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Charles B. Wayne

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versely affected and upon alternative means of protecting that interest. Thus, mandatory-directory analysis may result in broader compliance with procedural rules than would be demanded by due process.

Given the facts of *Humble Oil & Refining Co.*, a mandatory-directory analysis would have probably yielded the same results reached by the court through due process analysis. The advantage of the mandatory-directory analysis would have been a more precise articulation of the specific circumstances under which compliance with procedural rules is required. The disadvantage of the approach used by the court is that a cautious, overly broad interpretation of the scope of the procedural compliance standard may well lead to the exaltation of form over substance.\(^{37}\)

On balance, this decision makes a significant contribution to the development of administrative law for municipal and county agencies in North Carolina. The dramatic increase in the number of cases adjudicated by administrative agencies\(^ {38}\) accentuates the importance of assuring procedural fairness for parties who appear before quasi-judicial tribunals. The sensitivity demonstrated by the court toward the protection of procedural fairness, if tempered with recognition of the uniquely flexible and informal nature of administrative actions by local governmental agencies, should lead to constructive resolution of issues not definitively decided by this case.

**Wendell Harrell Ott**

Constitutional Law—Double Jeopardy in the Juvenile Courts

The right to be free from double jeopardy, as guaranteed by the fifth amendment to the United States Constitution,\(^ {1}\) is an integral part of the Anglo-American system of justice. "Fear and abhorrence of govern-

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37. Similarly, if an agency finds the burden of a rigid and overly-broad procedural compliance standard excessively onerous, a not unlikely reaction would be to delete by amendment the provision in question whenever the provision was not a minimum requirement of due process. The imposition of rigid standards designed to enhance procedural protection of applicants could thus ironically lead to minimum rather than maximum procedural protection.


1. U.S. CONST. amend. V provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."
mental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." The United States Supreme Court recognized the fundamental nature of this right in Benton v. Maryland, a 1969 decision which made the fifth amendment guarantee against double jeopardy applicable to state criminal prosecutions through the due process clause of the fourteenth amendment. In Breed v. Jones the Supreme Court was presented with the question whether the prosecution of an individual in an adult criminal tribunal after an adjudicatory proceeding in juvenile court was violative of the double jeopardy prohibition. A unanimous Court held that the guarantee against double jeopardy is violated in such a case. By so holding, the Court continued its pattern of selectively incorporating procedural rights and assured another safeguard for youths in state juvenile court systems.

On February 9, 1971, the State of California filed a petition in the juvenile court for the County of Los Angeles alleging that respondent Gary S. Jones, a seventeen-year-old minor, had committed an act that, if performed by an adult, would have been in violation of the California robbery statute. The petition further alleged that Jones was therefore a person described by California Welfare and Institutions Code section 602 and was thus within the jurisdiction of the juvenile court. At a subsequent adjudicatory or jurisdictional hearing, the juvenile court found that Jones had committed the robbery and that he was a person described by section 602. At a dispositional hearing held on March

4. 95 S. Ct. 1779 (1975).
5. Id. at 1781.
6. Chief Justice Burger wrote the opinion for the Court.
7. 95 S. Ct. at 1791.
8. Those constitutional and procedural safeguards already guaranteed by the Court are the right to notice, the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, and the right to a standard of proof beyond a reasonable doubt. See text accompanying notes 32-48 infra.
9. 95 S. Ct. at 1781.
10. When the petition was filed, California Welfare and Institutions Code section 602 (West 1966) provided:
   Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.
   (A 1971 amendment lowered the jurisdictional age from twenty-one to eighteen. Ch. 1748, § 66, 1971 Cal. Stats. 3766.)
11. 95 S. Ct. at 1782.
12. At the time of the filing of the petition, CAL. WELF. & INST'NS CODE § 702 (West Supp. 1968) set out the procedure for the dispositional hearing.
15, the juvenile court judge found that Jones was not amenable to the rehabilitative facilities of the juvenile court\textsuperscript{13} and that he would recommend prosecution of Jones as an adult.\textsuperscript{14} At the next hearing the court certified Jones to be tried as an adult.\textsuperscript{15}

Jones then petitioned for a writ of habeas corpus in juvenile court, contending that the adjudication under section 602 and the subsequent transfer to superior court placed him in double jeopardy. His petition was rejected.\textsuperscript{16} Habeas corpus relief was likewise denied by the California Court of Appeal.\textsuperscript{17} The California Supreme Court denied Jones' petition for a hearing.\textsuperscript{18} Jones was then tried in superior court and was found guilty of robbery in the first degree.\textsuperscript{19}

