

REPRESENTING CHILDREN IN JUVENILE CRIMINAL PROCEEDINGS

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I. Overview of the Juvenile Court System in the United States

Historical Background

In the United States, specialized juvenile courts were created beginning in Chicago in 1899 and continued to operate subject to their own unique rules and procedures without adherence to those imposed and available in adult courts until approximately six decades later. The justification for the departure from the strict rules and procedures followed in adult proceedings was that the role of the juvenile courts was to protect and rehabilitate the minor, not to punish or effect retribution, as with nonminors. Indeed, the child was considered to be inherently good, albeit wayward, and the court was acting as the child's parent, as "parens patriae" or "in loco parentis" with respect to the minor. Further, the court was not depriving the child of any rights already enjoyed, as unlike an adult, children did not have liberty rights, but only custodial rights.

A key distinction between juvenile and adult criminal courts is that in the former the offender is treated as a "delinquent" in need of care, protection and education and the goal is rehabilitation as opposed to punishment. In these specialized courts, juvenile offenders are dealt with separately from adult offenders, are detained separately, and hearings occur at a different time and location than those for adults. If any institutionalization is imposed, the juvenile is held at separate facilities. See generally, St. Julian, Andrea Renee, Am. Jur. 2d, *Juvenile Courts and Delinquency and Dependent Children*, § 4. In addressing the special needs of juveniles, the court has a wide range of options, from changing custody, requiring probation and/or restitution, or committing the minor to a public or private institution.

Though the juvenile courts have limited jurisdiction, the ramifications and consequences of an adjudication of delinquency persist throughout adulthood. For instance the individual may subsequently be required to register as a sex offender, their immigrant status or ability to remain in public housing may be jeopardized and the offenses may be considered against them in subsequent adult proceedings resulting in harsher penalties. See Simkins, Sandra, *When Kids Get Arrested: What Every Adult Should Know*, Rutgers University Press, NJ, 2009, p. 9-10 (hereinafter "Simkins, *When Kids Get Arrested*").

After the establishment of the specialized juvenile courts, as is the case presently, in most states and in most instances children under the age of eighteen accused of criminal acts became subject to their state's juvenile court system. For more than the next fifty years these courts operated with few procedural rules and with a great deal of discretion vested in the juvenile judges and the other personnel involved. The justification for this informality was the paternalistic and rehabilitative purpose of the court.

It is worth noting that courts with juvenile jurisdiction are not uniformly termed as such and may be part of a state's district, superior, circuit, family or probate court, among others. Notwithstanding the subsuming court, courts with juvenile jurisdiction are generally referred to as juvenile courts. 2006 National Report, p. 106. At the same time there are no federal juvenile courts, therefore juveniles taken into custody by federal agencies such as the Border Patrol, Federal Bureau of Investigation, Immigration and Naturalization Service or the U.S. Marshals may be prosecuted in federal district courts and sentenced to federal prison. 2006 National Report, p. 117.

The Modern Juvenile Court System

It became apparent in the middle of the 1900s that neither the youngsters who became involved in the juvenile system nor the public was being well served by these special courts. The numbers of juvenile offenders continued to grow with little evidence that the practices and policies of the juvenile justice system were successfully rehabilitating the offenders or addressing the children's or society's needs. The shortfalls were noted and in part addressed in the landmark decision by the Supreme Court in In re Gault, decided in 1967, when the Court for the first time formally imposed constitutional safeguards on juvenile criminal proceedings.

Initially after that decision, the pendulum in juvenile proceedings swung toward the imposition of greater procedural protections and safeguards of juvenile's rights. However it has more recently been moving back toward the criminal model with the implementation of harsher penalties and proceedings which reflect a no-nonsense, tough-on-crime attitude, a fundamental departure from the benevolent treatment model which initially justified the juvenile courts. See generally Markman, Joanna S., *In re Gault: A Retrospective in 2007: Can It Work?*, 9 Barry L. Rev. 123 (Fall 2007) (hereinafter "Markman, *Gault Retrospective*") and Feld, Barry C., *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. Crim. L. & Criminology 68 (Fall 1997) (hereinafter "Feld, *Abolish the Juvenile Court*").

