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Pennsylvania's Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae

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Pennsylvania's Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced *Parens Patriae*

I. Introduction

The debate over whether to treat children who commit murder as juveniles or adults recently resurfaced in Pennsylvania with the plight of Cameron Kocher.[1] Kocher, an intelligent fourth grader and Cub Scout,[2] was only nine years old when he was charged with murder in the shooting death of seven-year-old Jessica Ann Carr.[3] Kocher confessed to psychiatrists that he had been playing hunter when the gun went off, but that he had not seen the girl in the scope.[4] Kocher was arrested and charged with criminal homicide in a court of common pleas.[5] The trial court denied the child's request for a transfer of the matter to juvenile court[6] because it determined that Kocher was not amenable to treatment, supervision, or rehabilitation in the juvenile system.[7] In early 1992, the Supreme Court of Pennsylvania held that the court of common pleas had abused its discretion in denying Kocher's petition for a transfer to juvenile court.[8] The trial court's order was vacated, and the case was remanded for further proceedings.[9]

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1. *See* Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992) (plurality opinion).

2. Henry J. Reske, *A Childhood Tragedy Vexes Courts*, A.B.A. J., May 1992, at 32.

3. *Kocher*, 602 A.2d at 1309-10. On March 6, 1989, Kocher was home from school because of a snow holiday. *Id.* at 1309. After playing Nintendo with friends next door, Kocher went home, and the other children, including Jessica Ann Carr, began riding snowmobiles. *Id.* At home, Kocher procured the key to his father's locked gun cabinet and removed a hunting rifle equipped with a scope. *Id.* He loaded the rifle, opened a window, removed the screen, and pointed the gun toward where the other children were playing. *Id.* The gun discharged, and Jessica Ann Carr was fatally wounded. Commonwealth v. Kocher, 602 A.2d 1308, 1309-10 (Pa. 1992).

4. Reske, *supra* note 2.

5. *Kocher*, 602 A.2d at 1310.

6. *Id.*

7. *Id.* at 1313. Pennsylvania's Juvenile Act gives courts of common pleas the discretion to transfer murder cases to juvenile court when the defendant is a child. 42 PA. CONS. STAT. § 6322(a) (1990).

8. *Kocher*, 602 A.2d at 1315. Among other things, the supreme court concluded that the trial court erred in making transfer contingent upon proof that some underlying mental disease or disorder had prompted the killing. *Id.* Although this plurality opinion is not binding precedent for Pennsylvania courts, Commonwealth v. Shoop, 617 A.2d 351, 353 n.2 (Pa. Super. Ct. 1992), it may still influence future decisions concerning Pennsylvania's treatment of children who commit murder.

9. *Kocher*, 602 A.2d at 1315. In September 1992, Cameron Kocher pled no contest to involuntary manslaughter in a plea bargain that will keep him on probation until he turns twenty-

Disagreement regarding the appropriate treatment of children who commit murder is rooted in the philosophical differences between criminal and juvenile law. Criminal law emphasizes the prevention of anti-social conduct through the punishment of those who commit crimes.[10] In contrast, juvenile law disavows punishment and emphasizes treatment, supervision and rehabilitation as methods to prevent juvenile crime.[11] These fundamental differences affect judicial decisions on the matter[12] and have a profound effect on an accused child's future.

This Comment addresses Pennsylvania's treatment of children who commit murder. Part II discusses the evolution of Pennsylvania's juvenile laws. It will show how a philosophy of *parens patriae*[13] developed as the underlying foundation for the Commonwealth's juvenile justice system, even when dealing with children accused of murder. Part III analyzes the impact of four Supreme Court decisions that signaled a shift away from the *parens patriae* philosophy and toward the criminalization of juvenile court proceedings. Part IV of this Comment analyzes Pennsylvania's current juvenile laws. While *parens patriae* continues to be the underlying philosophy of the Juvenile Act, the Act recognizes that some children who commit murder should properly be tried in adult criminal courts. Part V of this Comment discusses the trend in other jurisdictions toward criminalizing juvenile courts and considers the way in which Pennsylvania courts should, in the future, treat children who commit murder.

