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A Right to Jury Trial for Juveniles - The Implications of McKeiver

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A RIGHT TO A JURY TRIAL FOR JUVENILES?— THE IMPLICATIONS OF McKEIVER

I. INTRODUCTION

Historically, the adjudication of a juvenile as delinquent in the United States was accomplished in much the same manner as that of the adult criminal.[1] The child was arrested, indicted by a grand jury, tried by a petit jury, and punished with all of the constitutional safeguards and procedures that accompanied the adult criminal process.[2] In addition, the juvenile was at one time incarcerated under criminal law theories, *viz.*, to protect society from harm and to deter others from criminal acts.[3]

The early reformers in the field of juvenile justice felt that criminal treatment methods were incompatible with what should have been juvenile corrective measures. The cornerstone of the reform movement was rehabilitation; a system of treatment that would eliminate the harshness of the adult criminal process and protect the juvenile from the stigmatizing effects of a criminal adjudication.[4] In 1899, the state of Illinois passed the first Juvenile Court Act and by 1925 juvenile court legislation had passed in all but two states.[5] The Juvenile Court Acts were generally upheld on the theory that the state was merely acting as *parens patriae* for the wayward child[6] with a view to treatment and guidance according to the needs of the youth rather than punishment for his delinquent behavior.[7] Consequently, the proposed issues in the adjudication of a juvenile were not criminal responsibility, guilt and punishment but rather understanding, guidance and protection.[8] Procedural rules were relaxed and a highly informal court replaced the traditional adversary system of adjudication.[9] The juvenile

1. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).
2. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 548 (1957); Mack, *supra* note 1.
3. Comment, 10 STAN. L. REV. 471 (1958), *citing* MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 4-17 (1940).
4. Mack, *supra* note 1, at 109.
5. REPORT OF PRESIDENTS COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME 2 & 1 (1967) [hereafter cited as TASK FORCE REPORT].
6. Paulsen, *supra* note 2, at 549.
7. TASK FORCE REPORT at 3.
8. Kent v. United States, 383 U.S. 541, 554 (1966).
9. Shwerin, *The Juvenile Court Revolution in Washington*, 44 WASH. L. REV. 421 (1969).

court even implemented its own vocabulary to emphasize its paternal role; complaint, warrant, conviction, and sentence gave way to the less imposing petition, summons, finding of involvement, and disposition.[10] The informality of the juvenile court was justified under the theory that the juvenile was taken into the custody of the state for his own good and therefore he did not require the same procedural protections afforded to an adult.[11]

II. THE DUE PROCESS REVOLUTION IN JUVENILE COURT

A. PRE-*Gault* ATTEMPTS AT REFORM

During the first half of the 20th century, any attempts to grant the juvenile the due process protections afforded the adult criminal were generally rebuffed.[12] The courts, acting *in loco parentis*, reasoned that the child would benefit most from an informal proceeding under a system which allowed the state some flexibility and latitude in exercising its custodial duty.[13] However, with the passage of time, the theoretical goals of the juvenile justice system became questioned more frequently by the courts. In 1952 the Appellate Court of the 2d District of California found that:

> [W]hile the juvenile court law provides that the adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason.[14]

The fiction the California court spoke of was the discrepancy between how the juvenile court was to operate in theory and how it functioned in fact. Informal proceedings without procedural safeguards were theoretically in the best interest of the child,[15] but in actuality, the juvenile court frequently did "nothing more nor less than deprive a child of liberty without due process of law. . . ."[16] A significant increase in the juvenile crime rate added to the problems of the juvenile justice system.[17] To say that juvenile courts have failed to reduce or even stem the tide of delinquency is to say no more than what is true of adult criminal courts

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10. TASK FORCE REPORT at 3.
11. *In re* Gault, 387 U.S. 1, 17 (1967).
12. Comment, *The Conflict of Parens Patriae and Constitutional Concepts of Juvenile Justice*, 6 LINCOLN L. REV. 65 (1970).
13. *In re* Gault, 387 U.S. 1, 17 (1967).
14. *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631, 633 (2d Dist. 1952). *See* United States v. Dickersen, 168 F. Supp. 899, 902 (D.D.C. 1950); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).
15. TASK FORCE REPORT at 9.
16. *Id.*
17. TASK FORCE REPORT at 1, *citing* FBI UNIFORM CRIME REPORTS 23 (1965).

in the United States.[18] "But failure is most striking when hopes are highest."[19] With the rising number of juvenile crimes, the courts in most cases were unable to allot more than a few minutes to the consideration of the numerous factors important in a rehabilitative effort.[20] In addition, many of the "modern" juvenile reformatories and training schools were plagued by the same defects and deficiencies as the early juvenile institutions.[21] The promise of the juvenile justice system was seemingly unfulfilled and, consequently, the reliability of juvenile proceedings was questioned with increased tenacity.[22]

In 1966 the Supreme Court of the United States had an opportunity to evaluate the juvenile court system in *Kent v. United States*.[23] The Court dealt with the procedures followed in transferring a case from a juvenile court to an adult criminal court pursuant to the District of Columbia Juvenile Court Act. Writing for the majority, Justice Fortas found that the juvenile court's latitude to waive jurisdiction was not complete.[24] The Court held that in order for a juvenile court to waive jurisdiction it must afford the juvenile the basic requirements of due process and fairness, as well as comply with the statutory requirement of a "full investigation."[25] This decision did not direct itself to the application of the constitutional safeguards of the adult criminal court, but Justice Fortas cast some doubt on the validity of the *parens patriae* doctrine when he stated:

> There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representative of the state in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for

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18. TASK FORCE REPORT at 7.

