MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

I. INTRODUCTION

A. Before Juvenile Courts

At common law, children were often held accountable as adults for their criminal acts. However, a child below the age of seven could not be found guilty of a crime. He was conclusively held incapable of the necessary intent.[1] Children between the ages of seven and fourteen years were presumed incapable of "discerning between good and evil". But this presumption could be overcome by evidence showing that the child was sufficiently intelligent to understand the nature and conseuqences of his misconduct, and able to distinguish between right and wrong.[2] All individuals, aged fourteen years or older were presumed capable of committing a criminal act.[3]

Application of these common law rules in England

---

1 State v Aaron, 4 N.J.L. 231, 244 (Sup.Ct., 1818)

2 State v Monahan, 15 N.J. 34, 48; 194 A.2d 21, 28 (1954)

3 This division of age was predicated on early Roman law. There the age of puberty was deemed to be the age of discretion. Justinian established the age of discretion at fourteen in boys and twelve in girls. The common law followed the Roman law and set fourteen years as the age of full criminal capacity. Id. at 51.

and in this country during the seventeenth and eighteenth centuries led to brutal consequences. In England, for example, an eight year old child was convicted and hanged for setting fire to a barn; a ten year old was hanged for killing a playmate; and a girl of thirteen was executed for killing her mistress.[4] In New Jersey, a boy of eleven was tried for murder.[5] A few years later in the same state, a boy of thirteen was hanged for an offense he had committed when he was twelve.[6] While such cases were the exception rather than commonplace, they exemplify the extreme and horrifying results of applying criminal law to young children.

Early in the nineteenth century, a reappraisal of the treatment of juveniles in need of state intervention began. The development of specialized institutions for such children originated in Italy and spread to Germany, England and finally the United States,[7]

---

4 Id. at 36

5 State v Aaron, supra., note 1

6 State v Guild, 10 N.J.L. 163 (Sup.Ct., 1828)

7 Bloch and Flynn, Delinquency: The Juvenile Offender in America Today (1956), 307

Legislation was introduced in several jurisdictions to spare youthful offenders the harsh treatment accorded them under criminal law. One of the first approaches was to confine children convicted of crimes apart from adult criminals.

The first institution in this country geared to the needs of "delinquent and wayward children" was the New York House of Refuge.[8] This institution was founded to improve the education and morals of children of paupers by removing them from the "filth, ignorance, idleness and disease" of their home environment.[9]

Unfortunately, therefore, what initially appeared to be juvenile reform was actually a modification of the earlier "poor law" philosophy which placed children of paupers in almshouses, workhouses, or poor houses.

---

8 It was incorporated in New York in 1824. Sussman and Baum, The Law of Juvenile Delinquency (3rd Ed., 1968), 3.

9 Rendleman, "Parens Patriae: From Chancery to the Juvenile Court", 23 S.C.L. REV. 205, 216-217.

The purpose of a House of Refuge was held to be the "improvement, reformation, wholesome restraint and protection" of the child from "depraved parents or environment". Ex parte Crouse, 4 Whart. 9 (1838). Following the New York example, Philadelphia established a House of Refuge in 1828. Boston established one in 1847. Bloch and Flynn, supra., note 7 at 309.

These "poor laws" were premised on the notion of "parens patriae" which permitted the state to interfere with and supplant control of the child by his natural parents when it was felt to be in the child's best interest and in the interest of the state to do so.[10] The extension of this "parens patriae" philosophy to the criminal domain was of great importance. It widened the scope of permissible state intervention into family life, and particularly increased state control over errant or wayward youth.

"Parens patriae" was not expressly cited until 1838 as the basis for justifying removal of a child from parental custody and committing him to a residential institution for juveniles.[11] But its appearance, fourteen years before, in the Houses of Refuge movement, provided the seeds that would later develop into the juvenile court system: a system which

---

10 "Parens patriae" was a doctrine which originated in the English Chancery courts by which the king, through his chancellors, assumed the protection of all infants in the realm. The soverign, as "pater patriae", had a duty to oversee the welfare of the children of the kingdom who might be abused, neglected or abandoned by their parents or other guardians. The king, through his Court of Chancery, could step in and provide the requisite protection and care. This doctrine spilled over into the American legal system. Eyre v Shaftsbury, 24 Eng. Rep. 659, 664 (1722).

11 Ex parte Crouse, supra., note 9.

predicated its jurisdiction and philosophy primarily on the doctrine of "parens patriae".

The real importance of the early Houses of Refuge, however, was that they sought to separate children in need of state services from adult criminals. This notion of separate, and, by inference, specialized treatment for juveniles was expanded in the next several years, primarily under the leadership of Massachusetts.

In 1869, Massachusetts mandated by statute that an agent of the state board of charity was to attend juvenile trials, investigate children's cases, protect their interests, and make suitable dispositional recommendations.[12] Legislation enacted in 1870, 1872 and in 1877 provided for separate trials for children. In 1880, Massachusetts founded the first probation system which operated without restriction as to age.[13] New York, Indiana and Rhode Island followed the Massachusetts example, providing for separate hearings for children.[14]

---

[12] Sussman and Baum, supra., note 8.

