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SWISHER v. BRADY: DOES A JUVENILE COURT REHEARING ON THE RECORD AFTER A MASTER HAS MADE PROPOSED FINDINGS VIOLATE DOUBLE JEOPARDY OR DUE PROCESS?

INTRODUCTION

In a series of decisions beginning with the landmark case of In re Gault,¹ the Supreme Court has held that many of the constitutional guarantees that protect the rights of adult defendants in criminal cases extend to juvenile court proceedings.² Among the guarantees the Court has found applicable under certain circumstances is the fifth amendment protection against double jeopardy, as incorporated into the fourteenth amendment.³

This right was again at issue in Swisher v. Brady,⁴ brought to challenge a feature of juvenile proceedings in Maryland. In the Maryland system⁵ masters⁶


5. The system described here is in force throughout the state, except for two counties. See note 196 infra.


That act provided for the appointment . . . of "a suitable person to act as Master." The Master was required at the conclusion of a hearing to "transmit to the Judge all papers relating to the case, together with his findings and recommendations in writing," with the further proviso that if no hearing were requested relative to those findings and recommendations they should, "when confirmed by an order of the Judge, . . . become the judgment of the court."

Id. at 96, 321 A.2d at 522.

The title of "master," originally "master in chancery," indicates the subordinate position of the office. Although the duties assigned to positions so named have ranged from strictly ministerial clerical tasks to more responsible work such as the hearing of evidence and the preparation of proposed decrees, they have not included strictly judicial functions, and have not been free of court supervision. See id. at 101–04, 321 A.2d at 525–27; E. MILLER, EQUITY PROCEDURE AS ESTABLISHED IN THE COURTS OF MARYLAND §§ 555, 556 (1897). But see note 48 infra. After 1943 the use of juvenile court masters was introduced in most counties of the state, with masters exercising their functions there, as in

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are authorized by a rule of procedure to hear cases assigned to them by the juvenile court and render proposed findings and recommendations, which may be accepted, modified, or rejected by the juvenile court judge. The state may file exceptions to a master's findings, and if it does so, a hearing on the record is held before the judge. In Swisher the Supreme Court ruled that the hearing held upon the state's taking of exceptions does not require an accused to stand trial a second time, and therefore does not violate the double jeopardy clause.

The proceedings before the Court in Swisher represented the culmination of a series of state and federal court challenges to the juvenile master system on double jeopardy grounds. In 1972, a Baltimore City master concluded, after a hearing, that the state had failed to show beyond a reasonable doubt that William Anderson, a juvenile, had assaulted and robbed a woman. The state's attorney filed exceptions to the master's findings and requested a de novo hearing.

Baltimore City, under the juvenile jurisdiction of the circuit courts. 272 Md. at 96–97, 321 A.2d at 522–23.

7. Maryland Rule of Procedure 911 authorizes masters to order detention or shelter care of juveniles, subject to a judge's immediate review if requested, Md. R.P. 911(a)(1), and to hear cases and matters assigned by a court except hearings on petitions for waiver of juvenile jurisdiction, id. 911(a)(2). It specifically provides that masters' findings and recommendations do not constitute final orders of the court, id., and makes the following provisions for review of masters' findings:

b. Report To The Court
   Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition.

c. Review by Court if Exceptions Filed
   Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be de novo or on the record.

   Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing de novo or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. Review by Court in Absence of Exceptions
   In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection.

Id. 911(b)–(d).

8. Id. 911(c).
10. Id. at 207.
hearing, as provided by the then applicable rule.\textsuperscript{11} Anderson responded with a motion to dismiss the notice of exceptions, arguing that the provision for a de novo hearing violated the double jeopardy clause. The juvenile court granted the motion,\textsuperscript{12} and subsequently granted the same relief to several similarly situated juveniles, including those who later initiated the \textit{Swisher} litigation.\textsuperscript{13}

The state appealed the cases of Anderson and three other juveniles, and the Maryland Court of Special Appeals reversed.\textsuperscript{14} The four juveniles appealed, and the Court of Appeals affirmed.\textsuperscript{15} Two of the appellants, joined by seven other juveniles, in November 1974 initiated a class action in the United States District Court for the District of Maryland under the federal civil rights statute.\textsuperscript{16} They sought a declaratory judgment and injunctive relief against the

\textsuperscript{11} \textit{Id.} At the time the exceptions were filed, Md. R.P. 908(e) (1971) governed the use of masters in Maryland juvenile proceedings. It differed from current rule 911, see note 7 \textit{supra}, in that it provided for a de novo hearing, rather than a hearing on the record, if the state took exceptions. Rule 908(e) was amended as of July 1, 1975, and became rule 910. 2 Md. Reg. 969–70 (1975). After a subsequent amendment, effective January 1, 1977, the provision was renumbered as rule 911, 3 Md. Reg. 1385 (1976). See notes 24 to 30 and accompanying text \textit{infra}.

\textsuperscript{12} The judge ruled that double jeopardy protections apply to juvenile court proceedings, 438 U.S. at 207–08, and that the de novo hearing upon the state's taking of exceptions violated those protections, \textit{id.} at 208. The opinion antedated the Supreme Court decision in \textit{Breed} v. Jones, 421 U.S. 519 (1975), which extended double jeopardy protection to juveniles. Maryland case law in 1973 rejected the notion of double jeopardy protection for juveniles, because it was held that juvenile courts did not punish for the commission of crimes. \textit{See Moquin} v. State, 216 Md. 524, 140 A.2d 914 (1958); \textit{Johnson} v. State, 3 Md. App. 105, 238 A.2d 286 (1968). \textit{See also note 55 \textit{infra}}.

\textsuperscript{13} 438 U.S. at 208.

\textsuperscript{14} In re Anderson, 20 Md. App. 31, 315 A.2d 540, \textit{aff'd}, 272 Md. 85, 321 A.2d 516, \textit{appeal dismissed sub nom.} \textit{Epps v. Maryland}, 419 U.S. 809 (1974), \textit{cert. denied}, 421 U.S. 1000 (1975). Assuming for purposes of its decision that jeopardy attached at the commencement of the hearing before the master, the court held that "there is no adjudication by reason of the master's findings and recommendations." \textit{Id.} at 47, 315 A.2d at 549 (footnote omitted). Thus, "the hearing, and the jeopardy thereto attaching, terminate only upon a valid adjudication by the juvenile judge." \textit{Id.} (emphasis in original). In the court's view, a de novo hearing in this context was not a second exposure to jeopardy, but "merely a continuance of the hearing and the initial jeopardy." \textit{Id. See note 72 and accompanying text \textit{infra}}.

\textsuperscript{15} In re Anderson, 272 Md. 85, 321 A.2d 516, \textit{appeal dismissed sub nom.} \textit{Epps v. Maryland}, 419 U.S. 809 (1974), \textit{cert. denied}, 421 U.S. 1000 (1975). Unlike the Court of Special Appeals, which assumed that jeopardy attached at the beginning of the master's hearing, the Court of Appeals held that "a hearing before a master is not such a hearing as places a juvenile in jeopardy." \textit{Id.} at 106, 321 A.2d at 527. In the court's opinion, a master was merely a ministerial and not a judicial officer. \textit{Id. But see Bris Realty Co. v. Phoenix Sav. & Loan Ass'n}, 238 Md. 84, 208 A.2d 68 (1965) (rejecting argument that master not judicial officer). Since his findings did not become binding until approved by the juvenile judge, double jeopardy could not arise if the matter was heard de novo before the judge. 272 Md. at 106, 321 A.2d at 527. An appeal to the Supreme Court by some of the minors was dismissed for want of a substantial federal question. \textit{Epps v. Maryland}, 419 U.S. 809 (1974). The Court later also denied certiorari. 421 U.S. 1000 (1975).

future operation of the rule on the ground that by permitting a second trial before a juvenile judge, it violated the double jeopardy clause. The juveniles also sought federal habeas corpus relief, contending that they had been unjustly deprived of their liberty as a result of the de novo hearings, which violated their rights under the double jeopardy clause.17

The district court judge considering the habeas corpus petition ruled that the provision for a de novo hearing on the state’s exceptions violated the double jeopardy clause, and granted relief.18 In contrast to the Court of Appeals of Maryland,19 the court held that a juvenile is placed in jeopardy as soon as the state begins to offer evidence in an adjudicatory hearing before a master.20 The court found that a de novo hearing before a judge places the juvenile in jeopardy a second time because it requires him to "[marshal] his resources against those of the State"21 for a second time, and "twice [subjects him] to the 'heavy personal strain' which such an experience represents."22 The court noted that in reaching its decision it was bound to consider the substance as well as the form of Maryland juvenile proceedings.23

Before this decision, the Maryland General Assembly had enacted legislation providing for the first time a statutory basis for the use of masters in juvenile court proceedings.24 The new statute differed somewhat from the rule by providing that either party, not just the state as under the rule, was authorized to file exceptions to a master’s findings and could elect a hearing on the record or a de novo hearing before the judge.25 The statute further specified that the

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18. Aldridge v. Dean, 395 F. Supp. at 1172–73. The petitions of three of the nine juveniles were dismissed without prejudice because they had not yet been brought before the juvenile judge.
20. 395 F. Supp. at 1172. Criticizing the Court of Appeals’ position, Judge Thomsen queried:

If this be the law of Maryland, when is a juvenile placed in jeopardy in the ordinary case, where the only hearing is before the master and the judge reads a printed form of report . . . without any factual details, and signs his name below the words "Approved and So Ordered"?