19. *Id.*

20. TASK FORCE REPORT at 7, *citing* CAL. GOV.'S SPECIAL STUDY ON JUVENILE JUSTICE, A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE IN CALIFORNIA P-1.2, 16 (1960).

21. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1233 (1970), *citing* A. DEUTSCH, OUR REJECTED CHILDREN 15 (1950). Mr. Deutsch revealed that the conditions that haunted the first juvenile reformatories had persisted: The disciplinary or punishment barracks—sometimes these veritable cell blocks were more foreboding than adult prisons—were known officially as 'adjustment cottages', or 'lost privilege cottages'. Guards were 'supervisors'. Employees who were often little more than caretakers and custodians were called 'cottage parents'. Isolation cells were 'meditation rooms'."

22. *See* United States v. Dickerson, 168 F. Supp. 899, 902 (D.D.C. 1958); Shioutakon v. District of Columbia, 236 F.2d 666, 670 (D.C. Cir. 1956); *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631, (2d Dist. 1952). *See generally* Schwerin, *supra* note 9, at 422.

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

24. *Id.* at 552-53. For an xcellent discussion of the rationale of the *Kent* decision and its relationship to *Gault* see Welch, *Kent v. United States and In Re Gault: Two Decisions in Search of a Theory*, 19 HASTINGS L.J. 29 (1967).

25. Ken v. United States, 383 U.S. 541, 554 (1966). For a discussion of waiver and the balancing test see Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874 (1972).

> concern that the child . . . gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[26]

B. THE *Gault* DECISION

Only sixteen months after *Kent*, the Supreme Court delivered its opinion in *In re Gault*,[27] a landmark decision that completely revolutionalized the procedural aspects of the juvenile justice system. In an informal hearing before an Arizona juvenile court, fifteen year old Gerald Gault was charged with making a lewd or indecent telephone call to a woman. Gault was committed as a juvenile delinquent to the State Industrial School "for the term of the child's minority, unless sooner discharged."[28] He received a maximum sentence of six years, whereas an adult would have faced a maximum sentence of a $50 fine or two months imprisonment for the same offense.[29] In addition to the dichotomy between adult and juvenile sentencing, Gault was denied the benefit of many of the constitutional safeguards to which an adult would have been entitled. Neither Gault nor his parents received notice of the charge, counsel was not present, the state obtained Gault's confession and used it against him, and he did not have an opportunity to confront the prosecuting witness.[30] The Supreme Court determined that the constitutional guarantee of due process applied to proceedings in which a juvenile was charged with delinquency.[31] More specifically, the Court held that (1) adequate notice must be furnished to the juvenile and his parents,[32] (2) the child and his parents must be informed of their right to counsel,[33] (3) the constitutional privilege against self-incrimination is applicable to juvenile court proceedings,[34] and (4) the juvenile must have an opportunity to confront the prosecuting witness.[35]

The majority opinion in *Gault* did not address all of the constitutional safeguards that are afforded to an adult in a criminal proceeding, but rather, limited the scope of its decision to the above-

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26. Kent v. United States, 383 U.S. 541, 555 (1966).
27. *In re* Gault, 387 U.S. 1 (1967).
28. Application of Gault, 99 Ariz. 181, 407 P.2d 760, 764 (1965); ARIZ. REV. STAT. ANN. § 8-236 (1956).
29. ARIZ. REV. STAT. ANN. § 13 377 (1956).
30. *In re* Gault, 387 U.S. 1, 10 (1967).
31. *Id.* at 30-31.
32. *Id.* at 33.
33. *Id.* at 41. For an excellent discussion of the problems surrounding the right to counsel in juvenile proceedings see Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653, 680 (1966). *See generally* Weiss, *The Emerging Rights of Minors*, 4 U. TOLEDO L. REV. 25 (1972).
34. *In re* Gault, 387 U.S. 1, 55 (1967).
35. *Id.* at 57. For discussion of the questions left unanswered in *Gault*, see Comment, *In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558 (1968).

