

A BRIEF HISTORY OF THE JUVENILE COURTS IN KANSAS, AND ACROSS THE COUNTRY

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An examination of the juvenile justice system and its historic development is necessary to appreciate the need to argue for expansion of constitutional rights to Juvenile's charged with crime. The history of the juvenile system in Kansas, and across the nation, illustrates that we have come full circle with the juvenile system being almost essentially no different than the adult criminal system.

In the 1800's, prior to Kansas even being created, juveniles and adults charged with crimes had the same rights, and were subject to the same punishments. Like an adult, a child who had reached the common age of criminal responsibility (as young as seven in some states), could be arrested, indicted, tried, and, if found guilty, imprisoned with adults. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909). As criminal law evolved, and attorneys began questioning the constitutionality of how adults were treated, similar questions arose about how children were treated. As a direct result more attention was focused on the distinct problems of juvenile crime, and cognizance of the need to address juvenile crimes differently than adult crimes was sought.

Professionals began to question the propriety of why children as young as eight could be given prison sentences, and be sent to jail with adult criminals. With increasing industrialization thousands of people flooded into the cities causing overcrowding, an increase in crime and the creation of larger jails and prisons. This in turn created special problems in the arena of dealing with children in jail. Debate began, and one

commentator during the period made the following comment about the problem of treating children like adults:

If acquitted, they [children] were returned destitute, to the same haunts of vice from which they had been taken, more emboldened to the commission of crime, by their escape from present punishment. If convicted, they were cast into a common prison with older culprits to mingle in conversation and intercourse with them, acquire their habits, and by their instruction to be made acquainted with the most artful methods of perpetrating crime.

New York Society for the Reformation of Juvenile Delinquents, 1826 Annual Report 4 (1827), cited in *1 Children and Youth in America* 671 (Robert H. Bremmer ed. 1970). It would not be long before reformers would make moves to change how children committing crimes were handled. In 1825 New York established the New York House of Refuge in which children convicted of crimes were separated from their adult counterparts. Following New York's lead, Massachusetts in 1847 opened a state reform school aimed at teaching trades to wayward youths. Later, Massachusetts created a special government representative to investigate criminal charges against juveniles, attend trials, and act to protect children's interests wherever possible. This was followed in 1872 by the legislative creation of a system of separate sessions, dockets, and court records for juveniles. The goal was to treat children differently than adults, since they were obviously less culpable than their adult counterparts.

In 1899, the state of Illinois followed New York and extended the concept of an entirely separate system for the treatment of juveniles by enacting the Illinois Juvenile Court Act. This act created a statewide court authorized to assume jurisdiction over juveniles on the basis of "pre-delinquent" statuses, such as ignorance and poverty, as well

as on the basis of criminal acts. To accomplish this goal, juvenile courts were given the power to commit children who were without “proper parental care,” wandering about the streets, committing mischief, and growing up unsupervised. For the first time, instead of seeking punishment the courts sought to actually address the behavior to prevent future delinquent behavior. The evolving system sought to use principles of medical and social science to actually *reform* the child, and give the child a chance that the child did not otherwise have.

The evolutionary process of legislatures seeking to appropriately address juvenile crime began. Each state would borrow from others. This led to various statutory schemes being created to address juvenile crime. By 1925 similar tribunals to that of Illinois were created across the country, and in a relatively short period of time society’s view of how to deal with delinquent children changed dramatically. Courts were no longer to seek a finding of guilt or innocence. Instead, the proper inquiry concerning a juvenile involved in criminal activity became a question of how to eliminate the cause of the behavior. States moved away from punishment, and moved toward the need to rehabilitate the child, and find real solutions.

One commentator wrote in 1909 the following about how the court and judges should view the accused delinquents brought before it:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm

around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

This gave birth to the concept that the State should, as much as possible, act as a good parent would act. Because Judges were encouraged to evoke the “proper sympathetic spirit” the informal, flexible process replaced the rigidity of the adult criminal court. Criminal procedures were viewed as obstacles and so were done away with entirely. Punishment quickly became foreign to juvenile court philosophy, there was simply no longer a need for procedural protections designed to shield an “innocent defendant” from the state because the purpose of the process was to give the child “proper parental oversight,” which was usually exactly what the child lacked in the first place. The reality was the child was not to be considered guilty or innocent of anything. The legal question was whether the child should be defined as delinquent. An example of this can be illustrated in the early Kansas case of *Brown v. Hall*, 129 Kan. 859 (1930).

