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JUVENILE LAW—DOUBLE JEOPARDY

Breed v. Jones, 421 U.S. 519 (1975)

In *Breed v. Jones*[1] the United States Supreme Court held that the prosecution of a juvenile as an adult in criminal court after an adjudicatory proceeding in juvenile court[2] violates the double jeopardy clause of the fifth amendment,[3] as applied to the states through the fourteenth amendment.[4]

On February 9, 1971, the state of California filed a petition in the County of Los Angeles Juvenile Court

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[1] 421 U.S. 519 (1975).

[2] Through the passage of juvenile court acts, juvenile courts have been established in every state in the Union, the District of Columbia, and Puerto Rico. *In re* Gault, 387 U.S. 1, 14 (1967). The first juvenile court in the country was opened in Chicago in 1899, and " . . . soon, like the prairie fires of the first decade of this century, the juvenile court movement swept over America." Ketcham, *Legal Renaissance in the Juvenile Court,* 60 NW. U.L. REV. 585, 586 (1965) [hereinafter cited as Ketcham].

The child in trouble was an object of special concern for nineteenth-century American social reformers. The juvenile offender was regarded as a tragic victim, innocently caught in the vortex of clashing social forces beyond his control: industrialization, mass immigration, and rapid urbanization. As Justice Fortas observed in *Gault,* the reformers "were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone." 387 U.S. at 15. Reform efforts began with the drive to create separate institutional facilities for juveniles, progressed to the development of the juvenile court system, and culminated in the alteration of "the very philosophy underlying judicial handling of children." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TASK FORCE REPORT].

Under the common law no differentiation was made between the adult accused of committing a crime and a minor who had reached the age of criminal responsibility, which in some states was as low as the age of seven. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 106 (1909). The child would simply be prosecuted exactly like an adult under the criminal law: if he were found guilty, he would be punished. As one of the leaders of the juvenile court movement declared:

> [The state] did not aim to find out what the accused's history was, what his heredity, his environments, his associations; it did not ask how he had come to do the particular act which had brought him before the court.

Id. at 107.

The origin of the juvenile court idea has been traced to the English chancery courts, which, in the name of the King, traditionally exercised protective jurisdiction over the interests of all children throughout the realm—particularly of their real property interests. This came to be known as the doctrine of *parens patriae.* When transplanted to America, the chancery courts were additionally regarded as the special protectors of neglected and abandoned children. Thus it was that the reformers could envision the state as beneficently reaching out by means of a special court to rescue children in trouble. Behind the juvenile system was

> the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities. . . .

Id. at 107. By casting the juvenile court as the inheritor of the benevolent tradition of *parens patriae* the constitutional question raised by the juvenile system was neatly foreclosed. Unlike an adult, the child had no right to liberty, but rather a right to protective and nurturing custody. If the parents were unable to provide this custody it was the duty of the state to step in to provide "the 'custody' to which the child is entitled." 387 U.S. at 17. Even though the children brought before them may have committed criminal acts, juvenile courts were not criminal courts, and thus the criminal justice safeguards of the Constitution were both inapplicable and unnecessary. An almost evangelically fervent defense of this view is found in Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905):

> [The Juvenile Court Act] is not for the punishment of offenders but for the salvation of children . . . whose salvation may become the duty of the state. . . . No child . . . is excluded from its beneficent provisions. Its protecting arm is for all . . . who may need its protection.
>
> To save a child from becoming a criminal, or from continuing in a career of crime . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the State's guardianship and protection. . . . [T]he State, when compelled as *parens patriae,* to take the place of the father . . . [is not] required to adopt any process as a means of placing its hand upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.

213 Pa. 50, 53, 62 A. 199, 200.

Juvenile proceedings differed from criminal proceedings in a number of ways. First, a new vocabulary was applied to the processes of the court, primarily to avoid the stigma of criminal prosecution. The terms of the new system were as follows:

alleging that respondent, then seventeen years old, had committed an act which, if committed by an adult, would constitute the crime of robbery in violation of Cal. Penal Code § 211. Following a detention hearing the next day,[5] respondent was ordered detained pending an adjudicatory hearing on the delinquency petition.

On March 1 this second hearing was held in accordance with Cal. Welf. & Inst'ns Code § 701[6] for the purpose of determining whether respondent had committed the crime alleged, whether the juvenile court had jurisdiction of the matter,[7] and whether respondent should be declared a ward of the juvenile court. Following testimony taken from two prosecution witnesses and from respondent, the Court sustained the delinquency petition, finding that respondent had committed the robbery and was within the jurisdiction of the juvenile court. Pursuant to Cal. Welf. & Inst'ns Code § 702[8] the proceedings

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Petition instead of complaint, summons instead of warrant, initial hearing instead of arraignment, finding of involvement instead of conviction, disposition instead of sentence. . . .

TASK FORCE REPORT, *supra,* at 3. Also, juvenile sessions were conducted in less formal physical surroundings. But more fundamental was a thorough-going re-ordering of basic goals and purposes.

