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and irrational.[38] If "work off" rates were increased considerably, to a point such that it could no longer be assumed out of hand that imprisonment is a harsher form of punishment than a fine,[39] then perhaps the basic premises of *Williams* and *Tate* would be altered, imprisonment would no longer constitute unequal protection of the laws, and the unsatisfactory alternatives considered here would also be unnecessary.[40]

Perhaps the greatest problem faced by the alternative penalties springs from the assumption that the *Tate* decision categorically forbids imprisonment of indigents when others able to pay a fine may escape this mode of punishment. *Tate* does not demand this. Writing for the majority, Justice Brennan declared that *Tate*

> ... does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fine by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.[41]

There seems to be no danger that imprisonment of an offender who refuses to pay a fine may be declared unconstitutional. The same may not be said of the imprisonment of the indigent unable to pay the fine for whom no suitable alternative has been found. By leaving this problem unsolved, *Tate* appears to be an intermediate case. The process begun in *Williams v. Illinois*[42] and carried further by *Tate* has yet to be completed by a Court pronouncement that indigents may not be imprisoned for nonpayment of fines in any case.[43]

Whatever the Court may in the future decide to do with the indigent offender who cannot avail himself of an alternative to imprisonment for nonpayment of fines, it is clear for the present that *Tate* will not allow the State to "impose a fine as a sentence and then automatically convert it into a jail term because the defendant is indigent." [44] Tate leaves questions unanswered, but it serves to put all on notice that a criminal offender's economic status must not affect the form of his punishment any more than it may affect his rights during the trial process.

[38] *Id.* The Court found it unnecessary to answer this argument, resting the decision squarely on equal protection grounds.

[39] *See* note 25 *supra.*

[40] Probably, however, the rate is immaterial, and the Supreme Court would never allow imprisonment of indigents for nonpayment of fines while others may avoid prison because they are financially better situated.

[41] 401 U.S. at 400-01.

[42] 399 U.S. 235 (1970).

[43] An interesting question is the effect *Tate* may have on bail. If the poor may not be put in jail in the first place because they cannot pay a fine, it seems to follow that they should not be kept in jail for their inability to raise bail while the more well-to-do defendants awaiting trial, or appeal, are able to "buy" their freedom. In each situation the result is the same—the offender's financial situation determines whether or not he is to be put in, or remain in, jail.

[44] Morris v. Schoonfield, 399 U.S. 508, 509 (1970).

JURY TRIAL—JUVENILE COURT

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

The extension of constitutional guaranties to juveniles—a trend initiated by the Warren Court—has apparently been reversed with the Supreme Court's decision in *McKeiver v. Pennsylvania.*[1] The Court held that the right to a jury trial was not constitutionally mandated in state juvenile delinquency proceedings.

McKeiver represents the consolidation of Pennsylvania and North Carolina cases involving Joseph McKeiver, Edward Terry and Barbara Burrus. McKeiver was sixteen years old when he was charged with robbery, larceny and receiving stolen goods—felonies under Pennsylvania statutes.[2] Terry was fifteen years old when he was charged with assault and battery on a police officer and conspiracy—misdemeanors under Pennsylvania statutes.[3] Both were denied a jury trial and adjudicated delinquent. Their cases were appealed to the Pennsylvania Superior Court and

[1] 403 U.S. 528 (1971).

[2] PA. STAT. ANN. ch. 18, §§ 4704, 4807 (1965).

[3] PA. STAT. ANN. ch. 18, §§ 4302, 4708 (1965).

[4] *In re* McKeiver, 215 Pa. Super. 760, 255 A.2d 921 (1969); *In re* Terry, 215 Pa. Super. 762, 255 A.2d 922 (1969).

then joined on appeal to the Pennsylvania Supreme Court.[5]

The North Carolina case arose when Barbara Burrus and approximately forty-five other children were charged with wilfully impeding traffic, a misdemeanor under North Carolina law[6] during a series of demonstrations. Their request for a jury trial was denied and after trial each of the juveniles was placed on probation. The cases were appealed to the North Carolina Court of Appeals[7] and then to the North Carolina Supreme Court.[8]