In the past few decades, proceedings in juvenile courts have increasingly taken on the qualities of adult proceedings, and in many states, depending on the nature of the offense and the age of the child, the young offender may be tried and sentenced as an adult. In most states, the child may remain involved in the juvenile system until as late as the age of twenty-one and in a few through the age of twenty-four. Simpkins, *When Kids Get Arrested*, p. 10-11. See also 2006 National Report, p. 103. In addition, since approximately the mid-1990s, there has been a significant increase in the number of federal arrests of juveniles of 18 and under largely due to immigration offenses. 2006 National Report, p. 117.

Currently there is little uniformity in the implementation of the procedural safeguards or quality of juvenile justice from state to state. These disparities have led some commentators to harshly criticize it as failing to address the public's need for safety or the juvenile's need for rehabilitation. See eg. Markman, *Gault Retrospective* and Feld,

Abolish the Juvenile Court, and Shepard, Robert E., Jr., *Still Seeking the Promise of Gault: Juveniles and the Right to Counsel*, ABA Criminal Justice Magazine Article, available at <http://www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html>. For a remarkable example of the disturbing absence of "justice" that can be found in the juvenile justice system in the United States today, one need only consider the recent Pennsylvania Supreme Court ruling in In re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications From 2003-2008. In that case, the court vacated five years worth of juvenile convictions after an investigation revealed that a judge had systematically deprived youngsters in criminal proceedings of the essential fundamental constitutional protections provided in Gault for financial gain.

II. Significant Cases and Developments

Kent v. U.S. and In re Gault

Prior to the landmark Supreme Court rulings in Kent v. U.S., 383 U.S. 541 (1966) and in In re Gault, 387 U.S. 1 (1967) the following year, children in juvenile courts did not enjoy the same constitutional rights as adults in the United States. Until that time, a child who was brought before a juvenile court due to neglect, delinquency or alleged criminal behavior was subject to a wide range of consequences without the availability of the most basic due process rights, such as the right to counsel, the right to be heard, the right to cross examine witnesses and other critical due process safeguards required in adult courts.

In Kent v. U.S., the Court determined that the lower juvenile court had unconstitutionally deprived sixteen-year-old Morris Kent of his due process rights when it waived jurisdiction without a hearing and without issuing a written statement detailing the reasons for its ruling. Kent was subsequently found to be not guilty of some of the charges by reason of insanity, was tried in the adult criminal court and sentenced to a prison term of up to 90 years. (The maximum penalty available in the juvenile court would have been five years, at which point the defendant would be over 21 and no longer subject to the juvenile court's jurisdiction). Because the case arose in the District of Columbia, the ruling technically was not applicable to the states. However, the Court clearly signaled its belief that children in juvenile courts should be afforded constitutional due process rights, stating, "... there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults with respect to a similar issue would proceed in this manner." Kent v. U.S., 383 U.S. 541, 554 (1966).

The Kent Court further commented that though "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 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." Kent v. U.S. at 555-556.

The defendant in In re Gault was Gerald Gault, a fifteen-year-old charged with making lewd phonecalls to a neighbor. After his detention by the local police, his parents were not notified that he was in custody, they did not receive a copy of any complaint, the neighbor never testified at any proceedings nor were the proceedings recorded or transcribed in any way, and he did not have counsel for the initial hearings.

As was starkly illustrated in Gault, notwithstanding the benevolent intentions and paternal goals that theoretically guided proceedings in the juvenile courts, in many instances these ideals were given little more than lip service. As noted by the Court, the informal lack of adherence to procedure found in juvenile courts did not necessarily foster accomplishment of the high goals underpinning such proceedings, instead "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." In re Gault at 17. This case marked the Court's formal determination that in all cases in which a juvenile faces a finding of delinquency and consequential loss of liberty, the child and parents must be afforded due process rights, meaning that they must:

- receive sufficient notice in writing of any charges and be allowed time to prepare a defense to same
- be advised of the child's right to counsel and provided with counsel if unable to afford private representation
- be advised of their "Miranda" rights against self-incrimination and that any waiver of such rights had to be made voluntarily and knowingly
- be allowed to cross examine all witnesses
- be granted the right to appellate review.