> The goals were to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix blame. The individual's background was more important than the facts of a given incident, specific conduct relevant more as symptomatic of a need for the court to bring its helping powers to bear than as prerequisite to exercise of jurisdiction. Lawyers were unnecessary—adversary tactics were out of place, for the mutual aim of all was not to contest or object but to determine the treatment plan best for the child. That plan was to be devised by the increasingly popular psychologists and psychiatrists; delinquency was thought of almost as a disease to be diagnosed by specialists and the patient kindly but firmly dosed.

TASK FORCE REPORT, *supra,* at 3. In the vivid words of a leading recent juvenile court judge:

> In the exuberant belief that court-ordered social service was the answer to all the ills of youth, law was forgotten and lawyers were summarily dismissed from the hallowed halls of the children's court to assure that salvation, lilac scent and the social-work supervisor would reign supreme.

Ketcham, *supra,* at 586.

[3] " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend. V.

[4] The double jeopardy clause of the fifth amendment was applied to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

[5] Respondent was represented by court-appointed counsel at this hearing and in all subsequent proceedings. At the detention hearing the probation officer was required to present a prima facie case that respondent had indeed committed the offense alleged in the petition.

[6] When petition for certiorari was filed with the United States Supreme Court, CAL. WELF. & INST'NS CODE § 701 (West 1966) provided:

> At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor had made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made.

[7] Should the allegations be true the juvenile court would have jurisdiction pursuant to CAL. WELF. & INST'NS CODE § 602.

At the time, CAL. WELF. & INST'NS CODE § 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.

[8] At the time, CAL. WELF. & INST'NS CODE § 702 (West 1966) provided:

> After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601 or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from deten-

were continued for a dispositional hearing and respondent was ordered to remain in detention until that time.

At the subsequent hearing on March 15 the juvenile court judge announced his intention to find respondent not amenable to rehabilitation as a juvenile and to order that respondent be tried as an adult in criminal court. When respondent's counsel objected on the grounds that he had not expected this to be a fitness hearing, a one-week continuance was granted, during which counsel raised the claim that a transfer to criminal court following adjudication as a juvenile would put respondent in double jeopardy. One week later the court ruled respondent was unfit for treatment as a juvenile under Cal. Welf. and Instn's Code § 707[9] and ordered that he be prosecuted as an adult. In so doing the court signalled its implicit rejection of the double jeopardy argument.

Respondent's attempts to obtain habeas corpus relief in the state courts met with no success.[10] Subsequently, an information was filed in superior court accusing respondent of having committed armed robbery. He entered a plea of not guilty and again raised the claim of double jeopardy, arguing that he had already been found guilty in juvenile court of the offense charged in the information. Nevertheless, respondent was found guilty and the double jeopardy argument was again rejected.

Following his conviction respondent filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California, alleging that the transfer to adult court and subsequent trial there constituted double jeopardy. The petition was denied by the district court[11] on the grounds that juvenile proceedings were "civil rather than criminal in nature"[12] and a juvenile court

tion, during the period of the continuance, as is appropriate.

[9] At the time, CAL. WELF. & INST'NS CODE § 707 (West 1966) provided:

> At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.
>
> In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.
>
> A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.
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> The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness.

[10] *In re* Gary Steven J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971), *cert. denied* by California Supreme Court August 4, 1971. *See* Jones v. Breed, 343 F. Supp. 690, 691 n.2 (C.D. Cal. 1972). Respondent made two contentions in his petition for a writ of habeas corpus at the state level. First, he maintained that as a matter of statutory construction the transfer order under section 707, *supra* note 9, must be made during the pendency of the section 701 hearing, *supra* note 6, and that once the section 701 hearing was completed, the statutory power to transfer a juvenile to adult court had lapsed. The court held that this construction ran "counter to . . . the whole philosophy of the present juvenile court law" and "would violate both the letter and the spirit of the statute" which sought to guarantee fairness by having separate hearings for detention and disposition. 17 Cal. App. 3d at 708, 95 Cal. Rptr. at 188. The purpose of requiring separate hearings was to prevent the court from being prejudiced "by evidence of the minor's character not relevant to determination of his guilt." 17 Cal. App. 3d at 708, 95 Cal. Rptr. at 188.

Second, respondent claimed a constitutional right to protection against double jeopardy which prevented transfer to criminal court once his section 701 hearing had begun. The court refuted this claim by relying on the concept of continuing jeopardy. *See* note 38 *infra*. A second jeopardy did not attach when respondent was transferred to adult court because no final disposition had been reached in his case.

[11] Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972).

[12] In Kent v. United States, 383 U.S. 541, 555 (1966), the Court observed:

> Because the State is supposed to proceed in respect of the child as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are "civil" in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases.