Both the Pennsylvania and North Carolina Supreme Courts concluded that a juvenile was not constitutionally entitled to a jury trial. The Pennsylvania Supreme Court applied the fundamental fairness test previously enunciated by the Supreme Court,[9] and found that particular elements within the juvenile process assured the juvenile protection of his rights thereby rendering the jury trial non-essential within the juvenile setting.[10] In a brief opinion, the North Carolina Supreme Court was unable to find authority extending the jury trial to juveniles and relied upon the extensive precedent against it.[11]

In a close decision, the Supreme Court affirmed the conclusions of the Pennsylvania and North Carolina Supreme Courts. Mr. Justice Blackmun delivered the Court's opinion, in which Justices White and Stewart and Chief Justice Burger concurred, concluding that a jury trial was not a necessary safeguard to insure accurate fact-finding.[12] Mr. Justice Harlan concurred separately, contending, as he had in *Duncan v. Louisiana*,[13] that the fourteenth amendment did not compel extension of the jury trial guaranty to the states.[14] Mr. Justice Douglas delivered a dissenting opinion in which Justices Black and Marshall concurred, maintaining that the fourteenth amendment constitutionally mandated state juvenile jury trials.[15] Mr. Justice Brennan wrote a separate opinion concurring in the Pennsylvania result but dissenting from the result in the North Carolina case.[16] He argued that while jury trials were not constitutionally mandated for juveniles, they must be assured procedural protection from judicial arbitrariness.[17]

The significance of the *McKeiver* decision emerges most clearly within the historical context of the juvenile system and the Supreme Court's involvement with it. The past five years have witnessed a virtual revolution in juvenile court proceedings, largely through the impetus of the Supreme Court's rulings in *Kent v. United States*,[18] *In re Gault*,[19] and *In re Winship*.[20] These decisions, founded upon the Court's concern over the judicial abuse of discretionary powers within the juvenile system,[21] profoundly altered the procedural character of the adjudicative phase of the juvenile hearing.[22]

The concept of juvenile proceedings arose early in the twentieth century when reformers successfully argued that society's interests were not properly served by a system that treated children and adults similarly.[23] Illinois first implemented the idea of a juvenile court in 1899 and other states soon followed.[24] Procedural formalities were purposely eliminated from the court's design and casualness was stressed in order to minimize the adversary character of the proceedings.[25] This system survived, largely unchanged, until the mid-twentieth century, when legal scholars and social reformers became increasingly distressed with its failures, which were graphically illustrated

[5] *In re* Terry, 438 Pa. 339, 265 A.2d 350 (1970).
[6] N.C. GEN. STAT. § 20.174.1 (1969).
[7] *In re* Burrus, 4 N.C. App. 523, 167 S.E.2d 454 (1969); *In re* Shelton, 5 N.C. App. 487, 168 S.E.2d 695 (1969).
[8] *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).
[9] *In re* Winship, 397 U.S. 358, 359 (1970).
[10] 438 Pa. at 348, 265 A.2d at 354 (1970).
[11] 275 N.C. at 528-9, 169 S.E.2d at 886 (1969).
[12] 403 U.S. at 547.
[13] 391 U.S. 145 (1968). *Duncan* held that the sixth amendment jury trial guaranty was incorporated into the fourteenth amendment due process guaranties and therefore was applicable to state criminal proceedings. *See* text accompanying notes 43–44 *infra*.
[14] 403 U.S. at 557.
[15] *Id.* at 557–58.
[16] *Id.* at 553.
[17] *Id.* at 554–55.
[18] 383 U.S. 541 (1966).
[19] 387 U.S. 1 (1967).
[20] 397 U.S. 358 (1970).
[21] *See* 383 U.S. at 556.
[22] Generally, state juvenile proceedings involve a bifurcated process: an adjudicative hearing to determine whether the child is a "delinquent," and a dispositional hearing to decide what to do about his delinquency. *See* Note, *A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court*, 64 NW. U.L. REV. 87, 89 (1969).
[23] *See* Flexner & Oppenheimer, *The Legal Aspects of the Juvenile Court*, 57 AM. U.L. REV. 65 (1923); Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965).
[24] *See* Abbott, *The History of the Juvenile Court Movement Throughout the World*, in THE CHILD, THE CLINIC AND THE COURT 267, 270 (1925).
[25] *See* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7.

by rising juvenile crime rates and a high rate of recidivism.[26] In 1966, the Supreme Court recognized the juvenile system's failures and indicated its approval of revisionary efforts in *Kent v. United States*.[27]