mentioned rights. Indeed, Justice Harlan, in his dissenting opinion, complained that the majority had failed "to provide any discernible standard for the measurement of due process in relation to juvenile proceedings. . . ."[36] As a further limitation, the Court recognized that a juvenile proceeding had three distinct phases—pre-judicial, adjudicative, and dispositional—and restricted its holding to the adjudicative phase.[37] The Court regarded both the prejudicial and dispositional phases as flexible and adaptable to the special needs of the juvenile,[38] reasoning that these stages offer the states latitude to further the rehabilitative goals that have historically characterized the philosophy of the juvenile court.[39] In contrast, the Court found that the adjudication of delinquency, in itself, had relatively little to contribute to the rehabilitative goal. Thus, there was little justification for departing from the constitutionally protected procedures for determining guilt.[40]

Although the *parens patriae* philosphy was not rejected entirely,[41] its traditional application to the adjudicative phase was rejected. The Court recognized that the consequences of being found delinquent in the adjudication hearing were comparable to a finding of guilt and subsequent conviction in an adult criminal court.[42] Accordingly, it held that the possible loss of liberty was a consequence that demanded application of the guarantees of due process.[43]

C. *In re Winship*: THE STANDARD OF PROOF

In 1970 a fifth element was added to the requirements of due process in juvenile proceedings. In the case of *In re Winship*,[44] the Supreme Court declared that proof beyond a reasonable doubt

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36. *In re* Gault, 387 U.S. 1, 67 (1967). For articles dealing with the effect of the *Gault* decision, see Note, *Delinquency and Denied Rights in Florida's Juvenile Court System*, 20 U. FLA. L. REV. 369 (1968); Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967); Comment, *In re Gault: Children are People*, 55 CALIF. L. REV. 1204 (1967).

37. *In re* Gault, 837 U.S. 1, 13 (1967).

38. *Id. See also* Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. L. O. No. 4, 9 (1967).

39. *In re* Gault, 387 U.S. 1, 13 (1967).

40. *Id.*

41. *Id.* The Court stated that the "civil" label was still appropriate in protecting the juvenile from being branded a criminal as a consequence of a delinquency adjudication.

42. *Id.* at 23-24.

43. *Id.* at 31. The Supreme Court felt that

> [A] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.

Id. at 36. *See generally* Welch, *Kent v. United States and In Re Gault: Two Decisions in Search of a Theory*, 19 HASTINGS L.J. 29, 35 (1967).

44. *In re* Winship, 397 U.S. 358 (1970).

is the standard to be applied in juvenile proceedings.[45] The defendant in the case was a twelve year old boy accused of taking $112 from a woman's handbag. He was convicted of robbery under the preponderance of the evidence standard and thereafter committed until he reached the age of eighteen. The Supreme Court rejected the argument that the use of the "reasonable doubt standard" would tend to negate the advantages now enjoyed by the juvenile system, noting that the "reasonable doubt standard" would assure the juvenile of greater protection from the possibility of confinement on the basis of insufficient evidence.[46] The Court reasoned that proof beyond a reasonable doubt should have been the standard and concluded that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."[47]

In his dissenting opinion, Chief Justice Burger expressed a fear that the majority opinion was a "protest against inadequate juvenile court staffs and facilities."[48] He reasoned that these inadequacies should not be used to turn juvenile proceedings into criminal courts, since that would eliminate the meritorious aspects of the juvenile system.[49] However, Justice Burger failed to recognize that the adoption of the reasonable doubt standard is not inconsistent with the rehabilitative goals of the juvenile proceeding.[50] In any event, the loss of liberty without due process of law must be the primary consideration in evaluating a procedure that conflicts with the original juvenile justice concept.

III. THE RIGHT TO A JURY TRIAL

A. JURY TRIAL—ADULT CRIMINAL CASES

Despite the guarantee of the United States Constitution of a right to trial by jury,[51] it was not until 1968 that the Supreme Court, in *Duncan v. Louisiana*,[52] extended the Sixth Amendment guarantee to state adult criminal trials. In *Duncan*, the defendant was convicted of simple battery, a misdemeanor under Louisiana

45. *Id.* at 368.
46. *Id.* at 367-68.
47. *Id.* at 365. *See* Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. CT. JUDGES, J. No. 1, 9, 15 (1968). Justice Douglas argued that: "Equal justice under law is our proud boast. There is no reason why it cannot be realized in the juvenile field." *Id.* at 15.
48. *In re* Winship, 397 U.S. 358, 376 (1970).
49. *Id.*
50. *See* Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, 68 MICH. L. REV. 567, 602 (1970).
51. U.S. CONST. amend. VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .
52. Duncan v. Louisiana, 391 U.S. 145 (1968).

law punishable by a maximum of two years imprisonment and a $300 fine. He sought a trial by jury, but because the Louisiana Constitution granted jury trials only in cases in which capital punishment or imprisonment at hard labor could be imposed, the request was denied by the trial judge. On appeal, the Supreme Court reversed, holding that trial by jury was a fundamental right which must be extended by the states to all defendants charged with serious criminal offenses.[53] The Court considered the arguments against allowing untrained laymen to determine the facts in a criminal proceeding.[54] However, the majority rejected the contention that juries were incapable of adequately understanding evidence or determining issues of fact. Justice White, speaking for the majority, argued that:

