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The controversial and complex issue of the right to jury trial in a juvenile delinquency proceeding finally received Supreme Court consideration in the recent case of *McKeiver v. Pennsylvania*.[1] In *McKeiver*, youthful Pennsylvania and North Carolina defendants contended that they had a right to jury trial since the adjudicatory phase of a juvenile proceeding is "substantially similar to a criminal trial."[2] They also argued that a jury trial would not interfere with the benefits of the juvenile court system, since such benefits are realized at the dispositive stage of the hearing while the jury functions during the adjudicatory stage.[3] In rejecting the juveniles' contentions and supporting its denial of the jury trial right to juveniles, the Court applied the due process standard of fundamental fairness and emphasized the state interest in "procedural orderliness" during the proceeding.[4]

Writing for a plurality of four, Justice Blackmun structured the decision on the two basic premises that a jury trial is not a critical component of the fact-finding mechanism in juvenile proceedings and would upset the paternalistic theory of juvenile justice.[5] The plurality of the *McKeiver* Court assumed that a jury would operate to intensify the delay, formality, and adversity of the proceeding and add an undesirable aura of publicity.[6] Justice Blackmun neatly embodied these presuppositions in a list of thirteen reasons[7] which are the focal point of this analysis.

In re Gault[8]— which extended to juveniles the right to counsel, the right to adequate notice, the privilege against self-incrimination, and the right to confront adverse witnesses—and *In re Winship*,[9] which extended to juveniles the right to be judged under the reasonable-doubt standard of proof, represent thorough analyses of the historical and functional considerations that necessarily accompany the due process standard of

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[1]403 U.S. 528 (1971).
[2]*Id.* at 541.
[3]*Id.* at 542.
[4]*Id.* at 545, *quoting* Commonwealth v. Johnson, 211 Pa. Super. 62, 74, 234 A.2d 9, 15 (1967).
[5]*Id.* at 543.
[6]*Id.* at 550.
[7]*Id.* at 545-51.
[8]387 U.S. 1 (1967).
[9]397 U.S. 358 (1970).

fundamental fairness.[10] *McKeiver*, however, substituted quantity for quality by supplanting due process analysis with a list of thirteen reasons that are only tangentially related to any such mode of analysis. These thirteen reasons can be fitted into three broad categories: prior judicial and legislative determinations in the areas of criminal and juvenile procedure; the theory of juvenile justice; and the positions assumed in various proposals and official reports.

In relying upon prior judicial determinations, the plurality commented that "[t]he Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding."[11] In this reference to the limited scope of *Gault* and *Winship*, the plurality correctly noted that the issue of the juvenile's right to a jury trial was an open one. However, the failure of the Court in *Gault* and *Winship* to consider the issue presented in *McKeiver* is a neutral factor, not an indication of a prior resolution by the Court to deny the jury trial right to juveniles.[12] Hence, the limitations of prior cases should not have influenced the Court's decision in *McKeiver*.

In addition, the plurality noted that in *Duncan v. Louisiana*[13] the Court had "recognized by dictum that a jury is not a necessary part . . . of every criminal process that is fair and equitable."[14] If this brief statement concerning the implications of *Duncan* was used to establish that the juvenile proceeding is one of those judicial situations in which the jury trial is not essential to fairness and equity, then the Court should have engaged in a due process mode of analysis similar to that implemented in *Duncan* to ascertain whether or not the right to a jury in juvenile proceedings is in fact a fundamental guarantee. *Duncan* suggested that one "inestimable safeguard" provided by jury trials is protection against a "corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge."[15] There is no reason to believe that these shortcomings are peculiar to the criminal prosecution of adults. A recent study indicates that a juvenile offender encounters special proce-

[10]For an example of such a functional and historical analysis, see 397 U.S. at 361-64.

[11]403 U.S. at 545.