Brown v. Hall clearly articulated the goals of the juvenile system, as they then existed, and outlined the need to address juvenile crime through a process that was in no way remotely close to its adult, criminal system counter-part. In the case the attorney had argued that the child deserved the same constitutional rights as those afforded adults in criminal proceedings. The basis for the attorney’s argument for the young child, then fifteen (15) years of age, was that his client was being subject to a criminal proceeding. In the case the Kansas Supreme Court pointed out that the child was using intoxicating liquor, that she was out late at night and that she was knowingly associating herself with thieves, vicious and immoral people, and that she was growing up in the streets. It was

noted that the child was patronizing pool rooms and places where gambling devices were operated. Even though the child's attorney pointed out the proceeding was "quasi criminal" and that the child's liberty could be affected, or at least that her liberty was at stake, the Court succinctly pointed out that, "The complaint did not charge the commission of any crime." Instead the Court explained *parens patriae*.

The Court made the very conspicuous observation that at the time nothing the child did was actually unlawful, including the use of intoxicating liquor. The Court went to point out that using liquor may have moral implications, but it was indeed not a crime at the time. This allowed the court to point out the beauty of the juvenile system as it then existed. The juvenile system was there to "address the behavior" of the child and do what the parents were not doing. The court articulated the following:

A proceeding against a delinquent and neglected child is not a criminal one. It is an inquiry to ascertain whether the child shall be placed under the direct and immediate control of the state for the good of the child, in securing for it proper nurture, training and education, not for the purpose of punishing it for any acts that it ought not to have committed. (*State v. Dunn*, 75 Kan. 799, 90 P. 231; *State v. Dubray*, 121 Kan. 886, 250 P. 316.) The judgment of the district court is not a punishment for crime committed; it is a finding of fact on which action for the good of the child is based. (*In re Turner*, 94 Kan. 115, 116, 145 P. 871.). Emphasis added.

It is fair to say that the articulation of the court likely deflated counsel in the case. The reality was the finding of delinquency that would come from the Court was merely a means to accomplish reformation, and that no lifelong/life altering label would come from it. In fact, the court pointed out, that this was the essence of the juvenile delinquency system. The term "*parens patriae*" wasn't even articulated in the case, however, that is what the Court was outlining.

A review of the statutes that would come later illustrates that the legislature codified what the Court was outlining:

This act shall be liberally construed, to the end that its purposes may be carried out, to wit, that the care, custody and discipline of a child shall approximate, as nearly as may be, proper parental care; and in all cases where the same can be properly done, that a child may be placed in an approved family home, by legal adoption or otherwise. And in no case shall any proceedings, order or judgment of the juvenile court, in cases coming within the purview of this act, be deemed or held to import a criminal act on the part of any child but all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state. G.S. 1949, 38-415. (Emphasis added).

The reality was that children who committed crimes were viewed as “delinquents” who needed proper parental care, control, and discipline. The juvenile in the system as it existed was not labeled as a criminal, but merely as a “delinquent” in need of “reformation.” The reforming part, the part that required the restraining of the child, was done for the child’s own good, and not for the purpose of necessarily “punishing” the child.

On a national level there were other challenges to what the courts were attempting to do, conduct more informal hearings suited to ascertain the facts so that the child could actually be rehabilitated. In *Commonwealth v. Fisher*, 213 Pa. 48 (1905), for example, a juvenile committed to the Philadelphia House of Refuge following an “informal” juvenile hearing claimed that he was denied due process of law as well as the right to trial by jury.

In answer to his challenge, the Supreme Court of Pennsylvania rightfully explained that:

[T]he natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as *parens patriae*, to take the place of the father for the

same purpose, required to adopt any process as a means of placing its hands 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. The act simply provides how children who ought to be saved may reach the court to be saved.

Id. at 53. Three years later in *Ex parte Sharp*, 15 Idaho 120 (1908), the father of a fourteen-year-old girl applied for a writ of habeas corpus to secure his daughter's discharge from the Idaho Industrial Training School, where she had been committed for delinquency. He charged that the Idaho Juvenile Court Act violated several constitutional guarantees applicable to criminal procedure. The court, however, ruled:

[this] statute is clearly not a criminal or penal statute in its nature. Its purpose is rather to prevent minors under the age of sixteen from prosecution and conviction on charges of misdemeanors, and in that respect to relieve them from the odium of criminal prosecutions and punishments. Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences and of educating and training him in the direction of good citizenship, and thereby saving him to society and adding a good and useful citizen to the community.