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one. *Probation Ends Shooting Case*, THE SENTINEL (Carlisle, PA), Sept. 3, 1992, at A2. The plea bargain finally resolved a case that had been stalled for several years while the boy's status as either a juvenile or an adult was debated in the courts. *Id.*

10. *See* Leonard Packel, *A Guide to Pennsylvania Delinquency Law*, 21 VILL. L. REV. 1, 1 (1975) (reviewing the historical development of delinquency law in Pennsylvania and analyzing the Juvenile Act of 1972).

11. *Id.*

12. Both philosophies colored the opinions written in *Kocher*. In his concurrence, Justice Flaherty wrote that "the public policy of Pennsylvania does not allow the criminal prosecution of a nine-year-old child for murder. That it was attempted in this case shocks my conscience." *Id.* at 1315 (Flaherty, J., concurring). In contrast, Justice Larsen stated that "[t]his nine-year-old defendant is not an innocent victim of the tragic instances of accidental shootings occurring in homes where firearms are handled carelessly. . . . The victim, whom the majority seems to forget ever existed, was killed by a bullet deliberately aimed and shot through her back, as she was riding as a passenger on a snowmobile." *Id.* at 1316 (Larsen, J., dissenting).

13. *Parens patriae* literally means "parent of the country" and refers to the principle that the state must care for those who cannot take care of themselves, including minors who lack proper care and custody from their parents. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The term *parens patriae* originated in the English common law when the king had a royal prerogative to act as guardian to persons with legal disabilities, including infants. *Id.*

II. The Evolution of Pennsylvania's Juvenile Laws

A. Common Law Presumptions of Incapacity

Under common law, there were no separate juvenile courts.[14] Nonetheless, courts recognized that children were less capable than adults of understanding the wrongfulness of their actions.[15] Consequently, the common law allowed children to raise the defense of infancy when faced with criminal charges.[16]

The infancy defense created a presumption of incapacity for children who, because of their age, could not appreciate the moral dimensions of their behavior and for whom the threat of punishment would not serve as a deterrent.[17] At common law, children under the age of seven years were conclusively presumed to be incapable of committing crimes.[18] Children between the ages of seven and fourteen were also presumed to be incapable of committing crimes; however, this presumption could be rebutted by evidence that the child understood the wrongfulness of his acts.[19] When a child reached fourteen years of

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14. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

15. *Id.* at 509-10. *See also* Allen v. United States, 150 U.S. 551, 558 (1893) (noting the presumption that children under 15 years of age are generally incapable of committing crimes).

16. Walkover, *supra* note 14, at 509-10.

17. *In re* Tyvonne, 558 A.2d 661, 664 (Conn. 1989). The focus of the infancy defense is the ability to understand the wrongfulness of one's acts, rather than the ability to formulate criminal intent or a "guilty mind." *In re* G.T., 597 A.2d 638, 640 (Pa. Super. Ct. 1991). It is capacity, not criminal intent, that is the focus of the common-law presumptions regarding children. *Id. See also* State v. Q.D., 685 P.2d 557, 559 n.1 (Wash. 1984) (stating that a defendant's general understanding of the juvenile justice system is insufficient to establish capacity). The exact age at which children are capable of distinguishing between right and wrong and are able to conform their behavior accordingly has not been pinpointed by the legal or psychiatric communities. *See* Francis B. McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J. L. REF. 181, 214-15 (1977). The flexibility inherent in the infancy defense reflects the difficulty in determining exactly when children possess the capacity necessary to commit a crime. *Id.* at 215. See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23-24 ("the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment").

18. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.11, at 399 (2d ed. 1986). *See also* Commonwealth v. Green, 151 A.2d 241, 246 (Pa. 1959) (noting that Pennsylvania has followed the common-law rules in measuring the capacity of a child to commit a crime); Commonwealth v. Cavalier, 131 A. 229, 234 (Pa. 1925) (discussing the common-law rules concerning a child's capacity to commit a crime).