In December 1971, Jones, through his mother as guardian \textit{ad litem}, filed a petition for habeas corpus in the United States District Court for the Central District of California, reasserting his claim of double jeopardy.\textsuperscript{20} The district court refused to accept Jones' contention that jeopardy attached at his adjudicatory hearing and denied his petition.\textsuperscript{21} The Court of Appeals for the Ninth Circuit reversed, finding that jeopardy did attach at the adjudicatory hearing and that a juvenile who is the subject of a hearing in which jeopardy has attached cannot be retried as a minor or an adult "absent some exception to the double jeopardy protection."\textsuperscript{22}

The Supreme Court affirmed,\textsuperscript{23} stating that for the purpose of protection against double jeopardy, the adjudicatory proceeding is essentially a criminal prosecution\textsuperscript{24} and that jeopardy attaches when the trier of fact has begun to hear evidence.\textsuperscript{25} The Court refused to accept a claim that, because respondent was subject to the risk of only one pun-
ishment, a trial in superior court would not violate the double jeopardy clause\textsuperscript{26} and also rejected a "continuing jeopardy" argument.\textsuperscript{27} The Court recognized that their decision would mean that, in most cases, a state must insure that a transfer decision be made prior to the adjudicatory hearing.\textsuperscript{28} It concluded, however, that assuring juveniles the constitutional safeguard against double jeopardy would aid rather than hinder the system and would further the objective "that to the extent fundamental fairness permits, adjudicatory hearings be informal and non-adversary."\textsuperscript{29}

The standard of fundamental fairness as applied to the juvenile courts has its origins in \textit{Kent v. United States}.\textsuperscript{30} In that case the Supreme Court held that a District of Columbia juvenile statute must be interpreted as encompassing certain constitutional rights and that the adjudicatory hearing must "measure up to the essentials of due process and fair treatment."\textsuperscript{31} \textit{Kent} was a portent of the landmark decision in \textit{In re Gault}.\textsuperscript{32} In that case the Court held that fundamental fairness\textsuperscript{33} requires that each alleged delinquent be entitled to the following procedural guarantees at his adjudicatory hearing: (1) the right to notice of the

\begin{itemize}
  \item 26. \textit{Id.} "For, even accepting petitioner's premise that respondent 'never faced the risk of more than one punishment,' we have pointed out that 'the Double Jeopardy Clause ... is written in terms of potential or risk of trial and conviction, not punishment.'" \textit{Id.}, citing \textit{Price v. Georgia}, 398 U.S. 323, 329 (1970).
  \item 27. 95 S. Ct. at 1788. The concept of "continuing jeopardy" has "never been adopted by a majority of the Court." \textit{Id.}, citing \textit{United States v. Jenkins}, 95 S. Ct. 1006, 1013 (1975).
  \item 28. 95 S. Ct. at 1789. The Court reasoned that such a requirement would be helpful, as it would eliminate a dilemma in which many youths find themselves. The problem arises in this context: if a transfer is allowed after the adjudicatory hearing, the youth who has cooperated has already given the prosecution his testimony and defenses before trial in the adult tribunal. On the other hand, a youth who is uncooperative may face both an unfavorable adjudication and dispositional recommendation within the juvenile court system. \textit{Id.} at 1791.
  \item 29. \textit{Id.} at 1791.
  \item 30. 383 U.S. 541 (1966). The Court first dealt with denial of due process to minors in \textit{Haley v. Ohio}, 332 U.S. 596 (1948), though the juvenile court system was not involved. The Court reversed the murder conviction of a fifteen-year-old because of a violation of due process in obtaining his confession. The defendant's age prompted the Court to take "special care in scrutinizing the record," for the juvenile cannot be expected to react in the same fashion as would a mature adult. \textit{Id.} at 599. Fourteen years later, the Court used its \textit{Haley} rationale in reversing the murder conviction of a fourteen-year-old in \textit{Gallegos v. Colorado}, 370 U.S. 49 (1962).
  \item 31. 383 U.S. at 562. "Fundamental fairness," a term quoted with approval by the Court in \textit{In re Winship}, 397 U.S. 358, 363 (1970), is used interchangeably with the phrase "due process and fair treatment."
  \item 32. 387 U.S. 1 (1967).
  \item 33. Actually the phrase "due process and fair treatment" was employed. \textit{Id.} at 30. See note 31 supra.
\end{itemize}
charges against him as well as timely written notice of the hearing; the right to counsel; (3) the privilege against self-incrimination; and (4) the right to confrontation and cross-examination.