See also Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

would be "[deprived] of its ability to function"[13] if it had to follow the same "formal and technical rules as to when jeopardy attaches or terminates"[14] as apply to adult criminal proceedings. Furthermore, even if it were assumed that jeopardy had attached during the juvenile proceedings, the district court held no new jeopardy would have arisen out of the transfer to criminal court. Since transfer constituted neither acquittal nor conviction, respondent was in "continuing jeopardy" at the adult level.[15]

The Court of Appeals for the Ninth Circuit reversed, holding that the double jeopardy clause of the fifth amendment is fully applicable to juvenile court proceedings.[16] The court held that jeopardy attached at the adjudicatory hearing, the point at which the juvenile court could "impose severe restrictions upon the juvenile's liberty."[17] The court of appeals concluded that application of the double jeopardy guarantee to juvenile courts would not impair "their basic goal of rehabilitating the erring youth."[18]

The United States Supreme Court, in a unanimous opinion delivered by Chief Justice Burger, upheld the opinion of the court of appeals.[19]

[13] 343 F. Supp. at 692. The court suggests that the legislature established juvenile courts to function in a manner different from the criminal justice system. The legislature had established a "comprehensive program . . . for the handling of delinquent youth," and there were many "distinctions between the preliminary procedures and hearings provided by California law for juveniles" and those for the criminal prosecution of adults. 343 F. Supp. at 691–92.

[14] *Id.* at 692. The court described these rules as "rigid and inflexible," 343 F. Supp. at 692, and seemed to imply they would have a destructive effect upon the unique ends sought to be achieved within the juvenile system. However, the only specific "end" of the juvenile system to which the court made any reference in its brief opinion was that of allowing "a minor accused of a crime a means to escape some of the consequences which would result to an adult offender." *Id.* at 692.

[15] *Id.*

[16] Jones v. Breed, 497 F.2d 1160 (9th Cir. 1974).

[17] *Id.* at 1165.

[18] *Id.*

[19] The court of appeals had originally ordered the district court to issue a writ of habeas corpus, directing the state court within sixty days to vacate respondent's adult conviction and either set him free or remand him to juvenile court. This order had been stayed while the Supreme Court's decision was pending. Since respondent was over eighteen years of age when the decision was announced, he was no longer under the jurisdiction of the California juvenile court system. The Court thus vacated the judgment of the court of appeals and remanded the case "for such further proceedings consistent with this opinion as may be appropriate in the circumstances." 421 U.S. at 541.

At the outset the Court recognized three points of agreement shared by the parties to the case. First, as a defendant to the armed robbery information after his transfer to the criminal court, respondent received the full protection of the double jeopardy clause of the fifth amendment.[20] Second, respondent was definitely placed in jeopardy by the proceedings on the robbery information. Third, both the delinquency petition filed in juvenile court and the robbery information filed in superior court stemmed from the same offense. The sole question before the Court was whether the prior proceedings at the juvenile court level placed the respondent in double jeopardy when he stood trial as an adult in criminal court.

The Supreme Court first reiterated that jeopardy denotes risk, the sort of risk "traditionally associated with a criminal prosecution."[21] Although the double jeopardy clause had been interpreted more broadly than its literal "jeopardy of life and limb" wording, it has been given application only to proceedings that are "essentially criminal"[22] in nature.

[20] *See* note 4 *supra.*

[21] 421 U.S. at 528. *See* Serfass v. United States, 420 U.S. 377 (1975) (defendant charged with willfully failing to report for and submit to induction into the armed forces; held, double jeopardy clause does not bar an appeal by the government from a pretrial order dismissing an indictment); Wilson v. United States, 420 U.S. 332 (1975) (defendant charged with crime of converting union funds to his own use; held, without contravening the double jeopardy clause, the government may appeal from ruling of trial judge in favor of defendant after a guilty verdict has been entered by trier of fact); United States v. Jorn, 400 U.S. 470 (1971) (appellee charged with willfully assisting in the preparation of fraudulent income tax return; held, double jeopardy clause bars government appeal of an order dismissing an information when retrial was presented to a second jury, the original jury having been discharged after the mistrial); Price v. Georgia, 398 U.S. 323 (1970) (where defendant tried for murder was found guilty of lesser included offense of voluntary manslaughter and conviction reversed on appeal, double jeopardy clause bars retrial on murder charge; return of verdict on lesser charge carried with it implicit acquittal on murder charge; Green v. United States, 355 U.S. 184 (1957) (jeopardy for first degree murder terminated when the jury was discharged at end of first trial where defendant had been found guilty of lesser included offense of second degree murder); United States v. Ball, 163 U.S. 662 (1896) (acquittal on charge of murder; held, even where indictment defective, sufficient to bar subsequent prosecution for same offense).

[22] Helvering v. Mitchell, 303 U.S. 391 (1938) (double jeopardy clause does not bar assessment of 50 per cent penalty following an acquittal of a charge of willful attempt to evade income tax; since penalty was not assessed for criminal purposes, assessment was not an essentially criminal proceeding). *See also* J. SIGLER, DOUBLE JEOPARDY 60–62 (1969).