Id. at n.25.
21. Id. at 1173 (quoting Breed v. Jones, 421 U.S. 519, 533 (1975)).
22. Id. (citations omitted).
23. Id. at 1169. See Breed v. Jones, 421 U.S. 519 (1975); In re Gault, 387 U.S. 1 (1967); see notes 55 & 90 and accompanying text infra.

Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master’s findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a
"proposals and recommendations of a master for juvenile causes [did] not constitute orders or final action of the court." After its enactment, on the day before the habeas corpus decision, the Maryland Court of Appeals promulgated a new rule governing the use of masters, which paralleled the new statute. Two weeks later a revised version was published, to take effect on the same date as the statute. Rule 911, currently in force, differs from the statute in that it labels as "proposed" the master's findings of fact. In addition, it only gives the state the power to secure a hearing on the record, not a de novo hearing. The juvenile, after filing exceptions, can elect either. The judge may hear additional relevant evidence to which neither party raises objection.

When rule 911 took effect, the juveniles amended their class action complaint to include it. The three-judge panel certified the plaintiff class to include all juveniles against whom the State of Maryland had filed exceptions to findings of non-delinquency. In a unanimous opinion, the court held the statute and rule 911 unconstitutional, noting that "[t]he most important element is that the State has more than one opportunity to convince a trier of fact of the guilt of the juvenile." The district court enjoined the state from taking exceptions to either a master's finding of non-delinquency or his proposed disposition.

The Supreme Court noted probable jurisdiction solely to determine whether the Double Jeopardy Clause prohibits state officials, acting in accordance with rule 911, from taking exceptions to a master's finding of non-delinquency or his proposed disposition.

hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

26. Id. § 3–813(d). Subsection (d) further provides that the findings "shall be promptly reviewed by the court, and in the absence of timely and proper exceptions they may be adopted by the court and appropriate orders entered based on them." Id.


32. The court noted that the statute and the rule were in conflict as to whether the subsequent hearing is to be de novo or on the record, and pointed out that "[u]nder Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule-making power of the Maryland Court of Appeals." 436 F. Supp. at 1365. See County Fed. Sav. & Loan v. Equitable Sav. & Loan Ass'n, 261 Md. 246, 253, 274 A.2d 363, 367 (1971). The statute and rule became effective on the same day, but the rule was adopted by the Court of Appeals after the statute was signed into law. Thus, the court held, the rule controlled. Presumably it was necessary to decide whether both rule and statute were unconstitutional because if the rule were repealed, the provisions of the statute would apply.

33. 436 F. Supp. at 1369.

34. Id. at 1370.

findings." A six-justice majority, in an opinion by Chief Justice Burger, reversed the decision of the lower court, holding that rule 911, in creating a system in which an accused juvenile is subjected to a single proceeding, does not impinge on the purposes of the double jeopardy clause. The majority did not reach the argument raised by amicus and put forth by Justice Marshall in his dissent, that rule 911 proceedings violate the due process clause by permitting ultimate decisionmaking by a judge who did not actually conduct the trial or observe the witnesses.

This Note will evaluate the Swisher Court's analysis of the double jeopardy claim and will examine the due process question addressed by the dissent. The first part will consider the Court's disposition of the double jeopardy issue and propose that the Court's reliance upon formal structure and designations of proceedings as indicating whether double jeopardy protections are violated neither takes due account of the actual functioning of Maryland juvenile courts nor accords with its earlier decisions. In the second part, the due process issue will be analyzed in light of the recent history of due process standards in juvenile courts. It will be suggested that factfinding under the master system is not sufficiently reliable to comport with the due process requirement of proof beyond a reasonable doubt. The "balancing test" for juvenile due process standards, as developed by the Court prior to Swisher, will be applied to the master system with the aid of an analogy from administrative law. It will be argued that the master system as presently constituted in Maryland violates double jeopardy and other due process protections accorded to juveniles, and ought to be modified so that it is constitutionally acceptable, or else abolished.

DOUBLE JEOPARDY

Double jeopardy, "one of the oldest ideas found in western civilization," has roots in Greek, Roman, and canon law. Blackstone considered it a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence," and his language was followed by Congress in writing the fifth amendment.

36. 438 U.S. at 213 (footnote and citation omitted).
37. Id. at 215. The Court did not rule separately on § 3–813.
38. The California State Public Defender filed an amicus brief. Id. at 232 n.9.
40. An equal protection issue connected with the due process question is discussed in note 196 infra.
43. 4 W. Blackstone, Commentaries *335 (Lewis ed. 1897).
44. United States v. Wilson, 420 U.S. 332, 340–42 (1975). Wilson provides a history of the development of the double jeopardy clause. Although the Maryland Constitution does not provide double jeopardy protection, the right has long been recognized under the common law. See Moquin v. State, 216 Md. 524, 528, 140 A.2d 914, 916 (1958).
The double jeopardy clause has been held to provide three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." The "underlying idea" of the guaranty, according to Justice Black, 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.\footnote{47}

In adult criminal cases the Court has interpreted the prohibition against retrial after acquittal broadly\footnote{44} and granted exceptions grudgingly.\footnote{49} The Court has held that the double jeopardy clause is applicable to juvenile proceedings.\footnote{45} In\textit{Swisher}, however, it chose to apply the clause narrowly,\footnote{46} and in a manner inconsistent with the spirit and substance of a series of recent juvenile decisions.

\footnote{45. See note 3 \textit{supra}. Taken literally, the double jeopardy prohibition would seem to apply only to a reprosecution in which conviction would result in a loss of life or limb. Neither the Constitution nor the common law principle is so restrictive, however, and the ban has been taken to apply to all cases of multiple prosecution for the same offense. \textit{E.g.}, Ashe v. Swenson, 397 U.S. 436 (1970); North Carolina v. Pearce, 395 U.S. 711 (1969); see United States v. Gibert, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (No. 15,204) (Story, J.).}


\footnote{48. The Court has referred to this aspect of the double jeopardy clause as protection against the personal strain and expense of a second trial, \textit{e.g.}, Abney v. United States, 431 U.S. 651, 661 (1977); \textit{Price v. Georgia, 398 U.S. 323, 331 (1970), and has held that, in order to vindicate it, an immediate appeal lies from a pretrial order rejecting a defendant's claim of double jeopardy, Abney v. United States, 431 U.S. 651 (1971).}}

\footnote{49. \textit{E.g.}, Lee v. United States, 432 U.S. 23 (1977) (second trial justified after dismissal for defective indictment at defendant's request); United States v. Ball, 163 U.S. 662 (1896) (defendant can be tried again for same offense if prior conviction has been set aside on appeal); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (dismissal on ground of "manifest necessity" does not bar retrial).}


\footnote{51. \textit{See California v. Jesse W., 20 Cal. 3d 893, 576 P.2d 963, 145 Cal. Rptr. 1, vacated and remanded, 439 U.S. 922 (1978). In Jesse W., the California Supreme Court had held}}
The most important of these juvenile decisions, and one of the earliest, was the 1967 landmark case of *In re Gault,* in which the Court held that certain constitutional guarantees traditionally associated with adult criminal proceedings — right to notice of charges, right to counsel, privilege against self-incrimination, right to confront and cross-examine witnesses — are applicable to juvenile proceedings that may result in commitment to a state institution. *Gault* marked a turning point in juvenile law, signalling a shift from a reliance on a *parens patriae* philosophy to a conception of juvenile proceedings, regardless of what they might be called, as functionally equivalent to adult criminal prosecutions. Writing for the majority, Justice Fortas found it that a de novo hearing following a hearing before a juvenile court referee is not merely a review of a hearing previously held, but a complete new trial of the controversy, which would expose the juvenile to jeopardy a second time. On certiorari, the United States Supreme Court vacated the judgment, and remanded the case for reconsideration in light of *Swisher.* In *In re Raymond P.,* 86 Cal. App. 3d 797, 150 Cal. Rptr. 537 (1978), the California Court of Appeals held that even though a referee's sua sponte dismissal of a juvenile proceeding did not result from a resolution of factual issues, a subsequent de novo hearing by a juvenile court judge exposed the juvenile to double jeopardy. In reaching its decision, the court considered the impact of *Swisher* on *Jesse W.* and concluded: "In our view, *Swisher* not only sustains the decision in *Jesse W.* it impels such a decision." *Id.* at 808, 150 Cal. Rptr. at 542.