[13] Id., at 3.

[14] Id., at 3-5.

Additionally, Illinois joined the group in establishing a probation system which served juveniles as well as adults.

One of the earliest cases dealing with the constitutional problems inherent in early "child saving" legislation was People ex rel O'Connell v Turner.[15] In 1855, Chicago passed a municipal ordinance that established a "school" for children who had been "convicted before any justice of the peace or police magistrate of a misdemeanor or non-criminal deviance liable for commitment".[16] Its jurisdiction was later extended to boys convicted of any non-capital offense.[17] Juvenile felons who had been tried and convicted in courts of general criminal jurisdiction[18] were thereupon referrable to the reform school. The appellate court in

---

15 55 Ill. 280, 8 Am.Rep. 645 (1870).

16 Fox, "Juvenile Justice Reform: An Historical Perspective", 22 STAN.L.REV. 1187, 1212 (1970).

17 Id., at 1213.

18 Children who were accused of serious crimes such as robbery, manslaughter, grand larceny or arson, were indicted and tried with all the formality and constitutional safeguards which attended adult criminal proceedings. Once convicted, they would be sent to the reform school. Sussman and Baum, supra., note 8, at 3-4.

O'Connell found that jurisdictional definitions in the statute were vague.[19] They further held that constitutional and natural rights of the child were violated because confinement and control were subject to unbridled administrative discretion.[20] In upholding a petition for a writ of habeas corpus on behalf of a child who had been committed to the school, the court noted that the reformatory was in fact a prison.[21] It further stipulated that incarceration therein was "punishment" for a crime; and that such punishment could be inflicted only after criminal proceedings were conducted with due regard for the constitutional rights of the child.[22]

The question which the O'Connell court faced was whether referral to the reformatory lay within

---

19 supra., note 15.

20 "Such a restraint upon natural liberty is tyranny and oppression..." Id., at 268.

21 In 1872, the Chicago school with which O'Connell concerned itself was forced to close down. See Fox, supra., note 16, at 1220.

22 Id., at 287-288.

the criminal or civil jurisdiction of the state. The court viewed the institution as essentially "punitive"; it was held criminal in nature. Accordingly, the court observed that basic procedural safeguards had to be afforded to children both during and after referral to the courts. This classification of juvenile proceedings as either "criminal" or "civil" was to play a crucial role in the development of specialized courts and procedures to deal with juvenile offenders in the early twentieth century.

B. The First Juvenile Courts

In 1899 an atempt was made to establish an independent judicial system to deal with juveniles.[23] The Juvenile Court created that year in Illinois,[24] encompassed most of the features found in juvenile

---

23 Law of April 21, 1899 Ill. Laws 131.

24 The juvenile court reform movement spread rapidly. By 1927 all but two states - Maine and Wyoming - had enacted Juvenile Court statutes. H. Lou, Juvenile Courts in the United States 24 (1927).

courts today.[25]

Both the jurisdiction and philosophy of the juvenile court were inextricably bound to the "parens patriae" doctrine discussed earlier.[26] The state, as "ultimate parent" assumed power of the child, allegedly to secure the child's welfare.

---

[25] When first enacted, the philosophy, principles and procedure of the Act were hailed as revolutionary. Some later scholars have suggested, however, that the Act was far from innovative. Rendleman, supra., note 9, at 255-256 argues that there was nothing new in any of the ideas espoused in the Act and, in fact, the plan was a consolidation of earlier legislative precedent from Illinois and elsewhere. Fox, supra., note 17, at 1229 believes that the Act was the product of political opportunism exercised by conservative political groups and that "humanitarian" or "progressive" considerations were secondary. Sussman, supra., note 8, at 5 says that "...while the court was to a certain degree novel and experimental, it had definite roots in our pre-existing court and legal system." Most crucial, "the 1899 Illinois Act... restated the belief in the value of coercive predictions." (Fox, supra., note 17, at 1229). That is, the legislation approached the problems of delinquency, dependency and neglect by assuming, as had all legislatures before, that government must devise methods to identify "predelinquent" children and force them to accept treatments designed by the state to correct their wayward tendencies.

[26] See footnote 14 infra., and accompanying text.

The philosophy embodied in the juvenile court acts was a beneficent one. The object of the proceedings was said to be curative, rather than punitive.[27]

Julian Mack, one of the principal reformers in the field of juvenile treatment at that time, stressed that the purpose of the juvenile courts was to develop and reinforce a sense of responsibility in both the parent and child.[28] The court was to act as an "agency of rescue" toward a child who had broken the law. Parents' attendance at hearings was mandatory, and they were fined for offenses their children committed when such acts grew out of parental neglect.[29]

---

27 "Such concepts as 'criminal responsibility', 'guilt', and the like, have no place here; custody and control are exercised for protective and correctional purposes...protection and treatment based on understanding rather than punishment based on a technical status of guilt. The policy is both preventive and reformative. The philosophy of the juvenile policy involved in statutes that render youths of tender years incapable of crime is child protective and child corrective." See State v Monahan, 15 N.J. 34, 52.