While *Kent* did not reach constitutional dimensions,[28] the Court clearly stated that the informality of juvenile proceedings did not entitle the juvenile court to disregard fundamental procedural guidelines.[29] In *Kent*, pursuant to a District of Columbia discretionary statute, the juvenile court waived jurisdiction over the sixteen-year-old respondent, abandoning him to the adult criminal court, without granting him a waiver hearing or access to his juvenile social records. Mr. Justice Fortas expressed his concern in the majority opinion that the child involved in juvenile proceedings seemed to be confronted with "the worst of both worlds," receiving neither the protections afforded adults nor the solicitous care intended for children.[30] After recognizing the critical importance of the waiver of jurisdiction hearing,[31] the Court held that the juvenile who was faced with such a hearing must be accorded certain procedural safeguards, including counsel, counsel's access to social records, and a judicial statement of the reasons underlying the waiver decision.[32]

[26] Between the years 1960 and 1965, arrests of persons under eighteen rose 52 per cent for willful homicide, rape, robbery, aggravated assault, larceny, burglary and car theft. Arrests for persons over eighteen rose only 20 per cent during the same period. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 56 (1967) [hereinafter cited as NAT'L. CRIME COMM'N. REPORT].

The 1965 F.B.I. figures show that of all persons arrested during that year, 30 per cent were under twenty-one, and 20 per cent were under eighteen. *Id.* at 55.

> In fiscal 1966 approximately 66 per cent of the 16 and 17 year old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 per cent of those in the Receiving Home were repeaters. The SRI study revealed that 61 per cent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 per cent had been referred at least twice before.

STANFORD RESEARCH INSTITUTE, PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, quoted in *Gault*, 387 U.S. at 22.

[27] 383 U.S. 541 (1966).

[28] Mr. Justice Fortas stated: "The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for the decision of this case, and we go no further." *Id.* at 556.

[29] *Id.* at 554–5.

[30] *Id.* at 555.

[31] *Id.*

[32] *Id.* at 557.

One year later, the Supreme Court expanded its *Kent* holding in *In re Gault*, attaching fundamental due process guaranties to the adjudicative phase of state juvenile court proceedings.[33] The Court held that where a juvenile faced possible committment, certain procedural safeguards were guaranteed him by the fourteenth amendment due process clause. The safeguards mentioned were advance notice of the charges, including particular allegations of the wrongful conduct; notice of his right to counsel and the availability of court appointed counsel if indigent; warning of his privilege against self-incrimination and right to remain silent; and warning of his right to confront and cross examine witnesses.[34]

The *Gault* rationale embodied the Court's recognition that procedural regularity at the juvenile level was important because of the serious consequences involved and to insure the juvenile system's effectiveness. Mr. Justice Fortas, again writing for the majority, noted the apparent failure of the juvenile system and asserted that the substantive benefits of juvenile proceedings should not be adversely affected by the implementation of basic procedural rights.[35] Fortas contended that any proceeding where the child faced possible loss of his liberty was comparable in seriousness to a felony prosecution.[36] Thus *Gault* extended certain of the fourteenth amendment's due process guaranties to the adjudicative phase of state delinquency proceedings and seemingly represented the Supreme Court's judgment that children, like adults, were entitled to protection from judicial indiscretion.

In 1970, the Supreme Court again expanded the accused juvenile's due process rights at the adjudicative stage in *In re Winship*.[37] *Winship* held that the standard of proof beyond a reasonable doubt was applicable to state juvenile proceedings. Relying on *Gault*, which compared delinquency and criminal proceedings to the extent that each potentially threatened the defendant's liberty, the Court felt that the reasonable doubt standard of

[33] 387 U.S. 1 (1967). *Gault* dealt with a fifteen-year-old youth charged with making lewd and obscene phone calls who was committed to a state institution for the remainder of his minority after being adjudicated delinquent. The youth's parents were not initially notified of the charges against him, nor was he represented by counsel or permitted to confront the complaining witness.

[34] *Id.* at 31–59.

[35] *Id.* at 21.

[36] *Id.* at 36.

[37] 397 U.S. 358 (1970).

proof was an essential element of procedural fairness at the adjudicative hearing.[38] Furthermore, the majority stated that this holding would not impair the beneficial aspects of the juvenile court system.[39] However, the Court seemed to go beyond *Gault* with the assertion that this decision would not impinge upon the "informality, flexibility or speed" of the fact-finding hearing.[40] The Court's specific concern with these features of the juvenile process indicated, at least to one commentator,[41] that the expansion of procedural rights would not be permitted to interfere with these particular aspects of the juvenile hearing.