Thus, in decisions such as *Hall*, *Sharp* and *Fisher* the theoretical framework for the juvenile court system was laid, and constitutional challenges were seemingly put to rest. Due process was brushed aside. The approach was to utilize and solidify the common law doctrine of *parens patriae* to dismiss all notions that children deserved constitutional protections. Based on the practices of English chancery courts (which protected juvenile property rights) the state should act as a protective guardian and intervene if parents were unable (or unwilling) to care for the child. Juvenile court was labeled as civil, rather than criminal, so that the rules of criminal procedure were deemed entirely inappropriate. The

framework was idealic and it appeared that the state was doing all it could to be a good parent.

THE CONTROVERSY WOULD BE REVIVED

After the 1930's the juvenile justice system did not receive a great deal of attention, likely because of world turmoil, and many social changes occurring across the country. It wasn't until the 50's when juvenile delinquency was again reviewed.

The earlier ideals of juvenile court reformers were not really reexamined. Instead, Attorneys began to point out that the rehabilitative institutions established to treat juveniles were not very different from adult prisons. The courts even noted that despite the rhetoric of *parens patriae*, and the distinctions made between civil and criminal proceedings, juveniles were being deprived of their liberty with very little attention to their rights as United States citizens. At this point the pendulum began to swing back to the old ways of how things used to be done, instead of a real debate ensuing on how to reform the way the system was reforming the delinquent, scholars and attorneys became overly critical and sought change. The change sought was to extend rights to the child.

A CHANGE IN FOCUS

And so in 1952 a California court committed violence against the earlier ideals of the early juvenile court reformers by finding that while juvenile courts held that the adjudication of a minor was not a conviction of crime, such a finding was still "a legal fiction, presenting a challenge to credulity and doing violence to reason." *In Re Contreras*, 109 Cal.App.2d 787, 241 P.2d 631 (1952). Elaborating on this theme, the court explained that when a child is labeled as a law breaker, especially in cases of

felonies that the allegation of such a nature is a “blight upon the character of and is a serious impediment to the future. . .” of any child. The California court went on to articulate that the minor is sometimes taken from his family, deprived of his liberty and confined in a state institution and concluded that the true design of the Juvenile Court Act may be to be parental in nature, but the reality is it does actually deny the minor his constitutional rights. The debate changed from “how to get youth on the right track” to “do kids deserve constitutional rights?” and “do children deserve the same protections as adults?” There was no longer an attempt to differentiate the adult criminal system from the juvenile system, but then began a move to assert rights for the child where it was inappropriate. Unfortunately, the Courts lent an ear to this argument and what resulted was the beginning of expansion of rights to children, which was laudable, but the result would eventually send the system back to exactly where it began.

In another decision in a case out of Washington D.C., in *Shioutakon v. District of Columbia*, 114 A.2d 896 (1955), the Municipal Court of Appeals of the District of Columbia followed the spirit of the law articulated in cases like *Fisher* and *Sharp* and concluded that a juvenile was guaranteed a right to counsel in a delinquency proceeding. The D.C. court seemingly took the position that to hold that a juvenile had no such right to an attorney solely because it is to promote the welfare of the child is a farce. What basically happened was the court extended due process to children, and required that the child have a ‘right to be heard’ because the child’s personal liberty is at stake, and this necessitated the effective assistance of counsel.

What then would occur is further reform of the Juvenile Codes across the country. As the Courts began extending rights to the child, the relative legislatures reacted by making the juvenile courts more and more penal in nature. Tensions would very gradually alter how legislatures would approach the handling of juvenile crime. This is only speculation, but it appears that legislatures would evolve their approach, after all, if the Courts were going to extend rights to the child that were not otherwise necessary, then why shouldn't a more penal approach be taken?

Some courts would continue to emphasize the juvenile's need for court protection over his or her constitutional rights, but this set the tone for creating the environment where the child would be subject to the worst of both worlds. Up until this point there were no U.S. Supreme Court decisions on the issue. Then in 1966 the Supremes entered the debate and considered the case of *Kent v. United States*, 383 U.S. 541 (1966). In *Kent*, procedures by which juvenile courts in the District of Columbia waived jurisdiction in favor of criminal prosecution were examined. The Supreme Court held the procedures to be defective because they failed to provide for a hearing where the juvenile was represented by counsel, access by the juvenile to social investigation reports, or a statement of reasons by the juvenile court judge. Essentially, there was a failure to allow the child to confront his accusers. While the court's decision in this case was based on statutory construction and, therefore, was somewhat narrow in scope, constitutional implications were clearly enunciated. Justice Fortas, writing for the majority in *Kent*, stated:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities, and techniques to perform adequately as representatives of the state in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds. That he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

In other words the Supreme Court accused the juvenile system of playing lip service to *parens patriae* and articulated, essentially, that the state as a good parent is not possible.

