up to 10 years in one appeal and for not less than five years in the other two. Under such circumstances no adult could be denied trial by jury.[66] Indeed, the dissenters feel that no procedural protection should be denied juveniles.

> Where a state uses its juvenile
>
> [C]ourt proceedings to prosecute a juvenile for a criminal act and to order "confinement" until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult.[67]

Justice Black repeated many of the arguments he presented in *DeBacker*.[68] The idea was again expressed that the label "civil proceeding" was a mere sham when one considers the possible length of the incarceration, the condition of many correctional institutions and the lack of secrecy of many of the proceedings. As a support to these arguments the dissenters appended a recent decision from Rhode Island to their dissent.[69] This decision was extremely practical in its approach and avoided the many generalities in which the majority in *McKeiver* indulged. The appendix stressed the trauma which a juvenile hearing causes a minor and asks whether a trial by twelve objective citizens can cause more trauma than is caused by being incarcerated by a judge who sits as a one-man grand jury and then sits in judgment on his own determination arising out of the proceedings and facts he conducted.

As to the fear that the introduction of jury trials would impair the functioning of

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COURT JUDGES, DIRECTORY AND MANUAL (1964). Of these it is reported that

> half have no undergraduate degree at all; a fifth had received no college education at all; a fifth were not members of the bar. Almost three-quarters devote less than a quarter of their time to juvenile and family matters and judicial hearings turn out to be little more than attenuated interviews of 10 to 15 minutes duration. Similarly, more than four-fifths of the juvenile judges poled in a recent survey reported no psychologist or psychiatrist available to them on a regular basis—over half a century after the juvenile court movement set out to achieve the coordinated application of the behavioral and social sciences to the misbehaving child.

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[65] Behind the non-offensive words "state correctional institution" may exist factors which led one Pennsylvania court to refer to one such institution as "a maximum security prison for adjudged deliquents." *In re* Bethea, 215 Pa. Super. 75, 76, 257 A.2d 268, 269 (1969). The institution being referred to is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire and guard towers.

[66] *Duncan* held that a defendant who is tried for a crime which can bring a maximum incarceration of 2 years is entitled to a trial by jury as a matter of right. The Court has since reduced the period of incarceration necessary for a mandatory jury trial to 6 months in Baldwin v. New York, 399 U.S. 66 (1970).

[67] 403 U.S. at 599 (Douglas, J., dissenting).

[68] "I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights [granted in *Gault*] and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world."

Id., quoting DeBacker v. Brainard, 396 U.S. at 34 (dissenting opinion).

[69] In the matter of McCloud, — R.I. — (Family Ct. Jan. 15, 1971).

the juvenile justice system, this simply is not supported by fact.[70] Far from impairing the justice in the juvenile court it is argued that

> [B]y granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time.[71]

In addition, the recent decision of *Williams v. Florida*,[72] which held that the constitutional right to trial by jury may be satisfied by a jury of less than twelve men, could facilitate the introduction of juries into juvenile court. A smaller jury could help maintain the informality so essential to Juvenile hearings while providing objective fact-finders. It is further argued that a jury cannot render the juvenile hearing more public than is presently the situation with "[w]itnesses for the prosecution and defense, social workers, court reporters, students, police trainees, probation counsellors and sheriffs present in the courtroom."[73]

Finally, the Appendix goes to the heart of the matter with its consideration of the label "civil" and "criminal." The inescapable conclusion is reached—"Murder is murder; robbery is robbery—they are both criminal offenses, not civil, regardless and independent of the age of the doer. . . ."[74] The fact that the juvenile court was meant to rehabilitate children who had become delinquent does not mean that the juvenile court has abdicated from the judicial system. Indeed, it is difficult to understand why solicitous, rehabilitative treatment necessarily precludes the sixth amendment guarantee of trial by jury. One can only wonder why treatment as a child and this constitutional protection are mutually exclusive.

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[70] The Denver Juvenile Court and the Detroit Juvenile Court are cited as two examples of courts where jury trials have been permitted by statute. In Denver the first seven months of 1970 saw fewer than two dozen requests for jury trials and Detroit Juvenile Court had less than five jury trials in the year 1969-1970.

[71] 403 U.S. at 565 (Appendix to dissent).

[72] 399 U.S. 78 (1970).

[73] 403 U.S. at 567 (Appendix to dissent).

[74] *Id.* at 571-572 (Appendix to dissent).