In discussing its recent juvenile justice decisions, *McKeiver v. Pennsylvania,*[23] *In re Winship,*[24] *In re Gault,*[25] and *Kent v. United States,*[26] the Court acknowledged that the ideals and aspirations of the juvenile court system have in reality fallen sadly short of fulfillment.[27] As a result of this disparity the Court has extended to the juvenile system a number of constitutional protections associated with criminal prosecutions.[28] This line of decisions has brought about so significant a "constitutional domestication"[29] of the juvenile court system that it is no longer possible to declare, as the district court had in denying respondent's habeas petition, that juvenile proceedings were "civil rather than criminal in nature."[30] The Court found no adequate grounds upon which to distinguish respondent's adjudicatory hearing in juvenile court from an adult criminal prosecution. The consequence of each was the same: incarceration for the purpose of enforcing the criminal laws.[31] And the fact that one was ostensibly for rehabilitative purposes and the other for punitive purposes was not controlling since loss of liberty against one's will resulted from either proceeding.[32] Such an end result engenders the very risk that the term "jeopardy" has come to denote.

Petitioner's argument centered on the contention that even if jeopardy were conceded to have attached at the adjudicatory hearing, the transfer to criminal court did not subject respondent to double jeopardy. Two lines of analysis were extended to support this claim, both of which the Court rejected.

First, petitioner claimed transfer "violated none of the policies of the Double Jeopardy Clause" because respondent was not subjected to double punishment for a single offense.[33] The Court relied on its line of double jeopardy decisions to refute this argument.[34] It is not only double punishment which the clause serves to prevent, but also the "potential or risk of *trial* and conviction."[35] The Court also cited to the "policy of avoiding multiple trials," a policy to which exceptions "have been only grudgingly allowed."[36] Although only punished once, respondent suffered the "heavy personal strain"[37] which follows from being twice put through the ordeal of trial.

Second, petitioner sought to support his claim on the basis of the concept of "continuing jeopardy,"[38] by analogizing to those cases where a second trial is permitted if proceedings against a defendant have not

[23] 403 U.S. 528 (1971). *See* notes 51–57 and accompanying text *infra.*

[24] 397 U.S. 358 (1970). *See* notes 48–50 and accompanying text *infra.*

[25] 387 U.S. 1 (1967). *See* notes 48–50 and accompanying text *infra.*

[26] 383 U.S. 541 (1966).

[27] In describing the shortcomings of the juvenile court system, the Court in *Gault, McKeiver,* and again in *Breed* made reference to the TASK FORCE REPORT, *supra* note 2. The Commission concluded:

> In theory, the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique . . .
>
> In theory, the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's.

TASK FORCE REPORT, *supra* note 2, at 9.

[28] *See* notes 48–58 *infra.*

[29] 387 U.S. at 22.

[30] 343 F. Supp. at 692. Indeed *Gault* specifically requires courts to shun "the 'civil' label-of-convenience which has been attached to juvenile proceedings." 387 U.S. at 50.

[31] 400 U.S. at 479.

[32] 387 U.S. at 50. *See* Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973).

[33] 421 U.S. at 532.

[34] United States v. Wilson, 420 U.S. 332 (1975); United States v. Jorn, 400 U.S. 470 (1971); Price v. Georgia. 398 U.S. 323 (1970); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[35] 398 U.S. at 329 (emphasis added by Chief Justice Burger). The double jeopardy clause had been held by the Supreme Court to prevent multiple punishments, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); reprosecution following conviction, *In re* Nielsen, 131 U.S. 176 (1889); reprosecution after acquittal, Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896); and reprosecution following premature termination of a trial in certain circumstances, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

[36] 420 U.S. at 343.

[37] 400 U.S. at 479. In Green v. United States the Court succinctly described the sort of personal strain it is the purpose of the double jeopardy clause to prevent:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187–88.

[38] A certain amount of confusion seems to surround the use of the term "continuing jeopardy"—confusion which arises in part, as the Court noted, because the term refers to both "a concept and a conclusion." 421 U.S. at 534. Justice Holmes first used the term in his dissent in Kepner v.

come to a full resolution.[39] The Court rejected the view that respondent was not placed in double jeopardy simply because the proceedings against him had not run their full course at the time of his transfer to adult court. If the double jeopardy clause is to be abridged in cases where a juvenile is transferred to adult court following juvenile court adjudication, it must be because of a "manifest necessity."[40] Either the societal interests expressed in the provision of a special juvenile court structure, or the needs of the juvenile himself would have to "render tolerable the costs and burdens . . . which the exception will entail in individual cases."[41]

Petitioner argued that implementing double jeopardy protection in the juvenile courts would destroy the unique flexibility of the juvenile system—a system structured to meet the needs of juvenile offenders in a more individualized and informal context than was possible within the framework of a criminal prosecution. Not all juveniles, however, are amenable to such treatment, and in recognition of this fact, the great majority of jurisdictions have provided procedures for transfer to adult court.[42] While acknowledging that the resources of the juvenile court system are already severely strained, the Court nonetheless rejected petitioner's contention that the system would be overborne by the application of the double jeopardy guarantee. Requiring transfer decisions to be made prior to adjudicatory hearings would not create any substantial difficulties for the nation's juvenile courts, and the Court observed there was no evidence that juvenile courts could not function effectively in those jurisdictions where such a procedure was already utilized. The nature of the juvenile court proceeding would not be altered although some duplication of evidence may arise in cases where transfer is considered and then rejected. Once transfer is recommended in a particular case, proceedings cease at the juvenile level, offsetting, in part, any increase that might be generated by cases where transfer is not recommended.