> [T]he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[55]

The Court indicated that the jury serves several positive functions: (1) involving the community in the judicial process, (2) mitigating the harshness of the law in light of local values, and (3) buffering the defendant from arbitrariness on the part of the judge or prosecutor.[56]

In *Bloom v. Illinois*,[57] the Supreme Court reinforced *Duncan* by holding that the right to trial by jury must be extended to criminal contempt for willfully petitioning to admit a falsely prepared and executed will. In comparing convictions for criminal contempt with those obtained under criminal law, the court determined that it was the loss of liberty and not the name given to the offense which demanded the fundamental right of trial by jury.[58] In holding that the right to a jury trial must be extended to criminal contempt cases, the court stated:

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53. *Id.* at 149. The Court held that the Due Process Clause requires a jury trial for serious crimes. To distinguish petty and serious offenses, the Court referred to the federal authority in which a serious offense was defined as one in which incarceration for more than six months had been set. *Id.* at 161.

54. *Id.* at 157. The debate included express or implied assertions that juries are incapable of adequately understanding evidence or determining issues of fact and that juries are "unpredictable, quixotic, and little better than a role of dice."

55. *Id. See also* Norton, *What a Jury Is*, 16 VA. L. REV. 261, 266 (1930); Corbin, *The Jury on Trial*, 14 A.B.A.J. 507, 509 (1928).

56. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

57. Bloom v. Illinois, 391 U.S. 194 (1968).

58. *Id.* at 207-08. *See* State v. Turner, 453 P.2d 910, 913 (Ore. 1969).

> [W]hen serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency. . .[59]

In *DeBacker v. Brainard*[60] the Supreme Court had an opportunity to direct itself to the question of whether a juvenile is entitled to trial by jury. However, the majority sidestepped the issue and ruled that because the juvenile hearing in question was held prior to the decision in *Duncan* and since *Duncan* was not effective retroactively, the petitioner had no right to trial by jury.[61] In his dissenting opinion, Justice Douglas argued that the Sixth and Fourteenth Amendments require a jury trial as a matter of right where a juvenile is charged with an offense that would be triable by a jury if committed by an adult.[62] The fact that a jury trial may be in conflict with the underlying philosophy of the juvenile justice system is irrelevant since the Constitution is the supreme law of the land.[63] Emphasizing the fact that the traditional juvenile justice concept did not entail a criminal trial which evaded the Constitution, Justice Douglas concluded that:

> Where there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play.[64]

B. JUVENILES DENIED TRIAL BY JURY—*McKeiver v. Pennsylvania*

In light of the Supreme Court decisions in *Duncan* and *Bloom*, coupled with the proposition of fair treatment and the essentials of due process expounded in *Kent* and *Gault*, the Supreme Court's denial of trial by jury to a juvenile in the case of *McKeiver v. Pennsylvania*[65] came as a surprise.[66] In *McKeiver*, sixteen year old Joseph McKeiver was charged with robbery, larceny and receiving stolen goods. He had allegedly participated with twenty or thirty other juveniles in pursuing three teenagers and taking twenty-five cents from them. A request for a jury trial was denied. The Pennsyl-

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59. Bloom v. Illinois, 391 U.S. 194, 208 (1968).
60. DeBacker v. Brainard, 396 U.S. 28 (1969).
61. *Id.* at 30.
62. *Id.* at 35. *See* Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. CT. JUDGES J. No. 1, 9 (1968).
63. DeBacker v. Brainard, 396 U.S. 28, 38 (1969) (dissenting opinion). *See* Peyton v. Nord, 70 N.M. 717, 437 P.2d 716, 723 (1967).
64. DeBacker v. Brainard, 396 U.S. 28, 38 (1969).
65. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
66. *See* Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561, 568 (1972).

vania Supreme Court held that the courts of Pennsylvania are not constitutionally compelled to grant a jury trial.[67] The Supreme Court of the United States granted certiorari and held that the Sixth Amendment does not require a trial by jury in state juvenile delinquency proceedings.[68]

Petitioner contended that his proceeding was "substantially similar to a criminal trial" due to the application of the usual rules of evidence, the availability of customary common law defenses, and the similarity between adult and juvenile detention facilities.[69] The juvenile also contended that the theoretical benefits of a juvenile proceeding could be realized in the dispositional phase of the hearing rather than by maintaining a different process of adjudication.[70]

The Court was reluctant to grant the right of trial by jury to a juvenile because it felt that the states had a right to develop juvenile procedures in the future without the encumbrance of juries.[71] The Court recognized the problem of the present juvenile system but did not feel that a jury trial would cure the existing defects.[72] The Court also reasoned that the right to trial by jury would remake the juvenile proceeding into a fully adversary process[73] and would eliminate the need for a juvenile proceeding separate from that for adults.[74]

Speaking for the plurality,[75] Justice Blackmun rejected the principle that trial by jury improves the quality of fact-finding in

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67. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The *McKeiver* case is a combination of three cases which were all granted certiorari and heard together by the Supreme Court. The cases were: *In re* McKeiver, 215 Pa. Super. 760, 255 A.2d 921 (1969); *In re* Terry, 215 Pa. Super. 762, 255 A.2d 922 (1969); *In re* Burrus, 4 N.C. App. 523, 167 S.E.2d 454 (1969).