52. 387 U.S. 1 (1967). In *Gault,* a juvenile was charged with making an obscene telephone call. His parents were not notified that he was taken into custody, nor were they served with a copy of the petition alleging delinquency. The petition gave no factual basis for the action. At the hearing, the complainant was absent, no one was sworn, and no record was kept. Notification of a right to counsel was not given, and a confession was obtained in the absence of counsel. The parents filed a petition for habeas corpus. The Supreme Court reversed the state supreme court's denial of the petition. *Gault* was preceded by *Kent v. United States,* 383 U.S. 541 (1966), in which the Court held, expressly on statutory grounds but while referring to the constitutional due process requirement, that a juvenile court waiver-of-jurisdiction hearing had to "measure up to the essentials of due process and fair treatment." *Id.* at 562.

53. 387 U.S. at 31-57. The broad language of the *Gault* opinion seems to indicate a willingness on the part of the Court to consider favorably other juvenile claims of constitutional rights; "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *id.* at 13. Justice Black, in a concurring opinion, argued that any person, child or adult, capable of being seized, charged, and convicted for violating a criminal law must be tried in accordance with the guarantees of all of the provisions of the Bill of Rights made applicable to the States by the fourteenth amendment. *Id.* at 61.


The care of all infants is lodged in the king as *parens patriae,* and by the king this care is delegated to his Court of Chancery . . . . Idiots and lunatics, who are
"unrealistic" to "disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."

Incapable to take care of themselves, are provided for by the king as parens patriae; and there is some reason to extend this care to infants. See generally Cogan, Juvenile Law, Before and After the Entrance of "Parens Patriae," 22 S.C.L. Rev. 147 (1970); Rendelman, Parens Patriae: From Chancery to the Juvenile Court, 23 S.C.L. Rev. 205 (1971).

Guided by the "state qua parent" philosophy, the early juvenile law reformers saw:

[t]he child [as] essentially good . . . [he] was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or trial. The rules of criminal procedure were therefore altogether inapplicable . . . . The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

... [P]roceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

In re Gault, 387 U.S. at 15–17 (footnotes omitted). See In re Holmes, 379 Pa. 599, 605, 109 A.2d 523, 525 (1954). In a dissenting opinion, Judge Musmanno suggested that the real issue was not the nature of "treatment," but whether the juvenile should be "treated" at all.

To say that a graduate of a reform school is not to be "deemed a criminal" is very praiseworthy but this placid bromide commands no authority in the fiercely competitive fields of every-day modern life.

... In point of fact it will be a witness against him in the court of business and commerce, it will be a bar sinister to him in the court of society where the penalties inflicted for deviation from conventional codes can be as ruinous as those imposed in any criminal court, it will be a sword of Damocles hanging over his head in public life, it will be a weapon to hold him at bay as he seeks respectable and honorable employment.

Id. at 612, 109 A.2d at 528–29. For further discussion of the history and nature of juvenile courts, see Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970); Mack, Juvenile Court, 23 Harv. L. Rev. 104 (1909).

55. 387 U.S. at 49–50. The denomination of the juvenile courts as civil rather than criminal has been understood to mean that specific due process rights guaranteed in criminal proceedings by the fifth and sixth amendments, and applied to the states through the fourteenth amendment, are not automatically applicable to juvenile proceedings. Id. at 14, 30; 59–60 (Black, J., concurring); 66 (Harlan, J., concurring in part & dissenting in part); McKeiver v. Pennsylvania, 403 U.S. 528, 541, 545 (1971) (plurality opinion); 551 (White, J., concurring); 553 (Brennan, J., concurring in part & dissenting in part). In its scrutiny of particular rights to determine whether the fourteenth amendment confers them upon juveniles charged with criminal conduct, the Court has had to consider in what respects juvenile proceedings differ from ordinary criminal proceedings. For example, in Gault, the special character of a boy's incarceration was found unimportant:

A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an
Three years later, in *In re Winship*, the Court held specifically that the requirement of proof beyond a reasonable doubt is an essential element of due process and is constitutionally required when a juvenile is charged with an act that would constitute a crime if committed by an adult. The following year, in *McKeiver v. Pennsylvania*, the Court denied juveniles a different constitutional protection, holding that there is no right to a jury trial in delinquency proceedings. In a confusing opinion "characterized by rapid shifts of analytic focus," a plurality of four distinguished this right from those granted in *Gault* and *Winship*. Applying the due process fundamental fairness standard, it found a jury trial, unlike the rights in the prior cases, not crucial to the accuracy of the factfinding process. Thus, despite the plurality's negative conclusion, *McKeiver*...
may be considered to stand in the line of cases that began with *Gault.* In addition to distinguishing jury trials as not critical to accuracy of factfinding, the plurality opinion returned to the "gentle conception" of *parens patriae* rejected in *Gault,* arguing that juries "would remake the juvenile proceeding into a fully adversary process," and end the "idealistic prospect of an intimate, informal protective proceeding." In a concurring opinion Justice White, who joined the plurality, remarked that an adult faced with criminal prosecution deserves jury protection under the Constitution against "corrupt, biased, or political justice" but a juvenile under prosecution does not, since he is not threatened with "criminal guilt." This distinction does not affect the consequence of conviction, deprivation of liberty for adult or juvenile.

In *Breed v. Jones,* the last relevant case before *Swisher,* the Court unanimously held that the double jeopardy clause was violated by prosecution of a youth in a California adult criminal court after he had been subjected to a delinquency hearing in juvenile court on the same charge. The hearing was before a referee, or master, having powers not materially different from those of

62. Justice Brennan's opinion, with its emphasis on the interests served by a jury trial, can perhaps also be viewed as consonant with this line of cases.
63. 387 U.S. at 26.
64. 403 U.S. at 545.
65. Id.
66. Id. at 551 (emphasis added). Justice White found differences of substance between criminal and juvenile courts, which were "quite enough for [him] to hold that a jury is not required in the latter." Id. at 553.
67. The seriousness of the punishment — lengthy incarceration — inflicted upon juveniles found to be delinquent was much stressed in Justice Douglas' dissent.

[W]here a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order "confinement" until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult.

Id. at 559 (Douglas, J., Black & Marshall, J.J., dissenting).

Justice Harlan, although he concurred in the result in *McKeiver,* also viewed juvenile proceedings as equivalent to criminal prosecutions. He noted that if he thought that jury trials were required constitutionally in state criminal proceedings, since — as he considered Justice Blackmun to have premised — juvenile proceedings had in effect become criminal trials, he would be unable to see why jury trials should be denied to juveniles. Id. at 557. Since the members of the court were thus evenly divided on the issue whether juvenile proceedings should be treated as criminal — the plurality on the one hand, the dissenters and Justice Harlan on the other — Justice Brennan's view is critical. He apparently subscribed to the plurality's view. He said that he agreed with the plurality's conclusion that the juvenile hearings "were not 'criminal prosecutions' within the meaning of the Sixth Amendment." Id. at 553 (Brennan, J., concurring and dissenting). That conclusion was for the plurality predicated on a difference between juvenile detention hearings and ordinary criminal cases, id. at 540-41; although the juvenile hearings were not "devoid of criminal aspects," id. at 541, neither had they been held to be criminal prosecutions under the sixth amendment, id. at 540.

a Maryland master, such a hearing was enough to place the youth once in jeopardy. The Court wrote:

We deal here, not with "the formalities of the criminal adjudicative process," but with an analysis of an aspect of the juvenile court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case . . . and a criminal prosecution, each of which is designed "to vindicate [the] very vital interest in enforcement of criminal laws."

Having concluded accordingly that jeopardy had attached at the juvenile hearing, the Court also rejected the contention that the jeopardy had "continued" from that hearing to the adult criminal trial. Decisive as this holding was, the violation of double jeopardy was found to occur not within the juvenile system, but only upon passage to criminal court and retrial there.

The Court's analysis in Swisher began with the statement of two related principles that it considered to govern the case: constitutional protection against double jeopardy prohibits a second trial following an acquittal; and a defendant has a right to have his trial completed by a "particular tribunal." The narrow question of the case was "whether the State in filing exceptions to a master's proposals, pursuant to rule 911, thereby 'require[s] an accused to stand trial' a second time." In the Court's view, there were several reasons why the state's action does not do so.