In the final analysis, the Court concluded that "transfer hearings prior to adjudication" would actually "aid the objectives" of the juvenile court system.[43] Where transfer was possible after juvenile court adjudication, a youthful offender was faced with a difficult dilemma. By fully cooperating with juvenile authorities he might prejudice his case if transfer to adult court were ordered. If he appeared reluctant to cooperate and transfer was rejected, he risked "adverse adjudication, as well as . . . an unfavorable dispositional recommendation" at the juvenile level.[44] Such a dilemma cast the juvenile and his attorney "into a posture of adversary wariness" fundamentally at odds with "the potential for informality and cooperation which was intended to be the hallmark of the juvenile court system."[45] The Court thus concluded that neither the interest of society in extending a special system of procedures and treatment for juveniles nor the interest of the individual juvenile offender would be best served by abridgement of the constitutional protection against double jeopardy.

Breed v. Jones is a consistent application of the analytical structure developed by the Supreme Court in its earlier juvenile justice holdings to the narrow question of whether juveniles transferred to stand trial in adult criminal prosecutions after an adjudication proceeding in juvenile court are subjected to double jeopardy. The Court had voiced a far-ranging dissatisfaction with the juvenile court system in *In re*

United States, 195 U.S. 100 (1904), to describe his view that "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried" because jeopardy continues from the "beginning to the end of the cause." 195 U.S. at 134. This view has never commanded a majority of the Supreme Court, but it has come to be known as the concept of continuing jeopardy, in contradistinction to the policy which the Court has adopted in *Jorn, Green, Price,* and the majority holding in *Kepner.*

The phrase "continuing jeopardy" has also been used to explain why an accused who has had his conviction reversed on appeal can again be tried.

> Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had "waived" his plea of former jeopardy by asking that the conviction be set aside. Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final. But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal.

Green v. United States, 355 U.S. at 189. Today, however, this conclusion can be more satisfactorily justified on the basis of the interests involved respectively by society and by the accused. Price v. Georgia, 398 U.S. at 329 n 4.

[39] Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

[40] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[41] 421 U.S. at 535.

[42] *See generally* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 WM. & MARY L. REV. 266, 297 n.128 (1972) [hereinafter cited as Rudstein].

[43] 421 U.S. at 540.

[44] *Id.*

[45] *Id.*

Gault.[46] Rather than summarily imposing all the Constitution's guarantees upon the juvenile system, the Court has continued to recognize the validity of a separate method of treatment for juvenile offenders. Instead the Court has proceeded on a case-by-case determination of the applicability of individual constitutional safeguards to juvenile proceedings. Justice Fortas in *Gault* specifically and emphatically declared that the Court was not concerned with "the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state."[47]

From *Gault, Winship,* and *McKeiver* it can be seen that the Court's analysis focuses on two fundamental questions: (1) What is the nature of the constitutional right involved; and (2) Will the application of that right negatively affect the unique aspects of the juvenile court system?[48] On the basis of this analysis, the Court extended four due process guarantees in *Gault:* the rights to notice, counsel, and confrontation of witnesses, and the privilege against self-incrimination. In *Winship,* following the same rationale, the Court held that juvenile criminal offenders were constitutionally entitled to a standard of proof beyond a reasonable doubt. In both cases the rights involved had previously been held to apply to the states through the fourteenth amendment,[49] and were deemed fundamental to any proceeding where a person, whether a child or adult, stood to lose his liberty for a number of years. Such proceedings against juveniles were found to be "comparable in seriousness to a felony prosecution" against an adult.[50]

Regarding the effect upon the juvenile system of the implementation of the four constitutional rights deemed fundamental in *Gault,* the majority declared that

> the observance of due process standards . . . will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. . . . [T]he features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication.[51]

Similarly, in *Winship* the majority found that the requirement of proof beyond a reasonable doubt would not have any deleterious effects upon the beneficial provisions of juvenile court proceedings—flexibility and informality would still prevail.

In *McKeiver v. Pennsylvania* the Court declined to hold that jury trials were constitutionally mandated in the juvenile courts. *McKeiver* has been seen as constituting a departure from the philosophy and also the rationale of *Gault* and *Winship.*[52] Although the analysis parallels that of *Gault* and *Winship,*[53] Justice Blackmun, speaking for a four-justice plurality, placed special emphasis upon the necessity for constitutional guarantees relating to *factfinding* procedures in juvenile courts. A jury trial was not considered "a necessary component of accurate factfinding"[54] and the plurality cited to several types of cases where juries are not required,[55] and to

[46] Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. 387 U.S. at 18–19 *See generally* TASK FORCE REPORT, *supra* note 2.

[47] 387 U.S. at 13.

[48] In *Gault* the Court also considered two secondary criteria: (1) whether national studies, commentators, or proposed model acts had recommended a given constitutional right be implemented within the juvenile court system, and (2) the number of jurisdictions currently extending the right to the juvenile courts.