In re Terry involved fifteen year old Edward Terry who was charged with conspiracy and assault and battery on a police officer when the officer intervened in a fight. Terry was found delinquent at an adjudication hearing. Counsel's request for a jury trial was denied.

In re Burrus involved Barbara Burrus and a group of 45 other black children ranging in age from 11 to 15. They were charged with willfully impeding traffic. Requests for jury trials were denied. The North Carolina Court of Appeals affirmed the lower courts determination that a jjury trial was not required.

68. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

69. *Id.* at 541-42. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1233 (1970).

70. McKeiver v. Pennsylvania, 403 U.S. 528, 542 (1971). *See* Comment, *In re Gault and The Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558 (1968).

71. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). For a discussion of the conflict that the juvenile court represents to the criminal *justice* system, see Miller, *The Dilemma of the Post-Gault Juvenile Court*, 3 FAM. L.Q. 229 (1969).

72. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

73. *Id.* at 551.

74. *Id. But see* Alper, *The Children's Court at Three Score and Ten: Will It Survive Gault?* 34 ALBANY L. REV. 46 (1969). Mr. Alper raises the question of whether the juvenile court is actually necessary and discusses some alternatives.

75. The Court's decision is expressed in several interrelated opinions. Justice Blackmun, speaking for the Chief Justice and Justice Stewart, wrote the prevailing opinion. The concurring opinion of Justice White is similar to the prevailing opinion, and, combined with Justice Harlan's special concurrence, made up a majority of the Court. Justice Brennan concurred and dissented. Justices Douglas, Marshall, and Black dissented.

the courts and concluded that ". . . a jury is not a necessary part of every criminal process that is fair and equitable."[76] Despite his majority opinion in *Duncan*, Justice White found no need for a jury, stating in his concurring opinion in *McKeiver*: "Although the function of a jury is to find the facts, that body is not necessarily or even probably better at the job than the conscientious judge."[77] Justice Harlan, in his concurring opinion, took the position that neither fundamental fairness nor the due process clause of the Fourteenth Amendment required a jury for either adults or juveniles.[78]

Writing for the dissent, Justice Douglas voiced his concern that a juvenile without the right to a trial by jury could be charged with a violation of a criminal law and confined for periods of time beyond that which an adult would be incarcerated for the same offense.[79] Consequently, he concluded that the guarantees of the Bill of Rights, as applied to the states by the Fourteenth Amendment, require a jury trial for juveniles.[80]

IV. RIGHT TO JURY TRIAL FOR JUVENILES?

The traditional objections advanced for denying a juvenile the right to a jury trial are: (1) juries would detract from the informality of the juvenile court; (2) the jury as a fact-finder may not be any more qualified than a juvenile judge; (3) the confidential nature of the juvenile court would be eliminated; and, (4) the jury would place an additional administrative burden on the juvenile courts.[81] In light of Justice Douglas' dissent in *McKeiver* and *Gault's* apparent rejection of the *parens patriae* theory in the adjudication phase of a juvenile hearing, a thorough discussion of the validity of these arguments is warranted.

A. INFORMALITY

Under the *parens patriae* theory of juvenile justice, one of the beneficial characteristics of the juvenile proceeding was the informality of the juvenile court.[82] Moreover, the *McKeiver* decision

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76. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

77. *Id.* at 551.

78. *Id.* at 557. The reason for allowing the right to trial by jury in *Duncan* was primarily historical. Another consideration may have been that all of the states provided for jury trials. In any event, it is doubtful that those considerations, standing alone, would provide adequate justification for providing juveniles the jury right. Yet, how much weight should be given to the 70 year history of the juvenil court in this context?

79. *Id.* at 559. *See* Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. CT. JUDGES J. No. 1, 9 (1968).

80. McKeiver v. Pennsylvania, 403 U.S. 528, 553 (1971).

81. Paulsen, *supra* note 2, at 559; Comment, *A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court*, 64 NW. U.L. REV. 87, 113 (1969).