70. 421 U.S. at 531 (citations omitted).
71. Id.
72. Id. at 534. For the application of Breed to Swisher, see text accompanying notes 112 to 114 infra. Justice Holmes enunciated the concept of continuing jeopardy in his dissenting opinion in Kepner v. United States, 195 U.S. 100 (1904). In his view, "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause." Id. at 134 (emphasis added). The continuing jeopardy concept has never been adopted by a majority of the Court. See Breed v. Jones, 421 U.S. 519, 534 (1975); United States v. Jenkins, 420 U.S. 358, 369 (1975).
74. Id.
75. Id. at 215. The Court rejected the state's chief argument that jeopardy does not attach at the hearing before the master, but noted that it was not essential to its decision to fix the precise time at which jeopardy attaches. Id. at 215 n.12. However, such a determination would be important for purposes of permitting reprosecution after a mistrial. See Schulhofer, Jeopardy and Mistrials, 125 U. PA. L. REV. 449, 454 (1977).

The first was that the accused juvenile is subject only to a single proceeding beginning with a hearing before the master and culminating in an adjudication by a judge. Next, the Court stated, a rule 911 proceeding fulfills a central purpose of the double jeopardy clause — preventing the prosecution from having a second opportunity to supply evidence because the record is closed after the state presents its evidence before the master. Additional evidence can be received by the juvenile judge only with the consent of the juvenile. Furthermore, rule 911 empowers only the judge to make binding determinations. Thus, there is not the increased risk of conviction of an innocent defendant that might arise if the state had the chance to persuade two factfinders. Finally, the Court noted that there was nothing in the record to indicate that a rule 911 proceeding "subjects the defendant to the embarrassment, expense and ordeal of a second trial."

Justice Marshall, joined by Justices Brennan and Powell, dissented. In the first part of his opinion he castigated the Court for enabling the state in rule 911 proceedings to circumvent the protections of the double jeopardy clause by simply redefining trial and appellate functions. He stated: "[O]ur Constitution is not so fragile an instrument that its substantive prohibitions may be evaded by formal designations that fail to correspond with the actual functions..."

78. 438 U.S. at 216. See Md. R.P. 911(d).
79. 438 U.S. at 216.
80. Id. Imposition of such burdens is proscribed by Green v. United States, 355 U.S. 184, 187–88 (1957), in which the Court held that retrial on a first degree murder charge after the defendant had been tried on the charge and found guilty of second degree murder violated double jeopardy. The Chief Justice likened the burdens of a rule 911 proceeding to "those resulting from a judge's permissible request for post-trial briefing or argument following a bench trial." 438 U.S. at 217.
81. 438 U.S. at 222–23. Justice Marshall agreed with the majority that jeopardy attaches at the master's hearing. Id. at 220 (citing the majority opinion, id. at 215 n.12). See note 75 supra.

Justice Marshall argued that it is inaccurate to say that only the judge is authorized to act as factfinder, because rule 911 expressly recognizes that the judge may enter his order "based on" the master's findings, without independently reviewing the record himself. Thus, according to Justice Marshall, although the master's findings are nominally "proposed," they are, in effect, final orders of the court.

Because of its reliance upon "formal designations" as determinative of the substance of proceedings, the Court's holding further complicates the problem of identifying which constitutional rights are possessed by juveniles. As Justice Marshall observed, the Court was placing great importance upon the fact that Maryland has conferred the names of factfinder and adjudicator only on the juvenile court judge. Although it is true that rule 911 refers to the master as a maker of "proposed" findings and orders, the evidence is conclusive that in practice it is his findings that are determinative of the guilt or innocence of the juvenile. This was made clear in Aldridge v. Dean, in which the single-judge district court found that "on the average, the judge devotes a little less than one minute to each proposed order. . . . Unless an exception has been filed by one side or the other, the judge seldom modifies the master's proposed order." Thus, in most cases, the master's "proposed" order is in fact final, requiring only the judge's signature to make it formally so. It follows that when a juvenile appears before the master he is genuinely subject to a "risk of a determination of guilt," which sets the stage for double jeopardy if the judge subsequently redetermines the case on the state's exceptions. The general rule that actual practice and substance, rather than theory and form, determine the significance of court

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82. 438 U.S. at 222.
83. Id. at 223–24. See Md. R.P. 911(b) & (d).
84. 438 U.S. at 224. The dissent noted that the lower court, 436 F. Supp. at 1364, had found that, "except when the State filed an exception, all of the masters' recommended findings of non-delinquency had been approved by the judge." 438 U.S. at 223–24 n.5. Furthermore, the state trial judge who first heard the juveniles' double jeopardy claim and found in their favor had concluded:

[I]t is impossible for the Judge . . . , who also carries a full docket of cases himself, to exercise any independent, meaningful judgment in the overwhelming majority of the many thousands of [master's] orders put before him each year . . . . With this being the case it is difficult to see how realistically a Master can be called only an adviser. . . . [T]he master conducts for all intents and purposes, full-blown and complete proceedings through the adjudicatory and dispositional phases and . . . as a practical matter he imposes sanctions and can effectively deprive youngsters of their freedom. Id. (quoting In re Anderson, No. 158187 (Cir. Ct. Balt. City, Juv. Div., Aug. 1, 1973)). A special commission on juvenile justice had reached a similar conclusion. 438 U.S. at 224 n.5 (quoting Final Report of the Commission on Juvenile Justice to the Governor and General Assembly of Maryland 13 (1977)).

85. 438 U.S. at 226.
86. Md. R.P. 911(b).
88. 395 F. Supp. at 1170–71 (footnote omitted) (emphasis added). See also note 84 supra.
proceedings in double jeopardy cases is well established. Accordingly, neither the lack of the appellation of factfinder nor the absence of authority to sign final orders can be fairly held to render the master's hearing incomplete.

Given that "[t]here is little difference in the conduct of an adjudicatory hearing before a master and the conduct of such a hearing before the judge," and given the perfunctory nature of the judge's role, it is not surprising that the court in Aldridge found:

The juvenile and his family regard, and are justified in regarding, the hearing before the master as a trial. They are supported in this view by the fact that the master not only announces his findings as to whether or not the charge has been sustained, but often either causes the child to be forthwith released from existing custody or taken into custody, without waiting for an order to be signed by the judge.

If, as is extremely likely, the juvenile who is found not delinquent by the master reasonably assumes he has been acquitted, then it is very difficult to understand the Court's position that he does not suffer the same "embarrassment, expense and ordeal" as an adult would from the appeal of an acquittal. The Court stated that there was nothing in the record to prove this point, but this assertion appears to be part of the Court's undue emphasis on form. In fact, the juvenile is required to appear at the hearing on the record, and his attorney presents oral argument. If the Court had viewed the rehearing as a second trial, however, and ignored its "label-of-convenience," it is unlikely it would have thought such evidence in the record necessary. The Court's comparison of a rehearing to

92. See notes 84 & 88 and accompanying text supra.
93. 395 F. Supp. at 1171.
94. See 438 U.S. at 216-17. Such hardship is especially to be deplored in the case of a juvenile, who may be brought to resist the rehabilitative efforts of the court by his belief that he was dealt with unfairly. See Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings, 6 U. TOL. L. REV. 1, 19 (1974); Whitebread & Batey, Juvenile Double Jeopardy, 63 GEO. L.J. 857, 862 (1975). See also In re Gault, 387 U.S. 1, 26-27 & n.37 (1967).
95. 438 U.S. at 216-17.
96. This is a matter of practice, not law. Telephone conversation with Judge Robert L. Karwacki, Administrative Judge, Supreme Bench of Baltimore City (Jan. 10, 1979).
97. See text accompanying note 55 supra.
a "post-trial briefing, or argument following a bench trial" is inappropriate since such proceedings are before the original factfinder, who presumably has not yet reached a decision. Justice Marshall's analogy to a trial judge and an appellate court better represents the actual nature of the proceeding.

Formal differences between types of proceedings were also stressed by the Court in distinguishing *Kepner v. United States* from the facts presented in *Swisher*. In *Kepner*, the defendant was acquitted of an embezzlement charge following a bench trial in a Philippine court. The government appealed to the Philippine Supreme Court, which found the defendant guilty. Under the Philippine system, derived from the Spanish system of law,

a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the . . . supreme court . . . . The trial was regarded as one continuous proceeding, and the double jeopardy protection given was against a second conviction after this final trial had been concluded in due form of law.

Relying on *United States v. Ball*, in which the Court had prohibited a retrial even though the prior verdict of acquittal had been declared void because it had been entered on a Sunday, the *Kepner* Court held that "to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment." The *Swisher* Court distinguished *Kepner* because the trial judge there had formal authority to enter a final order, so that appellate review of his final judgment was in question.  