As in Kent, the Court considered the long history and justifications for the unique role of the juvenile courts and its shortcomings. Likewise it considered data from numerous government studies starkly demonstrating its failures and inability to adequately meet the needs of juveniles. In imposing constitutional due process rights, it stated, "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court... The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case... So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide." In re Gault at 28-30.

Significant cases post-Gault

The Gault decision signified a marked departure in juvenile criminal justice and subsequent Supreme Court cases have further refined and clarified the rights and protections available to minors subject to the jurisdiction of the juvenile court as follows:

- In re Winship, 397 U.S. 358 (1970):

In this case, the narrow question of whether the due process rights required by Gault dictated that the standard of proof in adjudicating the guilt of juveniles charged with acts constituting crimes if committed by an adult was proof beyond a reasonable doubt, as opposed to the preponderance of the evidence standard, which the lower court had employed. In ruling that due process and fair treatment required proof beyond a reasonable doubt, the Court rejected the lower court's arguments that the juvenile proceedings were civil in nature or that imposing such a standard would fundamentally impede the benevolent rehabilitative purpose of the juvenile courts.

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

The Court's decision in this case marked a departure from those in previous cases where due process rights had been expanded. In McKeiver, the Court ruled that the Constitution did not require that juveniles be afforded jury trials in the adjudicative phase of juvenile delinquency proceedings. It noted that in both Gault and Winship, it was stressed that the applicable due process standard was dictated by fundamental fairness, with an emphasis on the court's role in accurate factfinding. It concluded that neither goal was necessarily more likely achieved by juries as opposed to judicial factfinders.

- Davis v. Alaska, 415 U.S. 308 (1974):

Relying on the applicable statute and procedural rules, the lower court prohibited cross-examination of a key prosecution witness regarding his juvenile record. In reversing the decision, the Court ruled that the right of the defendant to cross-examine the witness outweighed any potential embarrassment that may have resulted from the disclosure of the witness' juvenile record or probationary status.

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

This case illustrated that the fundamental similarities between juvenile and adult criminal proceedings can require similar procedural safeguards. The Court here ruled that the Constitutional protection against double jeopardy precluded a juvenile adjudicated of violating a criminal statute in a juvenile court from being re-tried in an adult criminal court.

- Oklahoma Publishing Co. v. District Court, 480 U.S. 308 (1977)

- Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979):

These two cases dealt with press restrictions on publication of juvenile court proceedings. In the former case, the lower court had issued a pre-trial injunction prohibiting publication of the name and photograph of a minor involved in a juvenile court proceeding. Though the applicable state statute provided that such proceedings were closed to the public unless an exception was granted by the court, the juvenile hearing had in fact been open to the public without objection. In weighing the applicable competing interests, the Court reiterated an earlier holding, stating "once a public hearing ha[s] been held, what transpires[s] there [can] not be subject to prior restraint." Oklahoma Pub. Co. v. Dist. Ct., 480 U.S. 308, 311 (1977) (quoting Nebraska Press Assn. v. Stuart, 427 U.S. 539, 586 (1976)).

In the Smith case, the Court again ruled that when the press legally obtains information regarding juvenile proceedings free press interests protected by the Constitution outweigh the justifications for keeping such information confidential¹.

- Eddings v. Oklahoma, 455 U.S. 104 (1982)
- Thompson v. Oklahoma, 487 U.S. 815 (1988)
- Stanford v. Kentucky, 492 U.S. 361 (1989)
- Roper v. Simmons, 543 U.S. 551 (2005):

The implementation of the death penalty in juvenile proceedings was examined in these cases. In Eddings, in sentencing a sixteen-year-old tried as an adult for the murder of a police officer, the court considered the defendant's youth as a mitigating factor but refused to consider factors such as the youth's troubled family history, which included beatings by his father, a serious emotional disturbance or his delayed mental and emotional development. In overruling the lower court, the Eddings Court stated that the Constitution required that the sentencer not be prevented "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (emphasis in original).