[49] Adequate notice was held to be a requirement of due process in state criminal proceedings in *In re* Oliver, 333 U.S. 257 (1948) and Cole v. Arkansas, 333 U.S. 196 (1948). The right to counsel in criminal proceedings was applied to the states in Gideon v. Wainwright, 372 U.S. 335 (1963) and Powell v. Alabama, 287 U.S. 45 (1932); the right to confrontation and cross-examination in Douglas v. Alabama, 380 U.S. 415 (1965) and Pointer v. Texas, 380 U.S. 400 (1965); and the privilege against self-incrimination in Malloy v. Hogan, 378 U.S. 1 (1964).

[50] *In re* Winship, 397 U.S. 358, 366 (1970), citing *In re* Gault, 387 U.S. 1, 36 (1967).

[51] 387 U.S. at 21–22.

[52] *See* Rudstein, *supra* note 42, at 273; Note, *Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures,* 26 U. FLA. L. REV. 300, 302 n.26 (1974). See also the reliance placed by district court upon *McKeiver* to deny application of double jeopardy clause to respondent. 343 F. Supp. at 692.

[53] Justice Blackmun also utilized the two secondary criteria discussed in *Gault. See* note 48 *supra.* When confronted with the issue "the great majority of States" had concluded that jury trials were not mandatory in juvenile courts under the rationales of *Gault* and Duncan v. Louisiana, 391 U.S. 145 (1968). 403 U.S. at 549. Also the National Conference of Commissioners on State Uniform Laws, the National Council on Crime and Delinquency, and the HEW Children's Bureau had stopped short of recommending jury trials in their respective proposals for model statutes. *Id.* at 549–50.

[54] 403 U.S. at 543.

[55] *E.g.,* military trials, cases in equity, probate, deportation, and workmen's compensation cases. *Id.* at 543. Here

statements in *Duncan v. Louisiana*[56] to the effect that a jury is "not a necessary part of every criminal process that is fair and equitable."[57] The right to trial by jury was not considered as fundamental as those applied to juvenile courts in *Gault* and *Winship*. Furthermore, imposing that right onto the juvenile system would "provide an attrition of the juvenile court's assumed ability to function in a unique manner."[58] Delay, increased formality, destruction of the juvenile court's historic confidentiality, and the advent of adversary proceedings were raised as probable results. The plurality combined this negative impact upon the informal, flexible and individualized elements of the juvenile system with the fact that trial by jury was not a constitutional right applicable to all criminal proceedings against adults, and declined to extend jury trials to the juvenile system:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[59]

In *Breed v. Jones* the Court made no reference to the narrower view that only constitutional safeguards relating to the factfinding process have a place in the juvenile system.[60] This unanimous holding may indeed imply a rejection of the limited standard embraced by the *McKeiver* plurality and a reaffirmation of the more inclusive standard of *Gault* and *Winship*.

Breed v. Jones is significant in showing that *McKeiver* did not signal the halt of the Court's extension of constitutional guarantees to the juvenile court system. It is another step in the Court's chosen process of case-by-case determination. *Breed* is a continuation of the two-pronged analysis followed in the earlier decisions. First, the protection against double jeopardy is not merely a "[formality] of the criminal adjudicative process" but a fundamental protection extended to all essentially criminal proceedings.[61] And, where the consequences of a delinquency proceeding approach in seriousness those of a criminal prosecution, the risk involved is one to which the term "jeopardy" ascribes. Second, the Court has been able to arrive at a procedural accommodation between the application of the double jeopardy clause and the unique aspects of the juvenile court system by requiring transfer proceedings to take place prior to adjudication. The nature of juvenile court hearings will not be disrupted here as they would have been by the imposition of jury trials. Any impact of *Breed v. Jones* will fall principally upon the dockets and caseloads of the juvenile courts, and although the Court did not anticipate this burden to be great, it is nevertheless one that must be absorbed under a constitutional system.

The Court's test as developed in these decisions seeks to balance the substantive benefits of individualized justice for juvenile offenders with the degree to which a given constitutional right is deemed to be fundamental. In the view of a persistent majority of the Court since *Gault*, both elements must be considered in determining whether a particular right is constitutionally required in the juvenile court system.

The negative portent of *McKeiver* has been greatly diminished by the Court's willingness to extend an additional constitutional right to juveniles in *Breed v. Jones*. However, in view of the contrasting conclusions reached in these two cases, a careful examination of the Court's test is necessary before projecting whether juvenile offenders may be extended addi-

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the plurality can be seen as leaning upon a very slender reed—military trials do not arise under the Constitution, and the remaining examples cited are not criminal proceedings.

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

[57] 403 U.S. at 547. *See also* Duncan v. Louisiana, 391 U.S. at 149–50 n.14, 158. In *Duncan* the Court struck down a provision of the Louisiana constitution which allowed for trial by jury only in capital cases or for offenses punishable by hard labor. The fourteenth amendment was held to guarantee a right to trial by jury in all cases which would come within the sixth amendment if tried in federal court. In determining whether a crime is a serious one subject to the sixth amendment, the penalty authorized for a particular crime was found to be a factor of major relevance.