28 Mack, "The Juvenile Court", 23 HARV. L. REV. 104, 120 (1909).

29 Id., at 115.

At all stages, the child was to be separated from adult criminals because of his "specialized needs". Separate detention and rehabilitation facilities were to be provided. Children's cases were to be heard in a chamber separate from adult proceedings. Separation of the child from its parents was to be done only as a last resort. The probation officer had the primary supervisory role if the child was released to his parents. Otherwise, the child was sent to an "industrial school" in a "pleasant, countrified surrounding".[30]

According to Mack, the hearings were to be informal, and the crucial role in the entire juvenile process was played by the judge. He was to be a man of high attributes and special qualifications with a "genuine interest in children".[31] The judge, to

---

30 Id., at 115-116.

31 "He must be a student of, and deeply interested in, the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boy's point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes and the trouble and to formulate the plan by which, through cooperation, ofttimes of many agencies, the cure may be affected." Mack, supra., note 28, at 119.

be effective, had to combine a "clinical" with a "fatherly" approach: he had to evidence deep concern for the child's welfare.[32]

The procedures envisioned by the early reformers emphasized removal of the "criminal stigma" from a youth who had violated a criminal statute. In addition to separate court facilities and records, informal hearing procedures were established. The "formalities" of arrest by warrant, indictment, trial by jury and other procedural safeguards ordinarily accompanying adult criminal proceedings were eliminated. Moreover, the broad jurisdictional language of the statutes enabled juvenile courts to extend their influence to large numbers of juveniles, who may have committed any one of a multitude of "offenses", no matter how trivial. As more states adopted juvenile court legislation and as the

---

[32] "The ordinary trappings of the courtroom are out of place in such hearings. The judge on the bench, looking down upon a boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at the 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." Id., at 120.

jurisdiction of juvenile courts expanded to encompass more children, consitutional challenges to the statutes proliferated in the courts.[33]

C. The Abridgement of Due Process for Juveniles

Early juvenile court statutes were challenged as unconstitutional because the child was denied rights accorded to adults accused of crimes and yet the determination of "delinquency" was predicated on commission of certain acts which, if done by an adult, would constitute a criminal offense. Proceedings under the juvenile statutes did not contemplate the

---

[33] While this comment has focused on children who are "ungovernable" or who commit delinquent acts, we recognize that juvenile courts hear large numbers of cases concerning children brought before them as abused, abandoned, or neglected. These children often present the most difficult and perhaps the greatest challenge for preventive services. Since passage of the 1967 amendments to the Social Security Act, (Title 4A; C.R.F. 45; Sec. 2221.0(8)) requiring as a condition of federal funding that there be a judicial determination that continuation of a child in his own home is contrary to his welfare, many thousands of cases previously handled by administrative agencies are now brought before the juvenile courts. In addition, an increasing number of cases involving issues of permanent neglect, adoption, and custody are being presented to these same courts. We are thus witnessing two opposing and inconsistent trends. One directs that more and more juvenile delinquents and status offenders be diverted from the destructive and stigmatizing effects of juvenile court experience. The other leads to a steady increase of dependent and neglected children directed to these same courts, which are under attack and receive little or no staffing to meet new responsibilities.

rights of admittance to bail, confrontation of witnesses, application of the rules of evidence obtaining in criminal trials and trial by jury.[34] The statutes were also attacked as vague and indefinite; insufficient to provide proper guidance for enforcement and administration;[35] and couched in language which made the definition of "delinquency" too broad and inclusive.[36] No form of appeal was outlined.[37] Finally, it was contended that persons committed to institutions pursuant to the acts were being "punished" as though they actually had been convicted of a crime.

---

34 For a detailed description of the actual mechanics of a juvenile court proceeding under one of the early acts, see: Cinque v Boyd, 99 Conn. 70, 80-81; 121 A. 678, 682

35 Id., at 82; 121 A. at 682

36 Id., at 82-83; 121 A. at 682

37 Id., at 83; 121 A. at 682

These arguments were defeated in nearly every instance. One of the early leading cases to uphold the constitutionality of the juvenile court acts was Commonwealth v Fisher.[38] The court in Fisher agreed that due process must be respected where one was charged with a criminal offense. However, the child was not being accused of a criminal act.[39] The legislature did not intend to "prosecute" the child, but rather desired its "salvation".[40] Relying on the doctrine of "parens

---

38 State v Monahan, supra., note 27 at 52-53; 62 A., at 200.

39 Id., at 52-53; 62 A. at 200

40 "To save a child from becoming a criminal, or from continuing in a career of crime...the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state, without any process at all, (emphasis added) for the purpose of subjecting it to the state's guardianship and protection.... 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. (again, emphasis added) The act simply provides how children who ought to be saved may reach the court to be saved." 213 Pa. at 53; 62 A. at 200.