Recent Supreme Court cases dealing with the right to trial by jury are also relevant to the issues in *McKeiver*. In *Duncan v. Louisiana*,[42] the Court held that the sixth amendment's trial by jury mandate was incorporated into the fourteenth amendment as one of the due process guaranties and was therefore applicable to the states. The Court limited its decision to those criminal cases where the right to a jury trial would be recognized in the federal system.[43] The majority also indicated that the severity of the penalty facing a defendant represented a major factor in determining whether the jury trial guaranty attached.[44]

The Court then proceeded in *Bloom v. Illinois* to extend the sixth amendment's guaranty to serious criminal contempt proceedings.[45] The majority failed to find a significant difference between serious contempt cases and other serious crimes where the defendant, as in *Bloom*, faced a possible two-year imprisonment.[46] They concluded that neither historical factors nor "the considerations of necessity and efficiency normally offered in defense of the established rule" [47] justified denying a jury trial in serious criminal contempt cases. Considered together, *Duncan* and *Bloom* suggest the Supreme Court's affirmation of a defendant's right to a jury trial whenever faced with possible lengthy incarceration, regardless of the precise nature of the proceedings.

However, *McKeiver* revealed the Court's unwillingness to reach what seemed to be the natural extension of *Gault*, *Duncan*, and their progeny. The trend established by *Kent*, *Gault*, and *Winship*, each expanding fundamental procedural safeguards into the adjudicative stage of juvenile proceedings, was seemingly abandoned by the Court's action. And, although many elements that the Court deemed important in *Duncan* and *Bloom* were present, the Court stopped short of applying the sixth amendment jury trial guaranty to the juvenile system.

Mr. Justice Blackmun's plurality opinion concluded that the jury trial was not an essential element of fundamental fairness and was therefore not constitutionally required in the juvenile setting.[48] After reaching this conclusion, Blackmun listed thirteen reasons supporting his opinion,[49] which embody four major considerations: the juvenile-criminal distinction; the role of jury trials; their potential effect on juvenile proceedings; and the existence of significant adverse authority.

Juvenile-Criminal Distinction

Mr. Justice Blackmun carefully distinguished between the juvenile proceeding and the felony prosecution, noting that the Court had refrained from equating the two processes for purposes of the sixth amendment.[50] He quoted language from *Kent* and *Gault* which explicitly stated that juvenile proceedings need not conform with all of the requirements of the criminal process.[51] He also pointed to the Court's past hesitation to burden the juvenile system with either a "criminal" or "civil" label.[52] Moreover, throughout his opinion, Justice Blackmun dwelt upon the unique beneficial aspects of the juvenile process and concluded that any equation between the two systems ignored the aims of the juvenile process: fairness, concern, sympathy and paternal attention.[53]

Blackmun's rationale seemingly ignored a fundamental, underlying concern of the Court in its previous juvenile decisions. Although the Supreme Court had refused to equate the two

[38] *Id.* at 368.
[39] *Id.* at 366.
[40] *Id.*
[41] [T]he Court might now regard speed, informality and flexibility as interests of the state which must be considered in applying due process standards to juvenile proceedings. . . . If applied, the 'informality, flexibility, or speed' test would militate against adoption of additional due process rights in juvenile proceedings, particularly the right to jury trial. Comment, *Juvenile Due Process in the Lower Courts*, 62 J. CRIM. L.C. & P.S. 335, 341-42 (1971).
[42] 391 U.S. 145 (1968).
[43] *Id.* at 149.
[44] *Id.* at 159.
[45] 391 U.S. 194 (1968).
[46] *Id.* at 198.
[47] *Id.*
[48] 403 U.S. at 545.
[49] *Id.* at 545–50.
[50] *Id.* at 540–41.
[51] *Id.* at 533–34 quoting Kent v. United States, 383 U.S. at 562, and *In re* Gault, 387 U.S. at 30.
[52] 403 U.S. at 541.
[53] *Id.* at 550.

processes, both *Gault* and *Winship* recognized that the consequences (incarceration) of an adjudication of delinquency were comparable in seriousness to a criminal conviction.[54] Blackmun failed to confront this issue squarely in his efforts to establish the criminal-delinquent distinction. On the other hand, Justice Douglas' dissent addressed this issue and emphasized the similarity between the two processes where the child, as in each of these cases, faced a possible incarceration of five years.[55] The dissent also pointed to the prosecutorial nature of the juvenile proceeding as a further indication of the two systems' similarity.[56] The failure of the plurality opinion to confront the criminal-delinquent distinction in terms of possible incarceration suggests a shift away from the reasoning of previous holdings.