[58] 403 U.S. at 547.

[59] *Id.* at 551.

[60] At least one court has viewed the double jeopardy clause as advancing the quality and efficiency of the factfinding process itself. State v. Halverson, 192 N.W.2d 765 (Iowa 1971). By eliminating the possibility of two trials for the same offense, it is argued that double jeopardy protection assures that all factual information will be gathered prior to the time of the transfer hearing. Sufficient investigation will be conducted by the state prior to a transfer hearing to determine whether a juvenile is amenable to the treatment and services of the juvenile court.

> [I]f a county attorney is causing juvenile cases to be investigated properly . . . he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff.

192 N.W.2d at 769.

[61] 403 U.S. at 551.

tional constitutional protections in future cases. Both elements of the Court's analysis contain troublesome ambiguities that can significantly affect the ultimate decision.

First, the threshold for determining whether a given right merits application to the juvenile system is whether that right has been held to apply to state criminal prosecutions through the due process clause of the fourteenth amendment.[62] But more is required: the right must also be "fundamental" in its application—it must be required in all criminal proceedings. It is doubtful whether any valid criteria can be established to determine whether some constitutional guarantees are more "fundamental" than others, but *McKeiver* signifies that this additional refinement can be a powerful determinative. On the basis of strained analogies,[63] a plurality of the Court in *McKeiver* concluded that the right to jury trial was not fundamental, even though only four years before the right to trial by jury had been held to be constitutionally required in state criminal proceedings. This extra scrutiny to determine "fundamentality" can permit the Court to maneuver within a given characterization. *McKeiver* stands as a warning that the Court's analysis allows for the drawing of highly refined distinctions concerning the nature of constitutional rights. Such distinctions may serve in a future case to again justify the withholding from the juvenile system of a given constitutional guarantee.

Second, the Court has not been sufficiently clear in defining just what it is about the juvenile court system that so manifestly deserves preservation. The test is framed in terms of whether a given constitutional right would have a negative effect upon the informal, flexible and unique qualities of the juvenile court system.[64] These are very generalized criteria by which to measure the applicability of constitutional rights, and at the present time the Court appears to have developed two different narrowing interpretations.

The Court's broad references to informality and flexibility may lead to the inference that it is seeking to keep the juvenile court as free as possible from the constraints of procedural formalities. To this end, constitutional rights which increase formality may be denied to juveniles, especially if the rights can also be found to be non-fundamental. Concern for the preservation of procedural informality is strongly apparent in *McKeiver*:

> If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system. . . .[65]

The alternative interpretation emphasizes preserving the flexibility necessary for the juvenile court to deal responsively with the needs of each juvenile offender as an individual human being. *Breed v. Jones* reveals a significant concern on the part of the Court for the personal rights and welfare of the individual offender.

> Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "anxiety and insecurity" in a juvenile, and imposes a "heavy personal strain."[66]

Hopefully, an observation made by the Court in *Breed* will limit the possibility of future decisions seeking to withhold constitutional rights to juveniles out of deference to a desire to maintain procedural informality within the juvenile court system:

> That the flexibility and informality of juvenile proceedings are diminished by the application of due process standards is not open to doubt. Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions.[67]

For the present, however, it must be recognized that in considering whether a given right should be held constitutionally required in the juvenile courts, the Court's analysis has allowed for emphasis to be selectively placed upon either the needs of the system, as in *McKeiver*, or upon the rights of the individual offender.[68]

[62] *See* notes 4, 49, 57 *supra*.

[63] *See* note 55 *supra*.

[64] 421 U.S. at 535; 403 U.S. at 547.

[65] 403 U.S. at 550.

[66] 421 U.S. at 530–31.

[67] 421 U.S. at 535–36 n.15.

[68] Other constitutional safeguards may yet be applied to the juvenile court system under the *Gault-Winship-Breed* analysis. Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), a case having potentially profound implications for the entire juvenile justice system, was decided in the fall of 1974 by a federal district court in Texas. The court ordered that two detention institutions operated by the Texas Youth Council be closed because confinement in them amounted to cruel and unusual punishment in violation of the eighth amendment. The court relied upon the right to treatment argument developed in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974) *vacated*, 422 U.S. 563 (1975), in holding that

> the juvenile must be given treatment lest the involun-

In summary, *Breed v. Jones* holds that a juvenile is unconstitutionally subjected to double jeopardy if he is transferred to stand trial as an adult following adjudication for the same offense in juvenile court.[69] The double jeopardy clause was found applicable to the transfer decision because protection against dou-

tary commitment amount to an arbitrary exercise of governmental power proscribed by the due process clause.

383 F. Supp. at 71.

The exhaustive opinion of the court was based upon the testimony of several renowned penologists and also of children who had experienced confinement in the two facilities in question. With meticulous detail, Judge Justice examined the practices of these institutions, where the staff spoke only of attaining "control," yet where violence among the inmates met with little resistance from staff personnel. The court concluded that the state was not carefully seeking to match children to appropriate treatment methods, but was instead incarcerating many children whose case histories did not indicate a need for institutionalization.