100. Id. at 222.
101. 195 U.S. 100 (1904).
102. 438 U.S. at 217 n.15.
103. 195 U.S. at 121. *See* note 72 *supra*. The defendant's claim was based on a statutory provision that extended double jeopardy protection to citizens of the then American territory of the Philippines. The government contended that because the statute's double jeopardy protection had to be construed in light of the local judicial system, which Congress intended to leave in effect, it did not preclude the proceeding involved. 195 U.S. at 120. The Court found that since Congress' intent was to make some of the "essential principles of American constitutional jurisprudence" applicable to the territory and "engraft them upon" the local system, *id.* at 121-22, the statutory language was to be interpreted in light of the settled meaning of the term under the Constitution, *id.* at 124. The statutory provision that the Philippine Supreme Court was to exercise its previous jurisdiction was not intended to affect the specific guarantee of the double jeopardy provision. *Id.* at 125. Because the Court relied on cases interpreting the double jeopardy clause of the sixth amendment in interpreting the parallel clause of the statute, *id.* at 124, the case is considered to be of constitutional magnitude. 438 U.S. at 225 n.6 (Marshall, J., dissenting).
104. 163 U.S. 662 (1896).
105. 195 U.S. at 133.
106. 438 U.S. at 217 n.15.
Justice Marshall found in this distinction another instance of exalting form over substance. He reminded the Court that it was established that "an 'acquittal' is not necessarily determined by the form of the order." What characterizes an acquittal, rather, is that the "ruling . . ., whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." He argued that a master's decision is fully equivalent to an acquittal and that the Court's rationale in Swisher gave the state the power to create several levels of appeal by simply labeling lower levels of decisionmaking "proposed" or "tentative." As has been shown in this section, the master's "proposed" findings are indeed "resolutions" in every sense save name, and thus the Ball and Kepner holdings, which stress the threat of multiple prosecutions and minimize the need for formal judgment, seem particularly appropriate to Swisher.

The Court also distinguished Breed v. Jones, finding it inapplicable because the Maryland procedure involved "only one proceeding" and consequently the rejection in Breed of the idea that jeopardy continued from one trial to another had no bearing on Swisher. However, there is nothing in the Breed opinion to suggest that the Court there intended to limit its rule to prevent successive prosecutions only in separate court systems. Moreover, such a reading seems incorrect if only because it would permit successive prosecutions of a juvenile on the same charge by two different juvenile judges. If one accepts that the master's hearing in fact creates a "risk of a determination of guilt" and that the judge's signature is not necessary to complete the initial jeopardy, then Breed is inapposite only if no further risk to the juvenile can result from proceedings subsequent to the master's adjudication.

In fact such risk can and does occur. Rule 911 gives the state the forbidden "second crack" at the defendant before another factfinder; it subjects him "to embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and insecurity." Although it may be true, as the Court states, that a rule 911 hearing on the record "bar[s] the prosecution from another opportunity to supply evidence which it failed to muster in the first proceed-

107. Id. at 225–27.
108. Id. at 226 (citing Martin Linen Supply Co. v. United States, 430 U.S. 564, 571 (1977) (judgment of acquittal on motion after deadlocked jury discharged an acquittal in substance); United States v. Wilson, 420 U.S. 332, 336 (1975) (whether dismissal of indictment is actually an "acquittal" left undecided by Court); United States v. Sisson, 399 U.S. 267, 270 (1970) (decision characterized as an "arrest of judgment" by lower court is in fact a "directed acquittal").
110. 438 U.S. at 226–27.
111. See text accompanying notes 86 to 89 supra.
113. 438 U.S. at 217–18.
115. 438 U.S. at 215.
rule 911 does not "preclude the prosecutor from enhancing the risk that an innocent defendant may be convicted." This is so because the state is free to present a new and more effective closing argument at the hearing on the record, and also simply because at a second hearing a different conclusion may be reached on the basis of the same evidence.

The foregoing arguments assume that the master's hearing amounts to a complete trial. Even if that is not so, Justice Marshall contended that by permitting the state to take exceptions to a master's findings, rule 911 denies the juvenile his "valued right to have his trial completed by a particular tribunal," a right also protected by the double jeopardy clause. This is so, in

117. 438 U.S. at 215–16 (citing Burks v. United States, 437 U.S. 1, 11 (1978)).
118. Id. at 216 (citing Arizona v. Washington, 434 U.S. 497 (1978)).
119. Rule 911 is silent on what constitutes the record, but it has been held that a record should not contain arguments of counsel. Silverberg v. Silverberg, 148 Md. 682, 694, 130 A. 325, 329 (1925). Defense counsel has an absolute right to make closing argument, Herring v. New York, 422 U.S. 853 (1975); presumably the State does as well.
120. One commentator has calculated the probability of conviction if a defendant has to undergo successive trials.

[If] the evidence were such that one in four [judges] would convict, and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted the defendant would have to convince two [judges] of his innocence and the probability of one of the two convicting would be 1 – (¼ x ¾) = (7/16); assuming the independence of each [judge] and the absence of other variables. If he had to convince five [judges] his probability of conviction by one would rise to over three in four.

Note, Twice in Jeopardy, 75 Yale L.J. 262, 278 n.74 (1965).
122. Id. at 689–90. See 438 U.S. at 227 (Marshall, J., dissenting). In United States v. Scott, 437 U.S. 82 (1978), the Court wrote, "[W]e pressed too far in Jenkins the concept of the 'defendant's valued right to have his trial completed by a particular tribunal.'" Id. at 100 (citation omitted). The broad language of United States v. Jenkins, 420 U.S. 358, 370 (1975), cited by appellees in Swisher, 438 U.S. at 218, in support of that right, was as follows:

[It is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues, going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would be necessary for it to make supplemental findings . . . ] To do so would violate the Double Jeopardy Clause.

420 U.S. at 370 (emphasis added by Swisher appellees). It was explicitly repudiated in Scott, 437 U.S. at 82, where the Court said that only those proceedings requiring the making of supplemental findings that follow a previous trial ending in an acquittal, in a conviction either not reversed on appeal or reversed because of insufficient evidence, or in a mistrial ruling not prompted by "manifest necessity" are barred by the double jeopardy clause. The Swisher Court accordingly dismissed Jenkins. The Court noted also that Jenkins was inapposite because, like Kepner, see note 106 and accompanying text supra, it involved appellate review of the final judgment of a trial court. 438 U.S. at 218. However, the issue in Scott was a narrow one, concerned with a government appeal from mid-trial dismissal requested by the defendant; thus while the Scott Court may have rejected, in dicta, what was really a general dictum in Jenkins, it is difficult to see how the Swisher Court could read Scott as determining exactly which "proceedings requiring the making of supplemental findings . . . are barred by the Double Jeopardy Clause."
Justice Marshall's view, because the master acts, for purposes of the adjudicatory hearing, as the "particular tribunal." Under rule 911, a juvenile can never, as a matter of law, have his trial completed before the "particular tribunal," since the master's recommendations must be confirmed by the juvenile judge.

What occurs when exceptions are taken is in fact closely analogous to a mistrial, inasmuch as the ordinary progress toward acceptance by the judge of the master's decision is interrupted. Under the manifest necessity exception to double jeopardy protection, a defendant can be subjected to retrial after a mistrial without a violation of double jeopardy only if the first trial had to be terminated prematurely because of "manifest necessity" or because "the ends of public justice would otherwise be defeated."

Although "virtually all of the [manifest necessity] cases turn on the particular facts and thus escape meaningful categorization," it is apparent that neither "the ends of public justice," nor an "important countervailing interest of proper judicial administration" would be defeated if the state were

123. 438 U.S. at 228. Justice Marshall stated:
This hearing is a formal, adjudicatory proceeding at which the State's witnesses testify and are cross-examined; the juvenile may present evidence in his own defense; and the juvenile is entitled to counsel and to remain silent. Presentation of evidence at that proceeding is keyed to the reactions and attitudes of the presiding master.

Id.

124. Id.
125. See text accompanying note 88 supra.
126. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). The "manifest necessity" doctrine has been invoked, for example, in cases involving mistrials declared because of a hung jury, id.; a defective indictment, Illinois v. Somerville, 410 U.S. 458 (1973); and juror prejudice, Simmons v. United States, 142 U.S. 148 (1891), and disqualification, Thompson v. United States, 155 U.S. 271 (1894). It was also applied to a mistrial declared to allow prosecution witnesses to seek advice on self-incrimination in their testimony. United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion). Cases in which application was rejected, and retrial barred, include ones involving prosecutorial misconduct, Downum v. United States, 372 U.S. 734 (1964) (mistrial declared because of absence, known to prosecutor before trial, of key prosecution witness); and defendant's request for or consent to mistrial or dismissal, Lee v. United States, 432 U.S. 23 (1977); United States v. Dinitz, 424 U.S. 600 (1976).