19. LAFAVE & SCOTT, *supra* note 18 § 4.11 at 399. *See also, e.g.*, Godfrey v. State, 31 Ala. 323 (1858) (holding that an eleven-year-old slave was properly convicted of murder because evidence showed that he understood the nature of his act and showed malice in its execution); Heilman v. Commonwealth, 1 S.W. 731 (Ky. 1886) (holding that jury was properly instructed that they could find defendant, a male child under twelve years of age, guilty of rape if he was

age, the presumption of incapacity ended, and the child was regarded as an adult capable of criminal behavior.[20]

The problem with the common-law approach was that an unsuccessful infancy defense meant that a child would be subject to the same sanctions as an adult criminal. Conversely, a successful infancy defense would preclude a child from receiving the treatment that he likely needed. A child who committed murder, but was found not guilty by reason of the infancy defense, still needed to be taught how to refrain from engaging in such antisocial behavior because the likelihood of continued criminal behavior was significant.[21] Because the common law did not provide treatment for juvenile offenders, it did not serve the best interests of child defendants.

B. The Birth of Parens Patriae *and Early Legislative Efforts to Reform Judicial Treatment of Juvenile Offenders*

The common-law defense of infancy met its demise with legislative recognition that children should be handled outside the jurisdiction of criminal courts.[22] In 1826, the Pennsylvania Legislature created the House of Refuge, an institution in Philadelphia that was exclusively for children.[23] The purpose of this institution was to treat and rehabilitate children and to protect them from the harsh environment which characterized adult penal institutions.[24] Thus, treatment was substituted for punishment as the method for dealing with children who committed crimes.[25]

In 1835, the Supreme Court of Pennsylvania considered the constitutionality of committing an incorrigible child to the House of Refuge without a jury trial.[26] The court held that no jury trial was

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physically capable of the crime and knew the wrongfulness of his act).

20. LAFAVE & SCOTT, *supra* note 18, § 4.11, at 399.

21. *See* Commonwealth v. Morningwake, 595 A.2d 158, 162 (Pa. Super. Ct. 1991); Commonwealth v. Cessna, 537 A.2d 834, 839 (Pa. Super. Ct. 1988).

22. Walkover, *supra* note 14, at 506. For a description of the demise of the infancy defense in the face of pre-delinquency theory, see generally Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 661-66 (1970).

23. Act of March 23, 1826, ch. 47, 1826 Pa. Laws 133 *repealed by* Act of Dec. 14, 1992, No. 142, § 2, 1992 Pa. Laws 887, 888.

24. 1826 Pa. Laws at 133. For a discussion of the oppressive and dangerous conditions under which children are held in adult jails, see Mark Soler, *Litigation on Behalf of Children in Adult Jails*, 34 CRIME & DELINQ. 190, 190-91, 195-97, 200-201 (1988). Children in such circumstances were commonly confronted with isolation, darkness, filth, contact with adult inmates, and abuse by both staff and other inmates. *Id.* at 190-91.

25. Walkover, *supra* note 14, at 512.

26. *Ex parte* Crouse, 4 Whart. 9 (Pa. 1839). By 1835, the type of conduct for which children could be committed to the House of Refuge had expanded from vagrancy and criminal offenses

required because such a commitment was not intended as punishment, but was merely for the benefit of the child.[27] The court called the state's power to confine children for their own benefit "*parens patriae*."[28] Accordingly, the state was not perceived as the punisher of the child, but as the child's paternalistic guardian, acting in the child's best interests.[29] The moral blameworthiness of the child was of no consequence because the child needed treatment and rehabilitation.[30]

The doctrine of *parens patriae* became firmly rooted in Pennsylvania law during the 1890s. The Act of June 8, 1893 allowed courts to commit children not only to the House of Refuge, but also to other charitable societies incorporated for the purpose of protecting wayward or unmanageable children.[31] The Act of June 12, 1893 mandated that children under sixteen years of age could not be imprisoned with adults who were charged with or convicted of crimes.[32] Moreover, the trials of children were to be separate from the trials of other cases.[33] These acts represent the Legislature's commitment to protecting children from the punitive treatment accorded to adult criminals. The enactments prompted an immediate judicial response.[34] The Act of June 12, 1893 was declared unconstitutional

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to incorrigible or vicious conduct. Supplement of April 10, 1835, No. 92, § 1, 1835 Pa. Laws 133, 133. When an incorrigible child was considered beyond control by his parent or guardian, the child could be committed to the House of Refuge. *Id.* Mary Ann Crouse was committed to the Philadelphia House of Refuge by her mother for being difficult to manage; her father opposed the incarceration and argued that since she had not been accorded a jury trial, the State's actions were unconstitutional. *Ex parte Crouse*, 4 Whart. at 11.