patriae", the court stressed that proceedings in the juvenile court were not criminal in nature. Thus, no constitutional guaranties attendant to an ordinary criminal proceeding were required.[41]

As we shall see, the subsequent demise of due process for juveniles and its halting reinstatement were essentially grounded in the conflict between the "parens patriae" philosophy and due process considerations. Where courts emphasized the duty of the state to safeguard youth, the proceedings were regarded as "civil", since no prosecution for a criminal offense was involved.[42] Moreover, it was held that the legislature, in seeking to promote the welfare of a child, undoubtedly

---

41 An Idaho court, after noting that the purpose of Idaho's Juvenile Court Act was to educate, train and save an errant youth so he could be a useful citizen, said:

> "It would be carrying the protection of 'inalienable rights' guaranteed by the Constitution a long ways to say that the guaranty extends to a free and unlimited exercise of whims, caprices, and proclivities of either a child or its parents or guardians for idleness, ignorance, crime or any kindred dispositions or inclinations."

Ex parte Sharpe, 15 Idaho 120, at 129-130; 96 P. 563, at 565 (1908)

42 Cinque v Boyd, supra., note 34, 99 Conn. at 83.

had the power to provide that an act done by a child should not be deemed a crime.[43] A fundamental principle running through these early cases, then, was that inquiries conducted by juvenile courts were not criminal trials and that, in fact, children were not being "tried" for anything at all.[44]

It is apparent that the juvenile court assumed a task far more ambitious than that of the criminal court or of the traditional chancery court from which the doctrine of "parens patriae" was adopted. The early cases upholding juvenile court acts, and those cases which defeated subsequent procedural attacks based on the denial of constitutional

---

43 People v Lewis, 260 N.Y. 171, at 178; 183 N.E. 353, at 355; cert. den. 289 U.S. 709 (1933).

44 For an extensive list of the early decisions upholding the constitutionality of juvenile court acts, see: Cinque v Boyd, supra., note 34, 99 Conn. at 84.
But the Detroit Juvenile Court Act was held unconstitutional. The Court found that, despite statutory language to the effect that the proceedings were "not to be taken as criminal proceedings in any sense", the purpose of the statute was punitive: the penalties imposed were identical to those imposed by criminal statutes dealing with the same offense. Robinson v Wayne Circuit Judges, 151 Mich. 315; 115 N.W. 682 (1908)

safeguards, emphasized the fear that introducing constitutional guaranties would result in adversary proceedings similiar to criminal trials. To permit this would be inimical to the underlying philosophy of the founders of the juvenile court system.

The result was a sacrifice of due process safeguards in favor of implementing the "clinical" approach of the court. Requests for a jury trial were denied.[45] Vague allegations of "anti-social" behavior were sufficient to subject a child to the juvenile court's jurisdiction.[46] Notice of charges was often dispensed with.[47] Because of the

---

45 It was held by a California court that the English chancery courts had no duty to accord children jury trials and this concept passed to the American colonies intact. Thus, juvenile courts whose jurisdiction closely correlated to that of the chancery courts, likewise were considered to have no obligation to accord trial by jury to children. In re Daedler, 194 Cal. 320; 228 P. 467 (1924).

46 Wisconsin committed a juvenile to the Wisconsin Industrial School for Boys as a delinquent on the grounds that he "habitually deported himself so as to injure or endanger the morals and health of himself or others." In re Bentley, 246 Wis. 69; 16 N.W. 2d 390 (1944).

47 In Ohio, a child staying with relatives was brought before the juvenile court without notice to the mother, who resided in another state. In re Duncan, 107 N.E. 2d 256 (Ohio Family Ct., 1951).

informality of the proceedings, the ordinary rules of evidence were not mandatory. Thus, uncorroborated admissions[48] and hearsay testimony[49] were made part of the court record. Right to counsel was deemed unnecessary.[50] The protections against self-incrimination[51] and double

---

48 A Texas court admitted the testimony of an accomplice, without corroboration, to implicate a youth in a theft case. Matter of Gonzalez, 328 S.W. 2d 475 (Tex. Ct. App., 1959).

49 A Pennsylvania court held that hearsay testimony which implicated a young boy in a robbery case was admissable.

"...from the very nature of the hearings of the Juvenile Court it cannot be required that strict rules of evidence should be applied as they properly would be in trial of cases in the criminal court....The hearing...may, in order to accomplish purposes for which juvenile court legislation is designed, avoid many of the legalistic features of the rules of evidence customarily applied to other judicial hearings."

In re Holmes, 379 Pa. 599, at 605; 109 A. 2d 523, at 526 (1954); cert. den. 348 U.S. 973 (1955).

50 People v Dotson, 46 Cal. 2d 891; 299 P. 2d 875 (1956).

51 In re Santillaves, 47 N.M. 140; 138 P. 2d 593 (1943).

jeopardy[52] were also denied.