[12]Certainly there is no indication in *Winship* that the failure of the *Gault* Court to resolve the dispute over the applicability of the reasonable-doubt standard to juvenile proceedings was a consideration in the determination of the fundamentality of that right.

[13]391 U.S. 145 (1968).

[14]403 U.S. at 547.

[15]391 U.S. at 156.

dural and theoretical hazards because juvenile-court judges often possess less education and training than is necessary to administer juvenile justice.[16]

The *Duncan* Court recognized that to require a jury trial would reflect "a reluctance to entrust plenary powers over the . . . liberty of the citizen to one judge" and that "[f]ear of unchecked power . . . found expression in [the] insistence upon community participation in the determination of guilt or innocence."[17] This need for participation by the jury in the function of justice is not a characteristic of criminal prosecutions alone; juvenile hearings may also result in the denial of personal liberty, albeit under the guise of the benign concept of "commitment."[18] Because of the emphasis on the rehabilitation of the youthful offender—an emphasis grounded in the belief that juveniles are more amenable to social readjustment than are adults with solidified social mores—it becomes even more critical that society assume, through juries, a meaningful fact-finding role in the endeavor to readjust the value judgment of the delinquent. Community involvement would ensure that such rehabilitative efforts are directed at only those youths who are in fact in need of such attention. Under the standard applied in *Duncan*, therefore, the right to a jury trial arguably protects more in a juvenile proceeding than in a criminal proceeding and in the former setting is more deserving of the label "fundamental to the American scheme of justice."[19]

The plurality relied heavily on the fact that "[s]ince *Gault* and since *Duncan* the great majority of state courts . . . have concluded that the considerations that led to the result in [*Gault* and *Duncan*] do not compel trial by jury in the juvenile court."[20] Yet, in *Winship* the Court did not appear to accord any weight—much less capitulate to—a contrary

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[16]See 403 U.S. at 544 n.4, *citing* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967) (hereinafter cited as TASK FORCE REPORT). This report is perhaps the most well documented contemporary study of the problems that beset juvenile justice.

[17]391 U.S. at 156.

[18]The PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 178-79 (1967) noted the deplorable conditions faced by juveniles in the supposedly rehabilitative habitat of correctional institutions. The Commission indicated that a critical obstacle to juvenile reform is the physical inadequacy of juvenile detention facilities. This condition necessitates the undesirable arrangement whereby juveniles are confined with adult criminals. Justice Douglas, dissenting in *McKeiver*, further noted that even when juveniles are separately confined, a negative effect may result from the hostile physical nature of the facilities. 403 U.S. at 560.

[19]391 U.S. at 149.

[20]403 U.S. at 549.

majority of state opinions on the issue of the applicability of the reasonable-doubt standard to juvenile proceedings. The plurality also relied on the position taken by the majority of state legislatures.[21] The Court felt that even though

> "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, . . . 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.' . . . It therefore is of more than passing interest that at least 29 States and the District of Columbia by statute deny the juvenile a right to jury trial in cases such as these."[22]

The statutory position taken by the majority of the states is, as the Court noted, a valid consideration in the context of due process analysis. However, that consideration has not proven to be much of an obstacle to a contrary holding by the Supreme Court; the Court has at times rendered decisions contrary even to a *unanimous* legislative position.[23]

The plurality structured its justifications under the theory of benign juvenile justice upon a single supposition—that the juvenile benefits not only in the dispositive phase of the proceeding but also in the phase in which the jury functions, the adjudicative phase.[24] Relying on this assumption, the plurality recognized that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring . . . into that system the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial."[25] However, *Gault* and *Winship* apparently assured a fair measure of formality, clamor, and adversary atmosphere by granting to the juvenile the privilege against self-incrimination and the rights to counsel, to confrontation, to adequate notice, and to be adjudged under the reasonable-doubt standard. Furthermore, allowing juveniles the right to jury trial might cause a smaller increase in delay and publicity than the Court anticipated. Even when juveniles are given the right to jury trial, a study

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[21]397 U.S. at 360 n.3.