For one of the few reports on the treatment of female juvenile offenders during the mid-nineteenth century, see Chaim M. Rosenberg & Herbert J. Paine, *Female Juvenile Delinquency: A Nineteenth-Century Follow-Up*, 19 CRIME & DELINQ. 72 (1973). During the nineteenth century, studies seldom analyzed the impact of detention on girls who passed through the courts and were committed to reform institutions. *Id.* at 73. Nearly all of the studies on delinquents dealt with boys. *Id.*

27. *Ex parte* Crouse, 4 Whart. at 11. The court declared that "not only [was] the restraint of her person lawful, but it would [have been] an act of extreme cruelty to release her from it." *Id.*

28. *Id.* For a definition of "*parens patriae*," see *supra* note 13. *Ex parte Crouse* was the first delinquency case in this country in which the term "*parens patriae*" was used. Packel, *supra* note 10, at 3 n.11.

29. *In re* Devon T., 584 A.2d 1287, 1291 (Md. Ct. Spec. App. 1991) (discussing the prevailing philosophy in juvenile courts at the turn of the century).

30. *Id.*

31. Act of June 8, 1893, No. 301, 1893 Pa. Laws 399 (codified at PA. STAT. ANN. tit. 11, § 27 (1965)).

32. Act of June 12, 1893, No. 328, § 1, 1893 Pa. Laws 459, 459 (repealed 1933).

33. *Id.* § 2.

34. Courts for Trial of Infants, 3 Pa. D. 753 (Bucks County Ct. 1893).

because it was not uniform in its treatment of all children.[35] In classifying criminals by age, the Act provided different treatment to children depending on whether they were under or over sixteen years of age.[36]

Despite this constitutional setback, legislative efforts to help wayward children continued. The establishment of a separate judicial system to deal specifically with the problems of children marked the next legislative step forward.[37] In 1901, the Pennsylvania General Assembly passed an act to regulate the treatment and control of dependent, neglected, and delinquent children under the age of sixteen.[38] The Act granted the courts of oyer and terminer[39] original jurisdiction in all cases coming within the terms of the Act.[40] A special courtroom was to be provided for the hearing of such cases, and the court was to be called the juvenile court.[41]

Like the Act of 1893, the 1901 Act was subjected to close constitutional scrutiny. In *Mansfield's Case*,[42] the Superior Court of Pennsylvania held that the 1901 act violated Article III, Section 7 of the Pennsylvania Constitution, which forbids the passage of a law granting to individuals any special or exclusive privilege or immunity.[43] The superior court ruled that the Act's separation of individuals into two

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35. *Id.* at 754. Judge Yerkes expressed his disapproval of the preferential treatment accorded to children: "It is quite probable that this Act became a law through inadvertence. It represents humanitarianism gone mad . . . . Some of the worst criminals known to the law are persons under sixteen years of age." *Id.*

36. *Id.* The effect of the Act can be highlighted by considering the treatment of two children, one just under sixteen years of age and one just over sixteen years of age, who together commit a crime. The Act required that the offenses of each child be examined separately at a preliminary hearing, be tried in separate courts, and be recorded on separate dockets. Act of June 12, 1893, No. 328, 1893 Pa. Laws 459 (repealed 1933). The prompt and cost-effective administration of justice was undoubtedly defeated by dual proceedings.

37. Packel, *supra* note 10, at 4.

38. Act of May 21, 1901, No. 185, 1901 Pa. Laws 279 *repealed by* Act of April 23, 1903, No. 205, § 12, 1903 Pa. Laws 274, 278.

39. In the United States, certain higher criminal courts were called courts of oyer and terminer. BLACK'S LAW DICTIONARY 1107 (6th ed. 1990).

40. § 2, 1901 Pa. Laws at 279. The Act generally did not apply to children under the age of sixteen who were inmates of a state institution or training school for boys, an industrial school for girls, or some other institution incorporated under Pennsylvania law. § 1, 1901 Pa. Laws at 279.