82. *See* Paulsen, *supra* note 2, at 559.

indicated that if the juvenile court was to continue under the *parens patriae* theory, it had to retain its unique character rather than become a fully adversary process.[83]

In *Gault* the Supreme Court took issue with the traditional application of the *parens patriae* philosophy and applied due process requirements only to the adjudicative phase of the juvenile hearing.[84] The Court specifically stated:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.[85]

However, in *McKeiver*, the Supreme Court did not focus on the adjudicative phase, but rather, evaluated the entire juvenile system in determining whether a juvenile had a right to trial by jury. The plurality opinion reasoned that:

> The imposition of the jury trial on the juvenile court system would . . . provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.[86]

The focus of the Supreme Court in *Gault* on the adjudicative phase of the juvenile hearing is easily distinguished from the Court's broad evaluation of the juvenile justice system in *McKeiver*. However, the Court's rationale for doing so is not as easily discernible. In *McKeiver* the Court reasoned that a jury trial would not remedy the defects of the juvenile system.[87] But in *Gault*, it was for that reason—a defective system—that the Court was motivated to require specific procedural safeguards.[88] Possibly, the underlying ra-

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83. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

84. *In re* Gault, 387 U.S. 1, 31-32 (1967). The Court's rationale for so holding was based upon the National Crime Commission Report which recommended that: "Juvenile Courts should make fullest feasible use of the preliminary conference to dispose of cases short of adjudication." The Court further explained that the problems of pre-adjudication and post-adjudication disposition were unique to the juvenile process.

85. *Id.* at 13.

86. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

87. *Id.*

88. *In re* Gault, 387 U.S. 1, 24-25 (1967).

tionale for denying a juvenile the right to trial by jury was the Supreme Court's determination that a reasonable balance had been established between due process rights and traditional juvenile court informality.[89]

With the procedural requirements now applicable in the juvenile courts as a result of *Gault*, how much formality would be added by the presence of a jury? Some courts have maintained that the right to trial by jury would result in a juvenile proceeding that would be identical to an adult criminal proceeding.

> Instead of a hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, . . . and reinstates the evils of trying young juveniles on the same basis as adult criminals.[90]

Gault guaranteed the juvenile the right to counsel in the juvenile hearing.[91] If any may assume that the attorney's primary role in the adjudication of delinquency is the protection of the juvenile's rights, then it follows that some elements of the adversary system cannot be avoided. The following quotation expresses the sentiments of one judge as to the character of the changes wrought by the *Gault* decision:

> *Gault* assures the juvenile the right to inject into the proceeding the right to inject into the proceeding all of the "clash and clamor" of an adversary proceeding that his counsel wishes to employ in asserting the due process rights specified in that opinion. *Gault* having permitted these inroads upon the traditional rehabilitative process, the basic character of the courtroom setting is changed from one of quiet communion between judges and child to that of an adversary arena of the ordinary law suit if the child or his parent so elect.[92]

However, there are several commentators who do not feel that the attorney in a juvenile hearing is restricted to an advocate's

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89. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). *See* Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874, 893-94 (1972). The author stated that the balancing test was evident in *Winship* and overt in *McKeiver*.

90. DeBacker v. Brainard, 183 Neb. 461, 474, 161 N.W.2d 503, 515 (1968), *appeal dismissed*, 396 U.S. 28 (1969). *See* Estes v. Hopp, 438 P.2d 205, 208 (Wash. 1968); Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9, 12 (1967).

91. *In re* Gault, 387 U.S. 1, 41 (1967).

92. State v. Turner, 453 P.2d 910, 915 (Or. 1969) (dissenting opinion).

role.[93] Besides serving an important role at the dispositional stage, the attorney may defend his client in a manner appropriate to the juvenile court setting.

> Although the attorney should accept the juvenile's wishes and defend the case, he should make it clear that his objective is to present a competent defense—and no more. He needs to impress upon his client that his responsibility is not to obstruct the state's presentation or to "win" the case, but rather to attempt to see that his client will be found delinquent only if legally dependable evidence is presented against him.[94]

If one concludes that a trial by jury will result in additional formality in the juvenile adjudication, the question arises as to what affect the additional formality will have on the traditional juvenile concept. In *Gault*, Justice Fortas, speaking for the majority, concluded that the features of the juvenile system that are supposedly of unique benefit would not be impaired by "constitutional domestication."[95] As one commentator noted, providing a formal procedure for the adjudication of a juvenile's guilt may prove beneficial to his rehabilitation.

> The child and his parents are under no illusion. They know they are in court, not in school or at a doctor's office. To find a court acting like a court may only bear out the expectation derived from television.[96]

The majority opinion in *Gault* also reasoned that the appearance of a court might have a rehabilitative effect on the juvenile.

> The appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process —may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.[97]

Although the Supreme Court in *Gault* was not speaking directly to the issue of trial by jury in juvenile proceedings, the same argument could be made for the jury right. Such an argument,

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93. *See* Skoler, *The Right to Counsel and the Right of Counsel in Juvenile Court Proceedings*. 43 IND. L.J. 558, 578 (1968); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 34.

94. Comment, *In re Gault and The Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558, 591 (1968). *But see* Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 538 (1968).

95. *In re* Gault, 387 U.S. 1, 22 (1967).

96. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. C. REV. 167, 186.

97. *In re* Gault, 387 U.S. 1, 26 (1967).

however, was not made in *McKeiver*. Furthermore, it is doubtful that the Court would have given the therapeutic value of a jury trial any significant weight in balancing the traditional juvenile concept due process requirements.