_Gault_ was a response to an idealistic "civil" juvenile court scheme that was initiated at the turn of the century to dispense "personalized" justice in a manner similar to a parent administering guidance to his child. _Gault_ acknowledged that the system had fallen short of its stated goal, noting in particular the high crime rate among juveniles, the high incidence of recidivism, and "departures from established principles of due process [which] frequently resulted not in enlightened procedure, but in arbitrariness." In fact, the "civil" nature of the proceedings had previously been asserted as the rationale for denying constitutional and procedural rights guaranteed to adult criminal defendants, including freedom from double jeopardy.

A fifth procedural right was later guaranteed to juveniles in _In re_
Winship when the Court held that children are constitutionally entitled to the standard of "proof beyond a reasonable doubt" in delinquency hearings. However, the trend toward full constitutional rights for juveniles stopped with McKeiver v. Pennsylvania, in which the Court stated that there is no right to trial by jury in juvenile proceedings.

In assuring the sixth right to those in the juvenile court system, the Breed Court engaged in a two-step analysis. It first considered whether the juvenile proceeding could be differentiated from a criminal prosecution for the purpose of the safeguard against double jeopardy. Concluding that it could not, the Court then examined whether the assurance of the right to be free from double jeopardy so diminished the juvenile court's "assumed ability to function in a unique manner" that the right should not be incorporated. Dealing with the problem in this fashion, the Court utilized the same analytical process employed in Gault, Winship, and McKeiver. In Gault and Winship, the Court characterized the juvenile court proceedings as criminal for the purpose of each right in question and determined that the incorporation of each

47. Id. at 368. The Court first had to incorporate explicitly this safeguard for adults though "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." Id. at 362, 364.
48. The Court first faced this issue in In re Whittington, 391 U.S. 341 (1968) (per curiam), but never reached the merits of the case and remanded to the state court for reconsideration in light of Gault. In DeBacker v. Brainard, 396 U.S. 28 (1969) (per curiam), the Court similarly declined to rule on the question, finding that resolution of the issue would not be appropriate in the circumstances of the case.
49. 403 U.S. 528 (1971).
50. See note 58 and accompanying text infra. The right to jury trial question had been previously raised in In re Whittington, 391 U.S. 341 (1968) (per curiam), and DeBacker v. Brainard, 396 U.S. 28 (1969) (per curiam), but the Court refused to rule on the issue in Whittington, for it never reached the merits of the case. See note 48 supra. DeBacker was held to be an inappropriate case for a resolution of the jury trial issue because the adjudicatory hearing had taken place prior to the effective date of Duncan v. Louisiana, 391 U.S. 145 (1968), which held the right of jury trial applicable to the states.
51. It might be argued that the Court did not fully incorporate the right. See text accompanying notes 59-65 infra.
52. 95 S. Ct. at 1785-87.
53. Id. at 1786. In so finding, the Court reiterated the conclusion reached in Gault that the juvenile is subject to substantially the same loss of liberty as an adult and also faces similar societal stigma. Since the juvenile encounters the same "potential consequences" as does the adult accused, he suffers the same "heavy pressures and burdens . . . ." Id.
54. Id. at 1787, citing McKeiver v. Pennsylvania, 403 U.S. at 547.
55. 95 S. Ct. at 1787-91.
56. In re Winship, 397 U.S. at 365-67 (right to standard of proof beyond a reasonable doubt); In re Gault, 387 U.S. at 35-36 (right to counsel); id. at 49-50 (privilege against self-incrimination); id. at 56 (right to confrontation and cross-examination). Gault did not discuss similarities in the juvenile and criminal court
right would not interfere with the functioning of the system in the desired manner.⁵⁷ The right to trial by jury was denied in *McKeiver* when the Court found that the possible advantages were outweighed by the fact that such a guarantee might “remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what [had] been the idealistic prospect of an intimate, informal protective proceeding.”⁵⁸

The Court’s mode of analysis in *Breed* was therefore consistent with previous cases. However, one way in which *Breed* might differ from those prior cases is the way the Court appeared to anticipate situations in which fundamental fairness would not require the protection against double jeopardy that they enunciated. The holding in *Breed* is limited to those situations in which a juvenile is prosecuted in trial court after an adjudicatory hearing in juvenile court.⁵⁹ The holding, coupled with the following language from the case, gives the impression that there may be some situations in which the right to be free from double jeopardy may give way to the desired operation of the juvenile court system:

> If there is to be an exception to that protection in the context of the juvenile court system, it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens . . . which the exception will entail in individual cases.⁶⁰

There are three basic situations in juvenile proceedings that might involve the issue of double jeopardy.⁶¹ *Breed* is an example of one situation: the prosecution of a minor in a criminal trial for the same acts that already were examined in an adjudicatory juvenile hearing. Another possibility is waiver of jurisdiction by the juvenile court after the start of processes in analyzing the right to notice, as the standard for a constitutionally adequate notice is the same in a civil or criminal proceeding. *Id.* at 33.