The exception was recently discussed, and the standard for determining "manifest necessity" explicated, in Arizona v. Washington, 434 U.S. 497 (1978). The Court there held that a trial judge's discretionary decision whether to declare a mistrial was to be given more weight where a hung jury or juror bias results in mistrial than when prosecutorial misconduct does. Id. at 507-14. The court also stated that a judge's explicit statement that a mistrial was being declared for "manifest necessity" was not necessary. Id. at 516-17 (dictum).


prohibited from taking exceptions to masters' findings. The state's interest in taking exceptions, and thus "changing tribunals," arises out of its dissatisfaction with the master's decision. This basis of interest would not satisfy the manifest necessity test: it is violative of double jeopardy for "the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first." Moreover, the result of application of the test — assuming that it is applicable at all — seems especially clear when, as is the case under rule 911, the trial is terminated when it is practically completed, and the likelihood of a second jeopardy is therefore particularly great.

In sum, the Swisher Court based its finding of no double jeopardy violation in a juvenile rehearing primarily upon a formalistic interpretation of Maryland juvenile proceedings under the master system. Yet the substance of those proceedings appears to indicate that violation does occur.

**DUE PROCESS**

The expansion from *Gault* to *Breed* of constitutional protection allowed to juveniles was accompanied by an evolution of the appropriate general due process standards to be applied in juvenile proceedings. A question raised by amicus in *Swisher*, and addressed by Justice Marshall in the second part of his dissent, was whether — in a case in which a juvenile is accused of an act that would be a crime if committed by an adult — a procedure, according to which the ultimate trier of fact bases his decision upon a cold record of a trial he did not conduct, is sufficiently reliable to comport with due process requirements. Since this question must be considered in light of the evolution just referred to, the present section begins with a brief reexamination, from the point of view of due process standards, of the relevant developments from *Gault* to *Breed* and then treats the issue in *Swisher*, with particular reliance upon the holding of *Winship*. An analogy from administrative law, especially apposite because of *Breed*, concludes the section.

131. See notes 52 to 72 and accompanying text *supra*.
132. 438 U.S. at 229–30. Justice Marshall asserted that it was within the majority's power to reach the issue raised by amicus because it had been argued in substance in opposition to appellant's motion to dismiss the complaint and because affirming the judgment of the district court on this ground would not have the effect of expanding the relief granted. *Id.* at 229 n.10. He also emphasized the narrowness of the Court's decision, which was only that the Maryland system and others like it are not unconstitutional under the double jeopardy clause. A contrary finding under the due process clause, he pointed out, might well be made in another case. *Id.* at 230.

A very similar question should be resolved shortly by the Court in United States v. Raddatz, argued February 25, 1980, 48 U.S.L.W. 3568 (U.S. March 4, 1980) (No. 79–8). A criminal defendant is there challenging on due process grounds the validity of a statutory provision, 28 U.S. § 636 (1976), permitting a pretrial suppression hearing to be held by a federal magistrate, with subsequent de novo determination of controverted issues by, and argument before, a judge.
A. Due Process Standards in Juvenile Proceedings: From Gault To Breed

The Court stated firmly in Gault that a juvenile court adjudication of delinquency "must measure up to the essentials of due process and fair treatment."13 What was "essential" was determined in Gault primarily by careful examination of particular rights in question, their basis in law, and their applicability to the special, supposedly beneficent juvenile court system.134 In connection with this determination, the Court wrote:

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. . . . [T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.135

This general assertion was replaced in Winship136 by the more cautious claim that the particular right at issue there — requirement of proof beyond a reasonable doubt in criminal cases — would not so "compel the States."137 The Court in Winship gave some attention to the argument that to grant juveniles that right would "risk destruction of beneficial aspects of the juvenile process," but rejected the argument.138 In McKeiver,139 the plurality opinion of the Court appeared to draw back from Gault in two ways. First, Justice Blackmun declared that "the applicable due process standard in juvenile proceedings, as developed by Gault and Winship, is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures."140 This rather narrow reading of the cases141 led the plurality to evaluate — and

133. In re Gault, 387 U.S. 1, 30 (1967) (quoting Kent v. United States, 383 U.S. 541, 562 (1966)). The phrase was applied in Kent only to a waiver-of-jurisdiction hearing.
135. 387 U.S. at 21. The Court went on to state that the benefits had been much exaggerated. Id. at 21–30.
137. Id. at 367.
138. Id. at 366–67 (citation omitted). The Court found that use of the reasonable doubt standard would not affect New York's policies that a finding of delinquency was not a criminal conviction and did not deprive the juvenile of his civil rights; nor would it affect confidentiality, informality, flexibility, or speed of the hearing, nor the distinctive features of pre- and post-hearing procedures.
140. Id. at 543. The term "fundamental fairness" was used by the Court in this context in Winship, 397 U.S. at 363, although the Court appeared to prefer the language of Gault, see id. at 359. Justice Black took the occasion in Winship to denounce "fairness" as not a constitutional guarantee at all, but only the "old 'shock-the-conscience' test." Id. at 377–86 (Black, J., dissenting).
141. In Winship the Court indeed referred to the need for "extreme caution in factfinding." 397 U.S. at 365. However, whatever emphasis on factfinding existed in Gault and Winship was not essential to the general question of due process standards but arose
deny — the right to a jury trial chiefly in terms of its effect upon the "factfinding function" of the juvenile court.\(^{142}\) Secondly, Justice Blackmun stressed more strongly than before the importance of avoiding even "attrition of the juvenile court's assumed ability to function in a unique manner."\(^{143}\) The Gault Court had expressed assurance that no harm would come to the juvenile courts from application of the "essentials of due process and fair treatment," which, it had written, "must" be present in juvenile proceedings. This assurance was now replaced by caution in weighing those rights against the claims of the juvenile courts to be allowed their peculiar procedures. Their factfinding methods in particular, their "unique functioning" in general, were now perceived as so valuable as not to be made subject to any "attrition." A kind of balancing test for due process protection was being put forward: in deciding whether juveniles were entitled to a given type of protection the Court was apparently to consider two issues. On the one hand, it had to judge how far application of the protection in question would contribute to "fundamental fairness" — not, as in Gault, simply whether it was "essential" to due process. Equally, the Court had to consider to what degree the protection would impair the "unique functioning" of the juvenile court, especially in factfinding.\(^{144}\)

In Breed,\(^{145}\) finally, the Court noted that in the earlier cases it had "evinced awareness of the threat" posed by application of constitutional guarantees in juvenile proceedings "to the efforts of the juvenile court system, functioning in a unique manner, to ameliorate the harshness of criminal justice when applied to juvenile offenders,"\(^{146}\) but stated nevertheless:

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 on law enforcement institutions.\(^{147}\)

It was the more remarkable, then, that the Court went on to add a new consideration to those that had earlier been balanced against the importance of due process protection, the cost and administrative burden such protection would lay upon the juvenile court system. "[J]uvenile courts," the Court wrote, "perhaps even more than most courts, suffer from the problems created by spiraling caseloads unaccompanied by enlarged resources and manpower. And

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out of the particular rights at issue and so was probably only coincidental. See Rudstein, supra note 134, at 277.

142. 403 U.S. at 543, 547.
143. Id. at 547.
146. Id. at 528–29.
147. Id. at 535 n.15.
courts should be reluctant to impose on the juvenile court system any additional requirements which could so strain its resources as to endanger its unique functions.\(^{146}\)

The Breed Court went on to make clear its concern with "burdens . . . quantitatively sufficient to justify a departure . . . from the fundamental prohibition against double jeopardy,"\(^{146}\) with "significant problem[s] for the administration of the juvenile court system,"\(^{150}\) with "commitment of resources,"\(^{151}\) and the like.\(^{152}\) Thus, even as it agreed to apply double jeopardy protections in a new setting, the Court indicated, by its weighing of administrative cost against due process rights, how reluctant it was to regard juvenile proceedings in the same light as traditional criminal proceedings.\(^{153}\) The Swisher decision did not discuss the balancing test, which awaits further definition by the Court.\(^{154}\)

B. Due Process and Trial by Transcript

The Winship decision requiring proof beyond a reasonable doubt,\(^{155}\) together with the emphasis on proper factfinding made explicit in the McKeiver plurality opinion,\(^{156}\) suggests strongly that the reliability of adjudication under the master system is insufficient to meet due process standards. The Swisher dissent in fact found the system inherently unreliable, and thus inadequate to establish proof beyond a reasonable doubt.\(^{157}\)

Masters have traditionally been expressly subordinate to the court that appoints them.\(^{158}\) In Maryland juvenile proceedings, however, masters have broad hearing powers, which fall just short of entering final orders. After

\(^{148}\) Id. at 537 (citation omitted).

\(^{149}\) Id. at 537.

\(^{150}\) Id. at 538.

\(^{151}\) Id. at 538-39.

\(^{152}\) The dissent in McKeiver suggested that such considerations had been urged upon the Court in that case. 403 U.S. at 561 & n.*.

\(^{153}\) See 25 De PAUL L. REV. 783, 789–92 (1976), and cases cited therein. "In the adult criminal context, administrative concerns surface when the court decides that the proceeding in question is 'not part of a criminal prosecution.'" Id. at 791 n.47 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)). See note 55 supra.