[22]403 U.S. at 548-49, *quoting* Leland v. Oregon, 343 U.S. 790, 798 (1952), *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[23]*E.g.*, Williams v. Illinois, 399 U.S. 235, 239 (1970).

[24]403 U.S. at 550.

[25]*Id.* For a discussion of these factors, see Carr, *Juries for Juveniles: Solving the Dilemma*, 2 LOYOLA U.L.J. 1, 14-24 (1971).

reveals that the invocation of that right by juvenile offenders is less frequent than by adult defendants.[26] Finally, delay in the criminal courts, as evidenced by the backlog in court dockets, certainly did not incline the Court to minimize adversity by denying the right of adults to jury trials in *Duncan*.[27] Thus, with the noted similarity in function between the juvenile and criminal court juries,[28] justification for the Court's endeavors to minimize the adversary quality of juvenile hearings is difficult to uncover. The Court's concededly valid interest in maintaining intimacy and privacy in the juvenile hearing can be attained in a manner which is less offensive to the Constitution than is the denial of the right to a jury trial. For example, jurors could be held in contempt for disclosing facts learned in juvenile proceedings.[29]

Justice Blackmun further contended that the presence of a jury would disrupt the unique mode of operation of juvenile courts with no assurance of a counter-balancing increase in fact-finding ability.[30] However, the opinion offered no explanation of why the jury is crucial to the fact-finding function in criminal proceedings but is not in juvenile proceedings.[31] Justice Blackmun also suggested that the functioning of a jury might "not remedy the defects of the juvenile system,"[32] but such is not a justification for the denial of the right to jury trial. In *McKeiver* the focus should have been—as it was in *Gault* and *Winship*—primarily upon the due process issue of whether fundamental fairness dictates the right of juveniles to trial by jury and only secondarily upon the resulting remedial effect.[33]

Another authority relied upon by the plurality is the *Task Force*

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[26]403 U.S. at 561 (footnote) (Douglas, J., dissenting), *citing* a study by the Public Defender Service and the Neighborhood Legal Services Program of Washington, D.C. The fact that the jury-trial right is invoked less frequently by the juvenile does not undercut the fundamental quality of that right in the juvenile proceeding. The juvenile may often wish to sacrifice the possible benefits of the jury trial in order to avoid damaging publicity. However, such a desire in no way diminishes the fundamentality of the right.

[27]*See* 391 U.S. at 156.

[28]For a discussion of the jury trial relationship to both the criminal and juvenile systems of justice, *see* Comment, *Juveniles and Their Right to a Jury Trial*, 15 VILL. L. REV. 972, 988-1001 (1970).

[29]Carr, *supra* note 25, at 21.

[30]403 U.S. at 547.

[31]*See* Comment, 15 VILL. L. REV., note 27 *supra*.

[32]403 U.S. at 547.

[33]It appears that only one member of the Court, Justice White, attempted to differentiate the interests protected by the jury in the juvenile court from those in the criminal court. 403 U.S. at 551-53 (concurring opinion).

Report: Juvenile Delinquency and Youth Crime.[34] The *McKeiver* Court noted that "[t]he Task Force Report, although concededly pre-*Gault*, is notable for its not making any recommendation that the jury trial be imposed upon the juvenile court system. This is so despite its vivid description of the system's deficiencies and disappointments."[35] This statement also mistakes the purpose of *Gault* and *Winship* and erroneously conditions the extension of a procedural right to juveniles on the remedial effect that such an extension would have on the defects of the system. Furthermore, the fact that the *Task Force Report* is pre-*Gault* is of considerable significance. The weight to be accorded the *Report* as authority for the *McKeiver* Court's conclusion was severely limited by the *Gault* and *Winship* decisions. Both of those cases extended procedural guarantees—the privilege against self-incrimination and the standard of proof beyond a reasonable doubt—that were not deemed essential by the *Report*.[36]