B. THE JURY AS A FACT-FINDER

Another objection to trial by jury in juvenile proceedings is that a jury may not be any more qualified than a judge to find the facts.[98] *McKeiver* echoed this sentiment in finding that the jury right was less fundamental than the juveniles' rights advanced in *Gault* and *Winship* and was not a necessary component of accurate fact-finding.[99] However, the opposing argument is not without merit. One commentator noted that a jury does not develop patterns and classifications that a judge often falls into as a matter of routine.[100] A jury affords ". . . protection against jaded judges who hear case after case, day in and day out, and decide on past prejudices rather than present evidence."[101] From a constitutional standpoint, there is no reason for denying a juvenile the basic safeguards that *Duncan* provided adults in criminal proceedings. The Supreme Court reasoned that:

> 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 complaint, biased, or eccentric judge.[102]

Justice White, concurring in *McKeiver*, stated that a jury "is not necessarily or even probably better at the job than the *conscientious judge*."[103] But how much emphasis should be placed on a juvenile judge's expertise and conscientiousness? A survey conducted in 1965 showed that half of the juvenile judges did not have undergraduate degrees, a fifth had no college education at all, and juvenile hearings were little more than interviews of ten or fifteen minutes duration.[104] Even if one could be sure of the judge's qualifications and compassion for juveniles, what standards and control does the juvenile justice system offer to protect the juvenile from

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98. TASK FORCE REPORT at 38; Paulsen, *supra* note 2, at 599.
99. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).
100. Corbin, *The Jury on Trial*, 14 A.B.A.J. 507, 509 (1928); *See* Norton, *What a Jury Is*, 16 VA. L. REV. 261, 266 (1930).
101. Comment, *Criminal Offenders in Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171, 1187-88 (1966).
102. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
103. McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (emphasis added).
104. TASK FORCE REPORT at 7.

arbitrary decisions? In *Gault,* Justice Fortas noted the danger of unlimited discretion, concluding that:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principal and procedure.[105]

The argument made by the petitioner in *McKeiver* is noteworthy. The juvenile contended that the adjudication and disposition are two separate procedural phases; therefore, the desired protection of the juvenile could be adequately provided in the dispositional phase.[106] The *McKeiver* opinion did not distinguish between the adjudicative and dispositional phases in denying juveniles the right to a jury trial. Yet, a jury could be utilized in the adjudicative phase as the fact-finder, while a judge's experience and training could be utilized best in the dispostional phase of the juvenile proceeding where the mode of treatment and rehabilitation is determined.

Our system of justice allows a person confronted with the possible loss of his liberty the right to have a body of his peers summoned to find the truth. Some courts have held that the right to jury trial is applicable to juvenile proceedings.[107] The Supreme Court of New Mexico stated:

> We see no escape from the conclusion that at the time of the adoption of our constitution petitioner [a juvenile] 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.[108]

In any event, the concern should be for the right of a juvenile to trial by jury and not over which fact-finder is better for the job.

C. CONFIDENTIALITY

Another traditional objection to trial by jury in juvenile cases is the consequential destruction of the confidential nature of the proceedings.[109] Confidentiality is deemed necessary to the juvenile proceeding in order to protect the juvenile from the stigma of

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105. *In re* Gault, 387 U.S. 1, 18 (1967).
106. McKeiver v. Pennsylvania, 403 U.S. 528, 542 (1971).
107. RLR v. State, 487 P.2d 27, 35 (Alaska 1971); Nieves v. United States, 280 F. Supp. 994, 1005 (S.D.N.Y. 1968); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716, 723 (1967).
108. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716, 723 (1967).
109. Paulsen, *supra* note 2, at 560; Mack, *supra* note 1, at 109.

criminality which results from public exposure.[110] However, in *Gault*, Justice Fortas pointed out that the claim of confidentiality was mere rhetoric and did not exist in reality.[111] The *McKeiver* decision did not specifically mention the confidential nature of juvenile proceedings, but the Court's concern for the unique manner[112] of the juvenile proceeding and its fear of a totally adversary[113] proceeding may indicate that the potential loss of confidentiality was considered by the Court.

Should the juvenile, with the advice of counsel, ultimately determine whether to forego a confidential hearing and elect trial by jury? As one commentator has noted, the juvenile who aggressively protests the formal accusations in the petition is "more interested in seeking the most expedient means of proving his innocence than in making certain his hearing remains completely confidential."[114] However, Dean Paulson maintains that a juvenile's best interest is not served by allowing a jury trial because of the consequential publicity.

> An open trial would operate as a check on arbitrary action by the court; but the advantage would be purchased at the expense of punishing the juvenile by publicity. The goals of protecting a young person from the misconduct of his youth, and of informing the community how its courts operate in every case, cannot be pursued simultaneously.[115]

A jury trial does not necessarily mean that a public trial must follow. The exclusion of the public from the court proceeding may be a solution. In this way the confidential nature of the juvenile proceeding could be retained, while providing the juvenile with the right to a trial by jury.