\(^{155}\) "The requirement . . . has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized. . . ." 397 U.S. at 363. See text accompanying notes 56 & 57 supra.

\(^{156}\) See text accompanying notes 139 to 144 supra.

\(^{157}\) 438 U.S. at 229–32 (Marshall, J., dissenting).

\(^{158}\) See note 6 supra. But see note 75 supra (two states empower juvenile masters to enter final orders).
hearing all the evidence and assessing the credibility of witnesses, they transmit to the juvenile court judge a transcript or a tape recording of the hearing, along with their proposed findings and orders. If there are no exceptions to the orders, the judge virtually always approves them after barely a moment’s consideration. If the State takes exception, the judge conducts a hearing on the record and arrives at a determination without ever having personally conducted a trial or observed witnesses.

Whether a judge’s review of the record under such circumstances affords a juvenile defendant his due process rights necessarily involves a determination of whether such methods are adequate to establish proof beyond a reasonable doubt. This question has never been specifically addressed, but the importance of proper factfinding is well established. The Court has also evinced grave doubts about both the separation of the hearing and decisionmaking functions in criminal cases and the use of mechanical factfinding procedures. In Holiday v. Johnson, a prisoner had applied for a writ of habeas corpus, alleging he was being unlawfully detained in Alcatraz Penitentiary. A district court commissioner took the prisoner’s testimony at Alcatraz and submitted a report setting

160. Rule 911(b) specifies a “written report,” but the lower court’s opinion in Swisher, 436 F. Supp. at 1363, states that the proceedings in Baltimore City are recorded on tape. The practice in Anne Arundel County is the same. Telephone conversation with Master Arthur O. Anderson, Anne Arundel County Circuit Court (Jan. 11, 1979).
161. Md. R.P. 911(b).
162. See note 84; text accompanying notes 87 & 88 supra.
163. Md. R.P. 911(c).
164. Two related issues, which have been discussed elsewhere, should be distinguished from the instant one: the obvious practical advantages of electronically recorded testimony and the sixth amendment right of a defendant to be confronted with the witnesses against him. The latter, which is applicable to juvenile proceedings, In re Gault, 387 U.S. 1, 56-57 (1967), may be formally violated in the master system because the judge is denominated factfinder. However, he is so in name only. See text accompanying notes 83 to 91 supra.
165. The Court has stated:
   To experienced lawyers it is commonplace that the outcome of a lawsuit . . . depends more often upon how the factfinder appraises the facts than on a disputed construction of a statute. . . . Thus the procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule of law to be applied. And the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights.

166. 313 U.S. 342 (1941).
167. Id. at 347.
forth his findings of fact, conclusions, and recommendation that the writ be
denied.168 On appeal of the district court's denial of the writ, the Supreme Court
ruled that the district judge should have himself heard the prisoner's testimony,
found the facts, and based his disposition upon his own findings.169

As Justice Marshall noted in Swisher, although the holding in Holiday was
a statutory one,170 the Court's "reasoning went to the fundamental nature of the
kind of factfinding on which many judicial determinations must rest":171

One of the essential elements of the determination of the crucial facts is
the weighing and appraising of the testimony. . . . We cannot say that an
appraisal of the truth of the prisoner's oral testimony by a master or
commissioner is, in the light of the purpose and object of the proceeding, the
equivalent of the judge's own exercise of the function of the trier of the
facts.172

It is a centuries-old idea that the trier of fact himself should see and hear
testimony, except when death or absence of the witness makes it necessary to
resort to a transcript or other record.173 A modern opinion graphically expressed
the reasons for the requirement:

[T]he demeanor of the orally-testifying witness is "always assumed to be in
evidence." It is "wordless language." The liar's story may seem uncontra-
dicted by one who merely reads it, yet it may be "contradicted" in the trial
court by his manner, his intonations, his grimaces, his gestures and the like —
all matters which "cold print does not preserve", and which constitute
"lost evidence" as far as an upper court is concerned. . . . A "stenographic
transcript correct in every detail . . . is like a dehydrated peach; it has
neither the substance nor the flavor of the fruit before it was dried."174

168. Id. at 348.
169. Id. at 353-54.
170. The statute construed was 28 U.S.C. § 461 (1940) (present version at 28 U.S.C.
§ 2243 (1971)).
172. 313 U.S. at 352 (emphasis added), quoted in 438 U.S. at 231.
173. See 11 & 12 Vict., c.42, § 17 (1848); 5 & 6 Edw. VI, c.11, § 12 (1552); in proceedings
in Parliament Against Sir John Fenwick (House of Commons), 13 How. St. Tr. 538, 592
(1696), it was noted: "Our law requires persons to appear and give their testimony vivo
voce; and we see that their testimony appears credible, or not, by their very countenances,
and the manner of their delivery . . . ."
F.2d 817, 822 (2d Cir. 1975) (administrative law; "decisions by administrative factfinders
as to demeanor and credibility will be overturned by court only when contrary evidence is
overwhelmingly compelling"); NLRB v. Warrensburg Board & Paper Corp., 340 F.2d 920,
922 (2d Cir. 1965) (questions of credibility are for the trier of fact). See also text
accompanying notes 181 to 191 infra.
The propriety of using electronically recorded evidence as a substitute for live testimony was addressed in Wingo v. Wedding. In that case, which specifically upheld the Holiday ruling, it had been contended that the use of a magistrate instead of a judge in a habeas corpus hearing was acceptable because the proceeding had been electronically recorded. The Court, however, ruled that the judge's listening to the recording was not the equivalent of his personally hearing and observing witnesses.

Finally, the due process problem in the Maryland master system is not mitigated, according to the Swisher dissent, by the fact that the juvenile may submit additional evidence to the judge when the state takes exception to the master's finding, because the state may refuse to agree to the supplementation of the record and thus thwart the juvenile's efforts. Even more important, in Justice Marshall's view, is that when a juvenile seeks to reopen the proceeding before the judge — to avoid having the case decided against him on the basis of a cold record in violation of the due process clause — he is being subjected to a second trial of the sort prohibited by the double jeopardy clause.

C. The Balancing Test and an Administrative Law Analogy

No authority on juvenile matters suggests that it is beneficial to the juvenile to come before a master in the first instance instead of a judge, or to have his case subjected to rehearing if exception is taken by the State. On the contrary, judges, legislators, and commissions on juvenile matters have urged the

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176. The Wingo Court was concerned with the current version, 28 U.S.C. § 2243 (1971), of the habeas corpus statute considered in Holiday. See note 170 supra.
179. 438 U.S. at 232. See Md. R.P. 911(c).
180. 438 U.S. at 232. "The constitutionality of forcing a juvenile to such a choice between fundamental rights is questionable at best." Id. (citations omitted).
abolition of the master system, finding it destructive of the aims of the juvenile courts. Thus, the only element of the Court's "balancing test" that could be invoked in support of the system is the administrative concern introduced in Breed. It might indeed be suggested that administrative law provides a model for separation of decisionmaking from hearing of evidence. In the work of administrative agencies the "institutional decision" is common.

In the administrative process, evidence may be taken before an examiner, the examiner or other subordinates may sift the evidence, various kinds of specialists of the agency's staff may contribute to the writing of the initial or recommended decision, and the agency heads may in fact lean so heavily on the work of the staff as to know little or nothing about the problems involved in many of the cases decided in the agency's name.

The examiner, or "administrative law judge" as he is now called, performs functions similar to those of the juvenile court master. "An agency loses no power of decision by having an administrative law judge preside at a hearing," and courts reviewing administrative decisions ordinarily review the agency's decision, not the administrative law judge's. Although recent decisions have made it clear that the agency cannot simply disregard the judge's findings, and may even have overturned the old rule that deciding officers were not to be examined to determine how and why decisions were made, the subordinate

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184. One report stated:

More than any other factor, the use of masters in the juvenile courts is seen by the Commission as a major problem in the present system, according a lower level of justice and consideration to children in the State, and lessening the court's credibility and image.

The Masters System not only evidences a "second class" status for juvenile causes, but is extremely inefficient, causing delays and duplication of work. The Commission acknowledges that there are many fine masters who would make good judges, but the problem is that they are not judges.

Final Report, supra note 183, at 12.