In Thompson, a juvenile who was fifteen years of age at the time of the offense was tried and convicted of murder as an adult and subsequently sentenced to death. The Court looked to current societal standards, state death penalty statutes, the views of professionals and the jurisprudence of other countries in rendering its opinion. It ruled that the imposition of the death penalty amounted to cruel and unusual punishment precluded by the Constitution where the individual was under the age of sixteen at the time of the offense and noted that no executions of such a child had occurred since 1948, leading inexorably to the conclusion that to impose such a penalty would be "abhorrent to the conscience of the community." Thompson v. Oklahoma, 487 U.S. at 832.

In Roper v. Simmons, the Court abandoned its earlier holding in Stanford v. Kentucky, allowing the imposition of the death penalty on defendants who had been over the age of sixteen but younger than eighteen at the time of the offenses. Roper established that societal norms had indeed changed and that the Constitution prohibition against cruel and unusual punishment forbade imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

- The Court has recently taken two cases under review and will consider the constitutionality of life sentences without parole in juvenile cases.
- Schall v. Martin, 467 U.S. 253 (1984):

In this case, the Court considered the issue of preventive detentions when it examined a statute allowing a juvenile accused of delinquency to be held prior

¹ It has been pointed out that inasmuch as many states allow juvenile proceedings to be open to the public, the confidentiality safeguards that otherwise govern information about juveniles in criminal proceedings are often effectively rendered meaningless. Markman, *Gault Retrospective* at 127-130.

to trial where there was a “serious risk” that the youth would re-offend prior to trial. It ruled that the protection of the juvenile and society justified such actions, that adequate procedural safeguards were in place and rejected the argument that such detentions were inherently punitive because the juvenile might ultimately be released.

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While In re Gault and subsequent cases have established certain minimal constitutional safeguards for juveniles accused of criminal offenses, there is no consistent implementation of these rulings and requirements and standards vary from state to state and even within states. While a young offender may be afforded many of the same constitutional due process rights as in any criminal court, the proceedings are generally less formal in keeping with the distinct purpose of the juvenile courts and not all criminal trial protections are afforded or required.

For instance:

- In the majority of states, the police can interrogate a child without the presence of an attorney or interested party. Simkin, *When Kids Get Arrested*, p. 23-26.
- Most states do not provide for bail or a jury trial in juvenile cases. Simkin, *When Kids Get Arrested*, p. 44.
- The proceedings may be open to the public with a wide variety of limitations and/or exceptions and the confidentiality and access to the juvenile court records vary depending on the circumstances. 2006 National Report, pp. 108-109, Markman, *Gault Retrospective*, p. 127-129.
- Fingerprints and other identifying information may be gathered. 2006 National Report, pp. 109, Simkin, *When Kids Get Arrested*, pp. 31 and 88.
- "Blended" sentencing laws may be used to impose juvenile and adult criminal penalties and the resulting penalty may effectively extend the jurisdiction of the juvenile court past the statutory upper limits. Provisions governing and prevalence of transfers and/or waivers of jurisdiction of cases from juvenile to criminal courts and vice versa vary widely from state to state, with certain offenses mandating transfers. 2006 National Report, p. 110-116.
- Most states require that if a minor is convicted as an adult that any future proceedings be adjudicated in adult criminal court. 2006 National Survey, pp. 108-115.

III. Summary

As the cases cited and above differences demonstrate, the pendulum with respect to safeguarding juvenile's due process rights in criminal proceedings continues to swing back and forth. The current trend appears to be in the direction of harsher penalties reflecting the more no-nonsense, tough-on-crime attitude pervasive in the United States in the late twentieth century. As noted above, this has led to a renewed criticism of the juvenile justice system as fundamentally failing in its attempts to strike a balance

between the protective, treatment-oriented juvenile court model and the retributive, punishment based criminal justice model. No doubt as society, the courts and other professionals address these concerns, the jurisprudence and public policy regarding juvenile justice will continue to evolve, and hopefully to improve and address the inequities and shortfalls that currently exist.