Later, the concerns of the *Kent* Court were addressed in the case of *In re Gault*, 387 U.S. 1 (1966). In *Gault* a fifteen-year-old child had been adjudicated delinquent under the Arizona Juvenile Code for making lewd phone calls. For this reason, he was committed to the state industrial school. His parents applied for a writ of habeas corpus for their son's release, arguing that he had been unconstitutionally deprived of his rights to adequate notice, to counsel, to confront witnesses, to a transcript of the hearing, and to an appeal. When the writ was denied by the Arizona Supreme Court it upheld the adjudication based on the *parens patriae* doctrine and the traditional distinction made between juvenile and criminal proceedings.

The U.S. Supreme Court was not willing to allow the invocation of *parens patriae* to justify a wholesale denial of all constitutional rights. It was not persuaded by the usual arguments in favor of procedural informality. The Court was critical of the concept of *parens patriae* and shockingly articulated that its meaning was "murky," and that "its

historic credentials are of dubious relevance.” Basically, this indicted further the ideals of the early reformers.

The Court noted that although “the highest motives and most enlightened impulses led to a peculiar system for juveniles,” that the “the constitutional and theoretical basis for this peculiar system” was “to say the least—debatable.” Even though the *Gault* case basically attacked the idea of *parens patriae* it still did not go so far as to hold that all procedural guarantees granted adults were also due juveniles. Instead, it simply stated that juvenile delinquency hearings “must measure up to the essentials of due process and fair treatment.” These essentials were held to include the right to notice of the charges, adequate time to prepare a defense, counsel (appointed or privately retained), confrontation and cross-examination of witnesses, and the privilege against self-incrimination. The constitutional basis for these rights, however, was left somewhat unclear, as the majority opinion cited different theories in different parts of its decision. Even though the *Gault* Court performed a thorough review of juvenile court history and expressed the need for constitutional protection for juveniles, it left the constitutional standards required of juvenile courts up in the air.

In 1970 in the case of *In re Winship*, 397 U.S 398 (1970), the U.S. Supreme Court was asked to state the appropriate standard of proof required in a juvenile proceeding where a juvenile is charged with an act that would constitute a crime if committed by an adult. In *Winship* a twelve-year-old boy stood charged with stealing \$112 from a woman’s pocketbook. If he were an adult, he would have been charged with larceny and a finding of guilt beyond a reasonable doubt would have been required for his conviction.

The New York Family Court Act, however, only required proof based on a preponderance of the evidence for an adjudication of delinquency. Relying on this standard, the juvenile was found to be delinquent, and was placed in a state training school for eighteen months, with the possibility of his commitment being extended to six years in total.

On appeal, the New York Court of Appeals affirmed, basing its decision on the familiar distinction between juvenile proceedings and criminal matters, one would assume this was a sound basis for the court's ruling because the delinquency hearing was a civil matter and that adult criminal court standards were, therefore, irrelevant. The Supreme Court disagreed. Strengthening the position taken in *Gault*, the Court stated that "civil labels and good intentions do not obviate the need for criminal due process safeguards in juvenile courts" and found that proof beyond a reasonable doubt was mandated in all delinquency cases.

Following *Gault* and *Winship*, it appeared that children just might be given the same rights provided to adults in the context of criminal proceedings. In 1971 the U.S. Supreme Court heard *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) and was asked to determine whether a juvenile accused of an act that would be a crime if committed by an adult had a right to trial by jury. The argument was couched under the due process clause of the fourteenth amendment. The Court answered the question in the negative, and many saw this as a setback, and seemingly failed to recognize the general agreement of all the justices that the juvenile systems across the country had evolved in the wrong direction, the way it originally began. The majority of the court basically articulated that the

juvenile court systems had almost come full swing; that a system was developing into something exactly like the adult criminal system. The court explained that if the juvenile systems were to ever come full swing then it would have no choice but to extend additional constitutional rights to children, including the right to trial by jury. The Court further stated that the insertion of juries into juvenile proceedings would only serve to disrupt what it termed “the prospect of an intimate, informal, protective proceeding.” Overall, the *McKeiver* holding represented a philosophical retreat because the Court concluded that to move forward would only make it (coming full circle) happen more quickly. Once again, it was pointed out that juvenile court proceedings were not criminal in nature, and that to equate a juvenile delinquency hearing to a criminal trial ignored “every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court contemplates.”