Under the Supreme Court's analysis a strong case can be made for extending the protection against cruel and unusual punishment to the juvenile court system. First, the Court has recognized that this constitutional protection applies to the states through the due process clause of the fourteenth amendment, Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Francis v. Resweber, 329 U.S. 459 (1947). In the words of Justice Brennan, "the values and ideals [the cruel and unusual punishments clause] embodies are basic to our scheme of government." 408 U.S. at 258. Second, the *Morales* opinion catalogues horrors and deprivations utterly inimical to the goals and purposes which a non-punitive, treatment-oriented system should be seeking to attain:

> Practices found by this court to violate the eighth amendment were: the widespread practice of beating, slapping, kicking, and otherwise physically abusing juveniles in the absence of any exigent circumstances ... the use of tear gas and other chemical crowd-control devices in situations not posing an imminent threat to human life or an imminent and substantial threat to property; the placing of juveniles in solitary confinement or other secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers; the requirement that inmates maintain silence during periods of the day merely for the purpose of punishment; and the performance of repetitive, nonfunctional, and degrading tasks. Included as such tasks ... were: requiring a juvenile to pull grass without bending his knees on a large tract of ground not intended for cultivation or any other purpose; forcing him to move dirt with a shovel from one place on the ground to another and then back again many times; and making him buff a small area of the floor for a period of time exceeding that in which any reasonable person would conclude that the floor was sufficiently buffed.

383 F. Supp. at 77.

A finding by the Supreme Court that incarcerating children in detention facilities where such practices were tolerated amounted to cruel and unusual punishment could have a truly revolutionary impact upon the entire juvenile court system. Constitutional compulsion may perhaps be the only effective way in which to secure the commitment of resources necessary for the truly humane treatment of juvenile offenders. As Judge Justice declared in *Morales*:

> The state may not circumvent the Constitution by simply refusing to create any alternatives to incarceration; it must act affirmatively to foster such alternatives as now exist only in rudimentary form (foster homes, supervised probation and parole), and to build new programs suited to the needs of the hundreds of its children that do not need institutional care ... The Constitution of the United States and the laws of the State of Texas require no less ....

383 F. Supp. at 125.

Several other criminal procedures guaranteed to adults, however, may never be extended to the juvenile court system. The constitutional right to a public trial under the sixth amendment is too contrary to the *raison d'être* of the juvenile system to withstand the test developed in *Gault, Winship*, and *Breed*. Although it may be argued that public trials would expose questionable procedures to community scrutiny, private hearings and confidential records serve a primarily protective purpose in juvenile proceedings. They seek to spare the child from the harmful glare of publicity that could jeopardize both the effectiveness of his rehabilitative treatment as well as his entire future.

The fourth amendment protections against illegal searches and seizures may in time be extended to the juvenile court system. The exclusionary rule found by the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), to be a constitutionally-required rule of criminal procedure, may never be applied to juveniles—but not, however, because of any incompatability between it and the basic objectives of the juvenile system. During the October 1975 term the Court will decide a case which directly challenges the conclusion of the *Mapp* Court that, in order to deter police misconduct, the fourth amendment requires the exclusion of evidence seized in violation of the laws of search and seizure. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *cert. granted*, 422 U.S. 1055 (1975). Some modification of the *Mapp* rule may well be forthcoming. As attested by his vigorous dissent in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 417 (1971), the Chief Justice strongly opposes the continuation of a constitutionally-required exclusionary rule. Justice Blackmun expressed similar views by joining in a concurring opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). And in a recent case the Court explicity questioned the validity of suppression as a sanction where the police have not acted in bad faith. Michigan v. Tucker, 417 U.S. 433, 447 (1974).

[69] The facts in *Breed* did not present the question of whether the double jeopardy clause prohibits a second delinquency petition in juvenile court following an original adjudication that ends in a dismissal of the charges. Under the Court's rationale, however, the same result would follow in this situation. Where a child is faced with a substantial deprivation of liberty, he cannot constitutionally be subjected to the ordeal of a second proceeding on the same offense in juvenile court once the original charges

ble jeopardy is essential in any proceeding where an individual stands to lose his personal liberty for the purpose of enforcing the criminal law. *Breed v. Jones* represents another step in the Supreme Court's process of applying the criminal procedural guarantees of the Constitution to the juvenile court system. The Court continues to acknowledge that the juvenile system has not lived up to its early idealistic potential. Simultaneously, however, the Court continues to support the theoretical validity of a separate mode of flexible and individualized procedure for youthful offenders. This is shown by the Court's decision to extend constitutional guarantees solely on the basis of case-by-case determinations, and even then, only after an analysis has shown that the right in question is indeed fundamental in nature and that its application will not have a deleterious effect upon those beneficial accomplishments which the juvenile system can still produce.

against him have been dismissed. The state courts which had faced this issue following *Gault* had unanimously concluded that fundamental fairness standards barred a second juvenile proceeding. *See* Rudstein, *supra* note 42, at 279.