Mr. Justice White apparently recognized that Blackmun had failed to elaborate the differences between the criminal and juvenile systems, so he attempted to sharpen the distinctions between the two processes in his concurring opinion. He argued that the criminal law attributed wilfullness to the criminal defendant and therefore punished him for engaging in unlawful conduct. On the other hand, the acts of a juvenile, he contended, are deemed the result of environmental or social pressures. Therefore the juvenile system was not geared toward punishment of the youthful offender, but aimed at his rehabilitation.[57] Although the juvenile was branded a delinquent, White felt that this represented a less onerous stigmatization than that attached to his criminal counterpart. Furthermore, White asserted that the consequences of a delinquency finding were less severe than those arising from a criminal conviction. These observations, which suggest substantive differences between the criminal and juvenile systems, compelled White to join in the majority's decision.

Fairness and the Jury

After examining past juvenile decisions, Mr. Justice Blackmun established that the Court had only extended certain fundamental rights to the juvenile,[58] and concluded that trial by jury was not an essential safeguard to assure procedural fairness. In reaching this conclusion, Blackmun applied the fundamental fairness test utilized by the Court in *Gault* and *Winship*.[59] The jury, he stated, was not necessarily an essential component of accurate fact-finding.[60] He pointed to workmen's compensation, probate, and deportation proceedings, along with military trials, as instances where the judicial system had functioned effectively without the use of a jury. Further, he cited the post-*Duncan* case of *DeStefano v. Woods*,[61] where the Court refused to apply *Duncan* retroactively, and *Williams v. Florida*,[62] where the Court found nothing improper with Florida's use of a six-man criminal jury rather than the customary twelve-man jury. These holdings, he asserted, indicated the Court's feeling that accurate factual determinations could be reached without the utilization of a jury.[63]

Justice Blackmun, however, did not satisfactorily confront the rationale of recent decisions. The Court's previous juvenile holdings indicated an abiding concern with the procedural fairness of the adjudicative phase of the delinquency proceeding, and *Winship* expressly revealed the Court's concern about accurate factual determinations.[64] These decisions alone do not provide authority for the attachment of the jury trial guaranty at the juvenile level, but *Duncan* and *Bloom* strongly suggest this result. Indeed, *Duncan* specifically stated that the possible length of imprisonment was

[54] *See In re* Winship, 397 U.S. at 365–66, quoting *In re* Gault, 387 U.S. at 36.

[55] Douglas stated that "[c]onviction for each of these crimes would subject a person, whether juvenile or adult, to imprisonment in a state institution." 403 U.S. at 558. And he later noted that "[j]ust as courts have sometimes confused delinquency with crime, so have law enforcement officials treated juveniles not as delinquents but as criminals." *Id.* at 560.

[56] *Id.* at 559. The argument equating the prosecutorial nature of juvenile proceedings with the criminal system was more fully elaborated by the Pennsylvania appellants in this case. They compared the juvenile and criminal systems by pointing to such features as the indictment-like nature of the delinquency petition, pretrial detention facilities, plea-bargaining processes, evidentiary rules, general courtroom procedures and the prison-like character of juvenile institutions. Their arguments were well summarized by Mr. Justice Blackmun in his opinion. *Id.* at 541–43.

[57] *Id.* at 552.

[58] *Id.* at 553, 545.

[59] *Id.* at 543. The fundamental fairness test was well expressed by Mr. Justice Brennan in his majority *Winship* opinion:

> *Gault* decided that, although the fourteenth amendment does not require that the hearing at this stage [adjudicatory] conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.'

397 U.S. at 359.

[60] 403 U.S. at 543.

[61] 392 U.S. 631 (1968).

[62] 399 U.S. 78 (1970).

[63] 403 U.S. at 543.