⁵⁷. *In re Winship*, 397 U.S. at 366-67 (right to standard of proof beyond a reasonable doubt); *In re Gault*, 387 U.S. at 32-33 (right to notice); *id.* at 35, 38 n.65 (right to counsel); *id.* at 51-52 (privilege against self-incrimination); *id.* at 56-57 (right to confrontation and cross-examination).


⁵⁹. 95 S. Ct. at 1791.

⁶⁰. *Id.* at 1788.

an adjudicatory hearing and a subsequent transfer to criminal court.62
Finally, a minor's acts might be the subject of a second adjudicatory
hearing in juvenile court, if the first hearing was terminated in some
manner favorable to the accused.63

In light of Breed's position as to the moment jeopardy attaches, the
first two situations are now functionally the same for the purpose of
double jeopardy determinations. Because jeopardy is said to attach when
the juvenile court begins to hear evidence,64 it does not appear to matter
whether the adjudicatory hearing reaches a conclusion before the case is
transferred; if evidence is heard, that would seem to be enough to
prevent a second episode in criminal court.

As to a second adjudicatory hearing after a favorable termination,
logic as well as fundamental fairness dictates that this second juvenile
hearing not be permitted. If the original adjudicatory hearing puts a
youth in jeopardy, so should the second. No court faced with this factual
situation since the Gault decision has allowed a second hearing.65 Thus,
despite the possibility of an "exception," there does not seem to be a
context in which one could arise.

Breed is therefore analytically consistent with the approach taken
by the Supreme Court in selectively incorporating rights for youths in
the juvenile court system. Rather than merely granting juveniles all of
the rights already guaranteed to adults accused of crime, the Court has
considered each safeguard separately and has determined (through the
two-step analysis) whether the states will be required to furnish that
safeguard. Although this technique has been cited as particularly suited
for the setting of juvenile justice,66 each time the Court guarantees
another right, the inconsistency of the entire approach is further empha-
sized. Justice Black, concurring in Gault, saw the illogic of first stating
that a youth in juvenile court faces the same risk as does an adult, and
then denying the juvenile the same constitutional and procedural guar-
antees that the adult enjoys: "[I]t would be a plain denial of equal
protection of the laws—an invidious discrimination—to hold that others
subject to heavier punishments could, because they are children, be

62. Nearly all jurisdictions permit this procedure. Id. at 297.
63. See, e.g., Richard M. v. Superior Court, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal.
Rptr. 752 (1971).
64. 95 S. Ct. at 1787.
65. Rudstein, supra note 61, at 279.
66. See Dorsen and Rezneck, In re Gault and the Future of Juvenile Law, FAMILY
denied these same constitutional safeguards." As each right is considered by the Court and the juvenile process is said to be indistinguishable from a criminal trial for the purpose of that right, the methodology of selective incorporation in the context of the juvenile court system becomes increasingly difficult to justify.

CHARLES B. WAYNE

Constitutional Law—The Decline of Male Chauvinism?

The Supreme Court once stated that woman is destined for an inferior role in the societal scheme of things, that she is properly placed in a class by herself, and that the law of the Creator deems that she perform the duties of wife and mother and no other. In the years since, the Supreme Court has softened its "romantic paternalism" toward the "weaker" sex and now views woman essentially as man's equal. This evolution has not been without its difficulties, however, and even the current Supreme Court stance on sex discrimination is obscure. The principal difficulties seem to be the determination of the standard with which to judge the discrimination in such cases and a determination of how stringently that standard will be applied.

Stanton v. Stanton is the most recent Supreme Court exposition on sex discrimination and the equal protection clause of the fourteenth amendment. In an almost unanimous decision the Court held that a Utah statute which fixed the age of majority at eighteen for girls and

67. 387 U.S. at 61 (Black, J., concurring). The same arguments were made by the dissenters in McKeiver v. Pennsylvania, 403 U.S. at 557-63.

3. See text accompanying notes 14-25 infra.
4. 95 S. Ct. 1373 (1975).
5. U.S. Const. amend. XIV, § 1. This section is the principal vehicle used by litigants to challenge statutes that allegedly discriminate against females on the basis of sex.