D. Initial Incorporation of Due Process in Juvenile Proceedings

In the early 1950's a reevaluation of the performance of juvenile courts began. In re Contreras[53] was one of the first decisions which reversed the trend of subordinating due process considerations to the "parens patriae" philosophy of juvenile courts. Contreras had been accused of stabbing another youth. He was not represented by counsel at the delinquency hearing. The victim testified that he was unsure as to whether Contreras

---

52 A minor was convicted of burglary and confined pursuant to a juvenile court order to the state's Industrial School for fifteen months. Upon his release, he was charged and committed to a state prison. The California court held that double jeopardy protection was applicable only to criminal cases under the Sixth Amendment and juvenile proceedings were strictly civil in nature. People v Silverstein, 121 Cal. App. 2d 140; 262 P. 2d 656 (1953).

53 109 Cal. App. 2d 787; 241 P. 2d 631 (1952).

had been his assailant.[54] Evidence, later adjudged violative of hearsay prohibitions, was admitted. Contreras was found guilty.[55] His conviction was subsequently reversed, the appellate court relying mainly on the denial of counsel.[56]

The Contreras court criticized the notion that an adjudication of delinquency was not a criminal conviction.[57] Serious future consequences could result from a juvenile record. It was a "blight on the character of the child, impeded his chances of obtaining any position of 'honor or trust' and might possibily result in the removal of

---

54 Id., at 788-789; 241 P. 2d at 632.

55 Id., at 789; 241 P. 2d at 632-633.

56 Id., at 791; 241 P. 2d at 634.

57 Id., at 789; 241 P. 2d at 633.

the child from his family and, ultimately, confinement in a state institution."[58] It appears that the court considered the fact that Contreras emphatically denied his guilt from the outset crucial. Typically, the minor admitted guilt, and the court thereupon concerned itself with how best to guide and rehabilitate the child. Here, a question pertaining to guilt was presented. In such an instance, the court said: "It cannot seriously be contended that the constitutional guarantee of due process of law does not extend to minors as well as adults".[59]

---

[58] Id., at 790; 241 P. 2d at 634.

[59] Id., at 791; 241 P. 2d at 634. See also: Haley v Ohio, 332 U.S. 596 (1948). In Haley, a fifteen year old charged with first-degree murder, confessed to the crime after being relentlessly questioned at a police station throughout the night. The Court held that the confession was improperly admitted at trial as it was obtained in violation of the Fourteenth Amendment. Note that in both Contreras, supra., note 53 and Haley, the minors were accused of very serious crimes. Haley was followed on similar facts in Gallegos v Colorado, 370 U.S. 49 (1962). The youth in the Gallegos case was fourteen years old.

A series of decisions handed down in the District of Columbia also were illustrative of the growing judicial concern over denial of due process to juveniles. Because of the serious nature and effect of an adjudication of delinquency, right to counsel was held to be essential in a juvenile proceeding.[60] In Shioutakon v District of Columbia[61] the court answered the argument that providing counsel in juvenile hearings would make them adversary in nature, thus defeating the benefits of informality. They cited a report investigating juvenile courts in the District of Columbia which noted that the "atmosphere of formality which surrounds Juvenile Court hearings is equal to, or greater than, hearings in adult courts."[62]

---

60 In re Poff, 135 F. Supp. 224 (D.D.C., 1955) held that where the personal liberty of the youth was at stake, counsel is as necessary in juvenile court as in criminal court.

61 Shioutakon v District of Columbia, 236 F. 2d 666 (D.C. Cir., 1956)

62 Id., n. 10, at 668.
Some juvenile court acts were revised to include several of the due process safeguards in delinquency hearings. For example, the Federal Juvenile Delinquency Act, which applied to all juvenile cases in Federal courts (exclusive of those in the District of Columbia), provided that the Bill of Rights guarantees applied in juvenile proceedings in the same manner as in adult criminal cases. Informal proceedings could only be invoked with the consent of the juvenile. 18 U.S.C. Sec. 5032 (1964).

Denial of bail to juveniles on the grounds that juvenile proceedings were "civil" was also overruled.[63] The Shioutakon court premised its analysis on the fact that incarceration in state institutions, a frequent outcome of juvenile hearings, emphasized punishment and deterence more than rehabilitation.[64] Finally, the prohibition against double jeopardy was held applicable to juvenile cases in a decision containing dicta to the effect that the privilege against self-incrimination and the right to a speedy trial should also be accorded to juveniles.[65]

---

63 "It is often dangerous to carry any conclusion to its logical extreme. These proceedings may have ramifications which cannot be disposed of by denominating the proceedings as civil. Basic human rights do not depend on nomenclature.." Trimble v Stone, 187 F. Supp. 484, 485-486 (D.D.C., 1960).