The plurality opinion also argued that to accord the right to jury trial would impede further experimentation by the states in seeking "in new and different ways the elusive answers to the problems of the young."[37] Had this rationale been utilized by the Court in *Gault* and *Winship*, the juvenile might never have enjoyed the procedural guarantees that were found to be fundamental in those cases. The recognition of an asserted constitutional right should turn not upon what latitude the states theoretically should possess to experiment with it but, as *Gault* and *Winship* mandate, upon whether or not the right is fundamental.[38]

As a minor concession to the advocates of jury trials for juveniles, Justice Blackmun commented that "[t]here is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury."[39]

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[34]*See* note 16 *supra*.

[35]403 U.S. at 545-46.

[36]TASK FORCE REPORT 40.

> Some elements of the criminal trial, including jury trial, a standard of proof beyond a reasonable doubt, a wholly open and public trial, and a rigid insistence on the privilege against self-incrimination in all its aspects, are not here regarded as so essential to procedural justice as to warrant the risks their use would entail for the integrity of the juvenile court.

Id.

[37]*Id.* at 547.

[38]"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." In re Gault, 387 U.S. 1, 20 (1967).

[39]403 U.S. at 548.

However, the plurality did not attempt to ascertain whether the advisory jury and the constitutional jury elected by the juvenile would actually protect the same interests.[40]

Finally, the plurality emphasized the position adopted in the Uniform Juvenile Court Act,[41] the Standard Juvenile Court Act,[42] and the Legislative Guide for Drafting Family and Juvenile Court Acts.[43] The major fault of the Uniform Juvenile Court Act is that it did not indicate what factors were relied upon to reach its conclusion that juveniles should be denied the right to jury trial. Hence, assessment of its validity is impossible. Any reliance on the Standard Juvenile Court Act and the Legislative Guide was undermined to a considerable extent by *Winship*, since neither proposal suggested the implementation of the reasonable-doubt standard adopted by the *Winship* Court. Rather, both proposals settled on a less stringent standard of "clear and convincing proof."[44] If the Court in *Winship* ignored these proposals in regard to the constitutionally required standard of proof, then the Court in *McKeiver* should not have accorded great weight to these legislative suggestions as to the juvenile's right to jury trial. The *Winship* decision indicates that any legislative proposal not structured on due process analysis should be accorded only limited consideration.

In summary, it appears that the plurality in *McKeiver* substantially avoided due process analysis and attempted to supplant it with a series of reasons that fail logically to support the Court's denial to juveniles of the right to jury trial. Thus one might speculate as to whether the reluctance of the plurality to utilize the due process standard suggests that perhaps this mode of analysis will not suffice to justify the denial of the jury trial right to juveniles. However, one fact belies conjecture: the *McKeiver* decision not only failed to satisfy the advocates of jury

[40]Even if the interests sought to be protected were identical, there remains a need for due process analysis to determine whether the jury trial right in juvenile trials is a fundamental right. Only upon a determination of fundamentality can there be a designation as to whether the judge or the juvenile can implement the jury trial right.

[41]UNIFORM JUVENILE COURT ACT § 24(a). This Act was approved by the National Conference of Commissioners on Uniform State Laws.

[42]STANDARD JUVENILE COURT ACT art. V, § 19. This Act was proposed by the National Council on Crime and Delinquency.

[43]CHILDREN'S BUREAU, SOCIAL AND REHABILITATION SERVICE, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 29(a).

[44]W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS 72 (1968).

trials for juveniles but also deviated from the positive direction of *Gault* and *Winship*. A return to that direction can occur only upon the proper application of the due process standard to the issue that confronted the *McKeiver* court.[45]

MICHAEL CHARLES EBERHARDT

[45]That the Court is holding in abeyance the ultimate assessment of the effectiveness of the juvenile system of justice and the role to be filled therein by the right to jury trial is clearly indicated in the plurality opinion in *McKeiver*. *See* 403 U.S. at 551.