D. ADMINISTRATIVE CONSEQUENCES

Another objection to trial by jury in juvenile proceedings is the resulting administrative burden.[116] The *McKeiver* opinion, on its face, did not consider the impact of a jury trial on the administrative functioning of juvenile courts. However, one commentator has suggested that ". . . the practical consequences on the administrative

110. Mack, *supra* note 1, at 109; *But see* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 17.
111. *In re* Gault, 387 U.S. 1, 24 (1967).
112. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).
113. *Id.* at 550.
114. Note, *A Due Process Dilemma—Juries For Juveniles*, 45 N.D. L. REV. 251, 269 (1969).
115. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 560 (1957).
116. *See* Comment, *A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court*, 64 NW. U.L. REV. 87, 113 (1969).

functioning of state juvenile courts played a large part in the Court's decision to deny juveniles a right to jury trial."[117] The experience of the District of Columbia would seem to bear this out.

> Prior to 1970, the District's juvenile courts had statutory authority to grant jury trials. Until the mid-1960's, this right was only infrequently invoked. During the period, 1965-1969, use of the jury demand substantially increased. By the end of fiscal 1969, 290 jury cases were pending, with a consequent effect of increasing the delays in all juvenile court matters. . . . As a result . . . Congress repealed the juvenile jury right in the District of Columbia.[118]

However, considering the high number of admissions of guilt in juvenile proceedings,[119] the fear of administrative backlog would appear to be exaggerated. In fact, many jurisdictions which allow jury trials for juveniles have not experienced any notable delay or overburdening of the juvenile courts.[120]

The foregoing discussion of jury trials for juveniles has focused on either the jury trial as a matter of right or the absolute denial of that right. As another alternative, one writer has suggested a middle of the road approach whereby only a juvenile who realistically faces the possibility of incarceration would be entitled to a trial by jury.[121] Under that approach, if a jury trial is not afforded in serious cases, the juvenile may not be committed.[122] Other compromises with respect to the juvenile jury right exist in several jurisdictions: (1) a jury of six persons is allowed in some jurisdictions;[123] (2) a jury is available on appeal in another jurisdiction;[124] (3) in yet another jurisdiction a young adult advisory panel is available to assist the judge in determining the facts.[125] These solutions significantly lessen the impact of the jury requirement on the administrative functioning of the juvenile courts. In any event, a juvenile should not be denied the right to a trial by jury when he denies his guilt merely because it will take more time and money.

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117. Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561, 568 (1972).

118. Carr, *Juries For Juveniles: Solving the Dilemma*, 2 LOYOLA L.J. 1, 22-23 (1971).

119. TASK FORCE REPORT at 9.

120. *See* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794 (1966).

121. Carr, *supra* note 118, at 9.

122. *Id.*

123. MICH. COMP. LAWS ch. 712 A § 17 (1968); OKLA. STAT. ANN. tit. 10 § 1110 (Supp. 1972-73).

124. MASS. GEN. LAWS ANN. ch. 119, § 56 (Supp. 1973).

125. ALASKA STAT. § 47.10.075 (Supp. 1971).

V. CONCLUSION

In holding that a juvenile does not have a constitutional right to a trial by jury, the United States Supreme Court avoided expressing complete disillusionment with the *parens patriae* philosophy in the adjudicative phase of the juvenile justice system. The *Kent, Gault,* and *Winship* decisions eliminated some of the inequities and arbitrary procedures from a failing system that was based on an unfulfilled promise. However, the *McKeiver* decision voiced a faint hope for the high promise of the *parens patriae* concept.

The Supreme Court held that individual states have the privilege, but not the obligation, to allow jury trials in their juvenile proceedings.[126] The Court also determined that juvenile court judges may use an advisory jury whenever they deem it necessary in a particular case.[127] This attitude does not indicate an overwhelming approval of the *parens patriae* theory of juvenile justice, but rather, only a tolerance for what it believes to be a commendable goal. The *McKeiver* decision may be viewed as a warning to the states. They will be allowed to re-examine their juvenile systems and to make constructive changes without further constitutional impediments. However, if the states do not correct existing deficiencies, the Supreme Court may very well reverse its present position.[128]

CARLAN J. KRAFT

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126. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

127. *Id.* at 548. *See also Ex parte* State v. Simpson, 263 So.2d 137 (1972). The Alabama Supreme Court said:

> [W]e think that the court has the power to provide for a jury trial in a juvenile delinquency proceeding and to consider the verdict as being only advisory. That discretionary power to invoke a jury's assistance should be exercised only in situations where the court is satisfied that a jury's advice will be helpful toward a just disposition of the adjudication of delinquency. When a jury is utilized, the court must continue to protect the accused from undue public attention. . . .

Id. at 139.

128. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Justice Blackmun, speaking for the plurality, stated:

> Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

Id. at 551.