64 Id., at 486.

65 U.S. v Dickerson, 168 F. Supp. 899 (D.D.C., 1958).

By 1966, it had become clear that due process considerations could no longer be divorced from juvenile court hearings. A number of factors made this conclusion inevitable. First, it was recognized that for many youths adjudication as a delinquent equaled criminal conviction, at least as far as the immediate consequences were concerned. Confinement in a juvenile institution constituted as significant a deprivation of liberty as a prison sentence. Treatment was virtually unknown in such institutions. Moreover, the tremendous increase of crimes committed by young people[66] greatly taxed juvenile court facilities. This made informal, individualized consideration of each child's case by a concerned judge impossible. The question was not whether procedural protections should be accorded to juveniles, but rather which safeguards should be extended first.

---

66 See, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, 1-9 (1967)

E. The Supreme Court Confronts the Due Process Question

During the early 1960's the Supreme Court had begun a major reevaluation and liberalization of due process rights for criminal defendants. A number of cases in nearly all areas of criminal law, including the right to counsel[67] and the rights of the accused while in police custody[68] were decided. It was not surprising, therefore, that when confronted with questions concerning the rights of juvenile offenders, the Court adopted the view that due process safeguards have a role to play in juvenile proceedings.

---

67 Gideon v Wainwright, 372 U.S. 335 (1963).

68 Escobedo v Illinois, 378 U.S. 478 (1964); Miranda v Arizona, 384 U.S. 436 (1966).

Kent v United States[69] was the first major step taken by the Court to protect juvenile offenders.[70] The significance of Kent lay in the Court's attempt to strike a balance between the discretionary power of the juvenile courts inherent in the "parens patriae" philosophy, and the recognition that such authority was not an "invitation to procedural arbitrariness".[71] While some latitude was desirable when they were in the early, experimental stage, the Court found juvenile courts were not achieving their theoretical promise.[72] Citing

---

69 383 U.S. 541 (1966).

70 The court, in two earlier cases, Haley v Ohio, supra., note 59, and Gallegos v Colorado, supra., had reversed convictions of youths based on coerced confessions.

71 Id., at 553.

72 "While there can be no doubt of the original laudible 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 guarantees applicable to adults." Id., at 555.

such facts as lack of sufficient personnel and facilities, the Court said that there was evidence that the juvenile, while denied his constitutional rights, was not being accorded the "solicitous care and regenerative treatment" originally envisioned by the early reformers as justifying abridgement of these protections. Consequently, the child received the "worst of both worlds".[73]

In 1967, after the Kent case had been decided, two reports became public which served as a devastating indictment of juvenile courts and their failure to stem the tide of delinquency.[74] Soon afterwards, the Supreme Court decided, in In re Gault,[75] that since the "promise"

---

73 Id., at 556. See also, Handler, "Juvenile Court and the Adversary System: Problems of Function and Form", 165 WIS. L. REV. 7 (1965).

74 One was the President's Commission's report on juvenile delinquency referred to in footnote 66, supra. The other was the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society (1967).

75 387 U.S. 1 (1967).

of the juvenile court system was clearly unfilled,[76] it could no longer be regarded as sufficient grounds for denying certain essential due process protections. In Gault the Supreme Court concluded that "constitutional domestication" of juvenile proceedings was required.

First, the Court questioned the constitutional basis of juvenile courts. There had been no trace of the doctrine of "parens patriae" in the history of criminal jurisprudence.[77] Then the benefits of the juvenile process were appraised. The claim that hearings and their results were kept secret so as to prevent the child from future stigma was dismissed

---

[76] The Court cited a report by the Stanford Research Institute, Crime in the District of Columbia. In 1966, 66% of the 16-17 year olds referred to the Juvenile Court had been before it previously. In 1965, 56% of the juveniles were repeaters, with 42% of this group having been before the court at least twice. 387 U.S. at 21.

[77] "...the highest and most enlightened impulses led to a particular system for juveniles unknown in our law in any comparable context. The constitutional and theoretical basis for this peculiar system is -- to say the least -- debatable." Id., at 17.

as "more rhetoric than reality".[78] Informality in the proceedings was condemned as being an invitation to arbitrariness which resulted in highly negative effects.[79]

However, the Court's attention was primarily focused on the consequences of juvenile proceedings. Often, juveniles faced long periods of confinement.[80]

---

78 Id., at 24. Disclosure of juvenile records was discretionary with the judge in most instances. Courts often routinely furnished information concerning juveniles to the F.B.I., the armed services, governmental agencies and private employers when youths sought employment. Moreover, police often maintained files on juveniles with whom they came into contact, and had discretion to reveal juvenile records to prospective employers. See also, Note, "Juvenile Delinquents: The Police, State Courts and Individualized Justice", 79 HARV. L. REV. 775, 802 (1966).

79 Id., at 58. In fact, it had been suggested by some studies that a juvenile would respond to rehabilitation more favorably if his hearing was conducted with complete fairness, impartiality and orderliness. See Wheeler and Cottrel, Juvenile Delinquency: Its Prevention and Control (Russell Sage Foundation, 1965), 33.

80 For example, the act committed by Gerald Gault, a fifteen year old Arizona youth, was considered a misdemeanor under the Arizona penal code. He had allegedly made a lewd phone call. If committed by an adult, this offense was punishable by a fine of $5 - $50, or a maximum period of imprisonment of two months. Gault was confined to the State's Industrial School as a juvenile delinquent for the "period of his minority". (approximately six years.) 387 U.S. at 29.