185. See text accompanying notes 143 to 154 supra.


188. K. Davis, supra note 187, § 10.03 (1976) (paraphrasing the Administrative Procedure Act, 5 U.S.C. § 557(b) (1974)).


role of the administrative law judge remains analogous to that of the master. He conducts hearings and "proposes" findings to decisionmakers, who very often decide in accord with his findings after the most cursory examination of his reports.\textsuperscript{192}

While this analogy is formally appealing, there is no difficulty in seeing that its real force is not to make the acceptability of the master system more plausible, but to suggest that such a system belongs in a different context. Administrative agencies adjudicate only civil, not criminal, matters. A great part of their work is routine; they must rely on the advice of specialists; and their very large volume of business makes delegation to subordinate officers necessary.\textsuperscript{193} The cost accounting suggested in \textit{Breed}\textsuperscript{94} may be properly employed in organizing the agencies' systems of adjudication. The juvenile court, on the other hand, has often to decide the liberty of individuals. To place that court outside the tradition of criminal law that insists upon face-to-face confrontation for reliable factfinding, to oblige it to depend upon "[t]rials-by-transcript [which] can never be more than trials by substantial evidence,"\textsuperscript{195} is almost to pretend that it is a kind of administrative agency, shielded from due process standards by its civil label. If the administrative concerns expressed in \textit{Breed} must be met, it should be by procedures that do not offend the fundamental right to "due process and fair treatment."\textsuperscript{196}

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\textbf{193.} Id. at 232–34.
\textbf{194.} See notes 148 to 153 and accompanying text \textit{supra}.
\textbf{196.} 438 U.S. at 236 (Marshall, J., dissenting). In addition to its procedural shortcomings, the master system may suffer from a failure to provide equal protection to juveniles because it is excluded by state law from two Maryland counties. Such non-uniformity of judicial authority is permitted by the Maryland Constitution: "The District Court shall have the original jurisdiction prescribed by law. Jurisdiction of the District Court shall be uniform throughout the State; except that in Montgomery County and other counties and the City of Baltimore, the Court may have such jurisdiction over juvenile cases as is provided by law." Md. Const. art. IV, § 41(a). This in turn authorizes the statutory provisions for Montgomery County, Md. Cts. & Jud. Proc. Code Ann. § 1–604 (1980): "Two of the [District] judges in district 6 [Montgomery County] shall have as their primary duty and, if made necessary by the case load their exclusive duty, the handling of juvenile cases;" and Prince George's County, id. § 3–813, which provides in part: "After July 1, 1978 the judges of the Circuit Court of Prince George's County may not appoint or continue the appointment of masters for juvenile cases."

That the state does not mandate the appointment of masters in counties where they are permitted does not alter the fact that territorial discrimination exists, since masters are forbidden elsewhere. It is well established that legislative territorial classifications are not necessarily prohibited by the federal equal protection clause, see McGowan v. Maryland, 366 U.S. 420, 426–27 (1961); Salsburg v. Maryland, 346 U.S. 545, 550 (1954); Missouri v. Lewis, 101 U.S. 22, 31 (1880); In re Trader, 272 Md. 364, 383–92,
CONCLUSION

The Swisher Court limited itself to analysis on narrow procedural grounds in deciding that the state's taking exceptions to a master's proposed findings does not subject the juvenile to a second trial. Concluding that the two hearings, before the master and the judge, form one unbroken proceeding and that the

325 A.2d 398, 403 (1974), and the test for such classifications is whether there is a rational basis for them.

"Maryland has long followed the practice of enacting local laws affecting only certain counties, or exempting particular counties or localities from the operation of general laws or some of the provisions thereof." In re Trader, 272 Md. 364, 383, 325 A.2d 398, 408 (1974) (citations omitted). The Court of Appeals has applied the rational basis test to require merely that "any state of facts reasonably can be conceived that would sustain [the classification]." Id. at 391, 325 A.2d at 402. The burden of proof that no such state of facts exists has been placed upon the challenger of the classification. Id. at 391–92, 325 A.2d at 413.

The Supreme Court has made it clear, on the other hand, that where fundamental rights are infringed by a classification the state law must be "shown to be necessary to promote a compelling governmental interest," Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original), in order to be upheld. Note, Strengthening Equal Protection Analysis in Maryland: Territorial Classification and In re Trader, 35 Md. L. Rev. 312, 322–23 (1975). To date, no Maryland law has been struck down because of this doctrine.

It is unlikely that the Court will find a violation of fundamental rights and apply this strict test to an equal protection challenge to the master system — unlikely, but perhaps not impossible. Inasmuch as the Court already applies a balancing test to juvenile due process rights, see text accompanying notes 131 to 152 supra, it might conceivably happen that the Court would find the master system barely acceptable — perhaps for administrative reasons, see notes 146 to 152 and accompanying text supra — under that test, but consider it to "infringe" far enough upon fundamental rights that strict scrutiny would be appropriate for a classification based on the system.

As to the "rational basis" test, a strong indication that the system could survive it is provided by In re Trader, 272 Md. 364, 325 A.2d 398 (1974), which involved four cases in which juveniles challenged on equal protection grounds a law affording different treatment to juveniles tried in Montgomery County than to those tried elsewhere in the state. The provisions of a general statute and of the one applicable only in the single county differed primarily as to the ages of juveniles over whom waiver of juvenile jurisdiction was allowed and the immediate appealability of a trial court's waiver order. The general statute contained an exemption from juvenile jurisdiction that the local one did not. See id. at 369–71, 325 A.2d at 401–02. The equal protection challenges were rejected in three of the cases — two involving the appealability of the waiver order and one the exception from juvenile jurisdiction — because no evidence had been presented to demonstrate lack of a reasonable basis for the different treatment and because neither of the differences was "so irrational as to be invidiously discriminatory on its face." Id. at 401, 325 A.2d at 417; see id. at 401–02, 403, 325 A.2d at 418–19. The Court of Appeals, after holding that the strict standard of review was not called for because fundamental rights were not significantly affected, id. at 395–97, 325 A.2d at 475–76, said of the difference in the provisions for review of waiver orders:

That the decision of a juvenile court to waive its jurisdiction is a matter of critical importance to the juvenile... does not compel the conclusion that no rational basis could possibly exist for a legislative determination limiting the right of immediate review of waiver orders in all but one county of the State... [C]onstitutionality is presumed in the absence of a clear and convincing showing by the party assailing the
master, despite his considerable factfinding powers, is not an adjudicator, the Court allowed the continuance of a juvenile court system markedly different in its two-tiered structure from adult criminal courts. While the decision will apply to juvenile courts in many states, it neither settled finally the question of the extent of double jeopardy protection available to juveniles nor addressed the adequacy of other due process protections afforded by master systems such as Maryland's.

After the sweeping introduction of due process standards into juvenile courts announced in Gault, the Court has preferred to examine particular due process rights on narrow grounds, and has increasingly given weight to considerations other than constitutional rights in deciding whether to recognize the rights as applicable to juveniles. Although in the McKeiver plurality opinion such considerations were found sufficient to deny the right to trial by jury, in both Winship and Breed the list of constitutional protections begun by Gault was extended. In Swisher the Court had the opportunity to extend Breed by recognizing that the Maryland master system operated in de facto violation of double jeopardy. It chose instead to ignore substance and to permit the state to evade the constitutional requirement by giving suitable formal labels to components of its juvenile court system. This choice made plain the difference, in the Court's view, between juvenile and criminal procedural requirements. Far from applying any real balancing test, the Court in effect left the question of double jeopardy protection under the master system to the legislature.

It is not only with respect to double jeopardy that the present Maryland master system is deficient. The system appears to violate the Constitution in another way: the judge's reliance on the cold record of a master's hearing does not make possible sufficiently reliable factfinding to satisfy the Winship requirement of proof beyond a reasonable doubt. Perhaps the former deficiency could be remedied by prohibiting the state from taking exceptions to a master's proposed findings; the latter, by permitting either party to demand a hearing in the first instance before a judge. But such tinkering would not reach the heart

legislative classification that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 399–400, 325 A.2d at 477 (citations omitted). From this it is evident how minimal is the Maryland rational basis test. It is worth noting that the Court of Special Appeals had found the denial of immediate appeal "arbitrary, unreasonably discriminatory and unrelated to any legitimate state objective." Id. at 374, 325 A.2d at 403 (quoting In re Trader, 20 Md. App. 1, 9, 315 A.2d 528, 534 (1974)). Accordingly, it is difficult to see how a challenge to the master system based upon the equal protection clause could succeed. It has been argued that the Court of Appeals may be ready to consider a strengthened rational basis test. See Note, supra.

197. See note 75 supra.
198. See text accompanying notes 52 to 55 supra.
199. See text accompanying notes 58 to 67 supra.
200. See text accompanying notes 56 to 57 supra.
201. See text accompanying notes 68 to 72 supra.
202. See note 75 supra.
of the problem, which is that the state, for reasons of cost, imposes second-class status in the courts upon juveniles charged with crimes. The best course of action for the Maryland legislature would be to abolish the juvenile master system.203

203. If the master system is abolished, it has been suggested that some of the masters could be appointed to juvenile court judgeships or given other positions within the court system. Final Report, supra note 183, at 13. One report stated that thirteen additional judgeships would be needed to replace the master system, and that the total cost to provide full judicial coverage would be only 25% more than the cost of the master system. Id. at 14.