[64] *See* 397 U.S. at 363.

important in determining whether the right attached,[65] and *Bloom* extended the right beyond criminal prosecutions.[66] The juvenile system presented a judicial proceeding which arguably was implicitly subsumed within the Court's language in these two cases. Blackmun's failure to distinguish these decisions suggests his inability to refute the argument that the prospect of incarceration imbues the juvenile proceeding with a criminal aura.

The dissenters, concluding that no substantial difference inheres between the juvenile and criminal systems, had no difficulty finding that the fourteenth amendment mandated the right to a jury trial. Mr. Justice Douglas quoted from Justice Black's dissent in *DeBacker v. Brainad*[67] where Black wrote that a jury trial was a fundamental aspect of criminal justice in the English speaking world.[68] However, Douglas did not specifically answer the plurality's assertion that the absence of a jury would have little significant effect on the ultimate accuracy of factual determinations.

Mr. Justice Brennan agreed with the plurality that the fundamental fairness test was the appropriate standard to apply.[69] He also agreed that juvenile proceedings were not criminal within the meaning of the sixth amendment. Yet he maintained that while a jury trial was not mandated, the juvenile's interest must somehow be protected in the fact-finding process.[70] He found that the Pennsylvania system provided this safeguard by permitting the juvenile to focus public attention on his case since there was no statutory bar to the public's admission to the proceedings. Public scrutiny thus adequately protected the accused juvenile from judicial prejudice or arbitrariness.[71]

[65] 391 U.S. at 159.

[66] 391 U.S. at 194.

[67] 396 U.S. 28 (1969). This case presented the same issue involved in the present case—the juvenile's right to a jury trial. The Supreme Court, however, felt that DeBacker's case was inappropriate for resolution of this issue because his hearing had antedated *Duncan* and *Bloom*, which had been accorded prospective application in *DeStefano*. Hence the Court dismissed DeBacker's appeal, with Justices Black and Douglas filing dissents.

[68] 396 U.S. at 34.

[69] *Id.* at 403 U.S. at 554.

[70] The Due Process Clause commands not a particular procedure, but only a result: in my Brother Blackmun's words, 'fundamental fairness . . . in factfinding.' In the context of these and similar juvenile delinquency proceedings, what this means is that the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve. *Id.* at 554.

[71] *Id.*

In the North Carolina cases, however, the public was excluded from the proceedings, thereby compelling reversal. This approach, however, would prove unworkable in most states since they require confidentiality in juvenile proceedings by statute.[72] Moreover, Brennan did not support his assertion that a public trial insures the juvenile procedural protection with the citation of either examples or judicial experience.

Preservation of Juvenile System

Justice Blackmun evidenced a deep-seated concern that implementation of the jury trial guaranty might either undermine the entire purpose of the juvenile court or unduly burden its already strained resources. He found that *Gault* and *Winship* were not intended to recast the existing juvenile system.[73] The *Winship* holding which emphasized "informality, flexibility and speed" as important aspects of the juvenile system[74] provided him with significant precedent as he argued that a jury trial would infuse juvenile proceedings with delay and formality, and would probably provoke undesirable publicity.[75] Basically, Blackmun felt that the jury trial threatened to convert juvenile proceedings into full-scale criminal adversary proceedings, thereby negating the need for separate systems.[76] Further, he feared that the jury trial requirement would prevent state experimentation.[77]

The plurality's concern for the substantive benefits embodied in the juvenile system's enlightened attitudes toward rehabilitation and treatment are justified to the extent that a jury trial might threaten them. Justice Blackmun, however, confined his discussion to the general theoretical underpinnings of the juvenile system without closely examining its mechanics. He failed to confront the argument that the jury trial would only affect the adjudicative, and not the dispositional, phase of the juvenile hearing.[78] Since the juvenile system's unique benefits consist mainly of discretionary intake procedures that permit disposition without adjudication and flexible sentencing,[79] the implementation of jury trials

[72] *See, e.g.*, ILL. REV. STAT. ch. 37, §§ 701-20(6) (1967); OHIO REV. CODE ANN. ch. 2151.35 (1964).

[73] 403 U.S. at 534.

[74] 397 U.S. at 366.

[75] 403 U.S. at 550.

[76] *Id.* at 550–51.

[77] *Id.* at 547.

[78] *Id.* at 542.