Regardless of whether the hearing was labeled "civil" or "criminal", the practical outcome of these proceedings was often incarceration.[81] Recognizing the potentially serious consequences of juvenile court proceedings, the Court in Gault held that the child must be accorded notice of charges, right to counsel, privilege against self-incrimination and the right to confront and cross-examine witnesses in all delinquency hearings.

Although the Court failed to rule on whether a juvenile was also to be guaranteed a right to appellate review, it strongly suggested that some record of the proceedings should be maintained. If no record of the case were preserved, a reviewing court would be obligated to reconstruct the record. This would impose on the juvenile judge the "unseemly duty" of testifying under cross-examination as to events that had transpired in hearings conducted before him.[82]

Gault left several questions pertaining to due process for juveniles unanswered. According to Mr.

---

81 "His world becomes a building with whitewashed walls, regimented routine and institutional hours. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide." Id., at 27.

82 Id., at 58.

Justice Harlan's opinion, the majority failed to provide any discernable standards for due process in juvenile proceedings.[83] It could be argued that whatever rights constitute the "essentials of due process and fair treatment"[84] must be incorporated into the juvenile court system. However, this analysis is problematic. Should all due process protections accorded to adult hearings be provided for juveniles?

The Court was clearly dissatisfied with the performance of the juvenile court system. Yet, there was no suggestion that it be scrapped, despite the strong inference that many delinquency hearings were indistinguishable from criminal proceedings. Mr. Justice Harlan suggested that the Court should guarantee fundamental fairness, yet permit the States to possess sufficient leeway to experiment so as to develop an effective response to the problem of juvenile crime.[85]

In re Winship[86] served to confuse the issue rather than clarify it. Winship held that proof beyond a

---

83 Id., at 67.

84 383 U.S. at 562.

85 387 U.S. at 72.

86 397 U.S. 358 (1970).

reasonable doubt was among the "essentials of due process and fair treatment" that had to be accorded to a juvenile offender at his hearing. On its face, the decision seemed to support those who argued that Gault intended to extend all adult criminal protections to delinquency proceedings. However, a close reading of the opinion suggests a movement toward the Harlan viewpoint. Mr. Justice Brennan's opinion emphasized that incorporating the "reasonable doubt" test would not destroy the "beneficial aspects" of the juvenile process.[87] Juvenile proceedings would still be confidential. Informality and flexibility would remain the cornerstones of the juvenile justice system. Opportunity would be made during the hearing for wide-range review of the child's social history. Individualized treatment was still to be keynoted. Moreover, the Court reaffirmed the axiom that a finding of delinquency did not constitute a criminal conviction.[88] It was evident that the original purpose of juvenile courts was to remain an important consideration where the question of incorporation of

---

87 Id., at 366.

88 Id., at 367.

due process for juveniles was concerned.[89]

In 1971, the Supreme Court held that the right to trial by jury was not applicable in juvenile proceedings.[90] Writing for the majority, Mr. Justice Blackmun noted that no case had expressly held that all rights constitutionally accorded to adults in criminal cases were also to be enforced in juvenile proceedings.[91] Justice Blackmun went on to suggest that while the "fond and idealistic hopes" of juvenile court proponents have not been realized, the addition of a jury would emasculate the unique process, making it "fully adversary" and "put an end to what has been an idealistic prospect of an intimate and informal protective procedure".[92]

The Court said that despite its many shortcomings,

---

89 See Mr. Justice Harlan's concurring opinion. Id., at 374-375. He noted that the "reasonable doubt" standard did not interfere with the worthy goal of rehabilitating the juvenile; increase the extent to which a youth is stigmatized as a "criminal"; or burden the juvenile courts with a procedural requirement that will make juvenile hearings significantly more time-consuming or rigid.

90 403 U.S. 528 (1971).

91 Id., at 533.

92 Id., at 545.

In 1960, the proposition was first advanced that a person who is involuntarily placed in a state institution pursuant to a proceeding which lacks basic procedural protections has a right to receive treatment designed to enable him to leave the facility and leave independently.[97] A recent Seventh Circuit opinion, Nelson v. Heyne,[98] offers a brief history of the development of the "right to treatment" concept regarding children in public custody. The court states that

> the right to rehabilitative treatment for juvenile offenders has roots in the general social reform of the late nineteenth century, was nurtured by court decisions throughout the first half of this century, and has been established in state and federal courts in recent years.[99]

A number of other federal district courts had decided before the Nelson opinion was published that confinement of delinquent children in anti- or non-

---

97 Birnbaum, "The Right to Treatment", 46 A.B.A.J. 499 (1960).

It should be noted that juveniles' right to rehabilitative treatment was recognized before such a right was established for the mentally ill. See, for example, Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N.W. 422, 427 (1899); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, 199 (1905); Ex Parte Sharp, 15 Idaho 120, 96 P. 536, 564 (1908); Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205, 207 (1929); White v. Reid, 125 F. Supp. 647 (D. D.C., 1954); Kaulter v. Reid, 183 F. Supp. 352 (D. D.C., 1960).