Since *McKeiver* the Supreme Court has not had an opportunity to address the question of whether some states have come full circle or not, but some state supreme courts have concluded that their state’s juvenile justice systems have come full circle.

The most striking example is Alaska. It made the determination that it had come full circle in RLR v. State Alaska, 487 P.2d 2 (1971). In the case the Alaska Court focused on the liberty interest of the child, and outlined that it is important that we do not get caught up in the realm of discussion of the terms used in the juvenile code to say that things we are doing, aren’t what they are, when they (the things we are doing) are no different than what is done in the adult system:

An adjudication of delinquency could result in RLR's [the child's] incarceration. *Gault* holds that regardless of benevolent-sounding labels, incarceration, when applied to children, is a taking of liberty under the Fourteenth Amendment. Our society uses incarceration for rehabilitative purposes with adult criminals as well as juvenile delinquents, yet none suggest that our benevolent purposes justify deprivation of rights applicable to adult prosecutions.

In other words, it was a farce to say that the juvenile system was different just because we call it different. As a direct result the Alaska Court did extend additional rights to the child, including trial by jury.

JUVENILE COURTS IN KANSAS AFTER MCKEIVER

In Kansas and across the country moves would be made to further reform the Juvenile Justice System. After *McKeiver*, Kansas would soon make moves that created a system that was more penal in nature, and would also make moves that would essentially destroy the entire notion of *parens patriae*.

As changes were made to the juvenile system the legislatures sought to separate the abused and neglected children, from those who were committing crimes, In the early 1980's the two systems were split, and for the first time in Kansas the delinquent was afforded the right to an attorney, and not given a *guardian ad litem*. Reynolds, Changes Made by the New Juvenile Codes, 51 J.B.A.K 181 (Fall 1982). The ethical obligations of the delinquent's attorney changed drastically, and the beginning of the creation of a fully adversarial system in juvenile court was kicked into high gear. It was in 1984 (just after the split of the two systems) that the Kansas Supreme Court heard *In re Findlay*, 235 Kan. 462, 681 P.2d 20 (1984). After *Findlay* the juvenile code would be revised again in 1996 (removing the *parens patriae* doctrine), and about that same time the Kansas

Supreme Court would rule that juvenile convictions (a new concept created by changes made to the code in the early 1980's and post 1996, a concept that was for all intensive purposes nonexistent) could be used against them as adults in *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 44 (1996), and was further solidified by *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002). No real discussion/debate was made in the courts regarding the evolution that was occurring in the Juvenile Courts. It just happened, and the reality was that Kansas was doing exactly what the *McKeiver* court warned about, coming full circle.

Today, the approach is drastically different from *parens patriae*. Today the Courts view the delinquent child as one who needs to be punished, and put through the rigors of a system that first determines “guilt or innocence” of a crime, and in the event “guilt” is established labels the child as a “juvenile offender” (a criminal), creating a criminal record that the child will have to carry, in some instances, for the rest of his/her natural life. In Kansas we no longer seek a “finding of delinquency” but of guilt!

The only true difference between the adult and juvenile systems is where the “little criminals” are housed. The system we have today in Kansas looks very different than how it used to look. The judge no longer sits “next to the child” with the “proper sympathetic” spirit where he/she can, on occasion “put his arm around his shoulder” and truly mentor him. Instead the Judge now sits in true judgment of the child, and has no obligation under any circumstances to do anything paternal in nature.

The reality is that the entire concept of *parens patriae* was removed entirely from the Kansas Statutes, when the law in Kansas was reformed in 1996. The reality is that the ideals of the early reformers have been lost *almost* entirely.

One approach could have been a further retreat with a curbing of the constitutional rights given children, essentially a going back to a more paternalistic system where juvenile convictions are not used like a true criminal conviction, but the Kansas Supreme Court could not redraft the Juvenile Offender code. Instead the Court, in *In Re L.M.*, 186 P.3d 164 (Kan. 2008), essentially acknowledged that we had indeed come full circle and that it would only be appropriate under these circumstances to fully extend constitutional rights to children charged with crime. It will be interesting to see if other jurisdictions across the country, where jury trials have not been given to juveniles, will come to the same conclusion.