[79] *See* Ketcham, *Guideline from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700, 1714–18 (1967).

during the adjudicative phase would have little effect on these benefits. Blackmun's opinion failed to distinguish between the adjudicative and dispositional phases, unlike previous decisions, which had concluded that the imposition of other procedural safeguards at the adjudicative stage would not impair the dispositional stage or other special features of the juvenile system.[80] Justice Blackmun's specific concern with speed and flexibility seemingly relate as much to the problems of judicial administration as they do to the beneficial aspects of the system.

The dissenters carefully considered the potential impact of jury trials, however.[81] Justice Douglas' argument was based upon his contention that the juvenile court's rehabilitative services were useless in cases where the child felt that he was dealt with unfairly during his adjudicative hearing.[82] After examining the experience of jurisdictions where juveniles had been offered jury trials, Douglas demonstrated that the expected backlogs had not materialized and, in the event they might, he suggested smaller juries.[83] He further contended that public trials would not affect the juvenile court policy of confidentiality, particularly since many groups already had access to the court and social records.[84] The role of the expert juvenile court would not be disregarded with the implementation of jury trials. Rather, the judge could still exercise his discretionary powers during the important dispositional phase.[85] The dissent's observations on the probable impact of a jury trial suggest that the plurality's concern over the continued existence of the present juvenile system, particularly with the elements of speed, flexibility, and informality, are irrelevant to the quality of juvenile justice or the system's rehabilitative effectiveness.

Existing Authority and Practices

Mr. Justice Blackmun, while recognizing the system's failures, cited substantial authority—state court decisions, existing statutes, and published reports—that either denied or argued against jury trials for juveniles. The National Crime Commission Report failed to recommend that jury trials be implemented on the juvenile level while specifically recommending that the existing juvenile system be perpetuated.[86] The majority of state courts that had considered the question of jury trials since *Duncan* had concluded that the fourteenth amendment did not mandate their extension to juvenile hearings.[87] Blackmun asserted that widespread state practices should merit consideration in determining whether a particular practice comports with due process, and he pointed to twenty-nine states that deny juveniles the right to trial by jury by statute[88] and ten others that permit it in only limited circumstances.[89] In addition, he cited the Uniform Juvenile Court Act,

[80] *See In re* Winship, 397 U.S. at 366; *In re* Gault, 387 U.S. at 21.

[81] Mr. Justice Douglas attached the opinion of Judge DeCiantis of the Family Court of Providence, Rhode Island in *In re* McCloud as an appendix to his dissenting opinion. The *McCloud* case involved a juvenile who was charged with the rape of a seventeen-year-old girl. Judge DeCiantis granted his request for a jury trial in the appendixed opinion. DeCiantis carefully examined the practical aspects of the problems that might arise with the implementation of the jury trial. 403 U.S. at 563.

This note will regard DeCiantis' appendixed opinion as a part of the minority's dissenting opinion, but Justice Douglas' statements will be distinguished from those of Judge DeCiantis.

[82] Judge DeCiantis made this observation:

> The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children come from broken homes, from the ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process.

Id. at 562.

The National Crime Commission expressed the same concerns:

> There is increasing evidence that the informal procedures contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by the seemingly all-powerful and challengeless exercise of authority by judges and probation officers.

NAT'L. CRIME COMM'N. REPORT 85.

[83] 403 U.S. at 565 (DeCiantis, J., appended).

[84] *Id.* at 567–68 (DeCiantis, J., appended). DeCiantis also quoted from the National Crime Commission Report: "A juvenile's adjudication record is required by the law of most jurisdictions to be private and confidential; in practice the confidentiality of those reports is often violated." *Id.* at 568. *See* NAT'L. CRIME COMM'N. REPORT 75.

[85] *Id.* at 568 (DeCiantis, J., appended).

[86] *See generally* NAT'L. CRIME COMM'N. REPORT 9.

[87] *See, e.g., In re* Fucini, 44 Ill. 2d 305, 255 N.E.2d 380 (1970); *In re* Johnson, 254 Md. 517, 255 A.2d 419 (1969).

[88] *See, e.g.,* KY. REV. STAT. § 208.060 (1962); MINN. STAT. ANN. § 260.155 sub. 1. (1971).

[89] *See, e.g.,* COLO. REV. STAT. ANN. § 37-8-2 (1963); KANS. STAT. ANN. § 38-808 (1969 Supp.).