98 491 F. 2d 352 (1974).

99 Id., at 358.

"we are particularly reluctant to say...that the (juvenile) court system cannot accomplish its rehabilitative goals".[93] States should remain free to experiment in dealing with problems of youthful offenders. The "abuses" of the system were not of "constitutional dimension." They relate to lack of resources and dedication, rather than inherent unfairness.[94] To date, a majority of the states have not sanctioned jury trials for juveniles.[95]

F. The "Right to Treatment" Doctrine and Juveniles[96]

---

93 Id., at 547.

94 Id., at 548.

95 Ibid.

96 During the last decade concern for children has been put increasingly in terms of "children's rights." It is often suggested that the right to treatment under the juvenile justice system is one of the most basic "children's rights". But equally, if not more, important are the rights to adequate nutrition, health care, comprehensive child development services; the right to an appropriate education, the right to read; the rights of students and most importantly, the right to a decent, stable and permanent home.
The phrase "children's rights" has been invoked to support such disparate causes as constitutional rights for delinquents, affection for infants and lowering the voting age. It does not yet reflect any coherent doctrine about, or approach to, children. "We don't yet have a sound enough conceptual framework to approach children's rights." Marian Wright Edelman, Director, Children's Defense Fund, in an interview with the Harvard Educational Review, February, 1974, 44 HARV. ED. REV., Volume 2 at 67.
On December 10, 1975, James Rich, Esq., on behalf of the Child Welfare League of America and the Children's Bureau of HEW, asked Joan FitzGerald to accept a consultancy with them for the purpose of defining "children's rights". The definition, which will be developed during the next year, will serve as a guideline for federal legislation and programs in the area.

rehabilitative environments constitutes a violation of the fourteenth amendment.[100]

Failure to provide treatment for those juveniles labelled children-in-need-of supervision has also been held violative of statutory or constitutional requirements.[101]

Although state statutes do play a role in securing the "right to treatment" for children, federal courts have recently focused their analyses on the constitutional underpinnings of children's right to treatment. Recent decisions have either (1) emphasized the state's responsibility in its role as "parens patriae" or (2) have recognized the trade-off between the attenuated procedural processes which characterize juvenile commitments and the treatment which a child should

---

100 See, Morales v. Turman, 1364 F. Supp. 166, 175 (E.D.Tex., 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1367 (D.R.I., 1972); Creek v. Stone, 379 F. 2d 106, 111 (D. C. Cir. 1967).

101 Martarella v Kelly, 349 F. Supp. 575 (S.D.N.Y., 1972), enforced, 359 F. Supp. 478 (S.D.N.Y., 1973).

receive upon commitment.[102] Although most decisions confuse the distinctions which can be made between these two theories, they can be understood separately.

1. "Parens-Patriae" This theory is clearly stated in Morales v Turman.[103] The court notes that commitment of children to "rehabilitation centers" would be an arbitrary exercise of governmental power unless those children were in fact afforded treatment. The essential legitimate governmental interest which sanctions such incarceration is treatment.[104]

---

[102] hereinafter referred to as the "quid-pro-quo" theory. It should be noted that several juvenile decisions have found that the absence of adequate treatment constitutes cruel and unusual punishment in violation of the 8th Amendment. (Martarella, supra. 585; Nelson, supra, 355; and Lollis v. New York State Dept. Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970)).

In most right to treatment cases, however, a finding under the 8th Amendment is joined with findings under the 14th Amendment. (e.g., Maratella, supra, and Nelson, supra.) But in at least one recent case (Lollis, supra) the court found under the 8th Amendment alone that a truly ghastly situation, in which a fourteen year old girl was kept in darkened solitary confinement for two weeks, without books or any other stimulation, was indefensible. This was a very narrow ruling, however, explicitly limited to the facts of the Lollis case.

[103] 383 F. Supp. 53 (E.D. Tex., 1974).

[104] 383 F. Supp. at 71.

A similar "parens patriae" analysis is found in Creek v. Stone.[105] The Creek case was brought by a juvenile plaintiff who claimed that he was unlawfully confined in a "receiving home" pending final disposition of his case. He claimed that the confinement was unlawful because there were no psychiatric services at the home.[106]

While both Morales and Creek recite the "care and custody" requirements of state statutes which authorize juvenile commitment, these decisions should not be identified simply as being statutorily based. Both cases clearly state that they are relying on the state's role of "parens patriae" in its 14th Amendment dimension.

In Martarella v. Kelly,[107] in which plaintiffs were juvenile PINS detained in "maximum securities" facilities, the court stated that "where the State, as "parens patriae",

---

105 379 F. 2d 106 (D.C. Cir., 1967).

106 Id., at 109.

107 349 F. Supp. 575 (S.D.N.Y., 1972).