41. § 3, 1901 Pa. Laws at 280.

42. 22 Pa. Super. 224 (1903).

43. *Id.* at 234. *See* PA. CONST. art. III, § 7. This case involved a petition to commit a minor to the House of Refuge for breaking into a store and stealing money. *Id.* at 229. Despite the fact that the lower court had been without jurisdiction to hear the case because the petition filed with the court had not been verified by an affidavit, the superior court proceeded to review all aspects of the Act of 1901 in the interest of public concern. *Id.*

distinct age groups for purposes of criminal procedure conferred a special immunity on children who were under sixteen years of age.[44]

C. *Successful Legislative Efforts to Implement* Parens Patriae

Advocates of a juvenile justice system wasted no time in promulgating new legislation to aid troubled youths following the setback in *Mansfield's Case*. In 1903, the Pennsylvania General Assembly passed another act defining the powers of the courts over dependent, neglected, incorrigible, and delinquent children under the age of sixteen.[45] Significantly, the juvenile courts no longer had original jurisdiction over *all* children charged with violations of the law.[46] Instead, only those children who would benefit from treatment at the House of Refuge or other charitable societies were to be referred to the juvenile court.[47]

Unlike the Act of 1901, the Act of 1903 withstood constitutional scrutiny. In considering many of the same issues that were raised before the superior court in *Mansfield's Case*,[48] the Pennsylvania Supreme Court held in *Commonwealth v. Fisher*[49] that the 1903 act was constitutional and did not grant special privileges to children based on age.[50] The court emphasized that the Act of 1903 had not been promulgated to punish juvenile offenders, but to save all children under a certain age whose salvation was the duty of the State.[51] The court

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44. *Mansfield's Case*, 22 Pa. Super. at 233-34. The court also expressed its concern that the 1901 act could conflict with the Equal Protection Clause of the United States Constitution. *Id.* at 234.

45. Act of April 23, 1903, No. 205, 1903 Pa. Laws 274 (repealed 1933). The importance of the concept of *parens patriae* was highlighted in the Act's preamble, which stated that "the real interests of . . . children require that they be not incarcerated in penitentiaries and jails, as members of the criminal class, but be subjected to a wise care, treatment and control, that their evil tendencies may be checked and their better instincts may be strengthened . . . ." *Id.* at 274.

46. § 1, 1903 Pa. Laws at 274.

47. *Id.* The 1903 act also contained no provision for a right to a jury trial, even if demanded by an interested party. § 2, 1903 Pa. Laws at 275.

48. 22 Pa. Super. 224 (1903).

49. 62 A. 198 (Pa. 1905).

50. *Id.*

51. *Id.* The court noted that the 1903 act did not create distinctly new courts, but merely conferred additional powers upon the old courts and more clearly defined those powers. *Id.* Although these courts were to be called juvenile courts when caring for children, the *Fisher* court found that this was simply a convenient designation; no such courts, as independent tribunals, were created. *Id.* The court also noted that a jury trial was not necessary in a juvenile proceeding. Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905). The Act of 1903 was not intended to govern the trial of a child charged with a crime but was the means of saving a child from such an ordeal. *Id.* In upholding the constitutionality of the Act, the court emphasized that the Act violated no protected right, but performed one of the most important duties that organized society owes to its

reemphasized the active role that the State and its courts must play in preserving and promoting the welfare of children through protection and rehabilitation instead of punishment.[52] Thus, *Fisher* reaffirmed the philosophy of *parens patriae*.

The court's decision in *Fisher* was a milestone in the development of Pennsylvania's juvenile justice system. No longer was the adjudication of children to be an all-or-nothing approach whereby children would face either adult criminal sanctions or no sanctions at all because of a successful infancy defense. The philosophy of *parens patriae* provided Pennsylvania courts with a basis for evaluating the unique needs of children. The courts' disposition of children accused of committing crimes could thus be made in accordance with those needs.

Despite early setbacks, legislation designed to establish guidelines by which juveniles would be treated in Pennsylvania courts gained momentum. The Act of 1903 was subsequently amended to add several new provisions to protect the welfare of children.[53] These amendments and related judicial decisions were consolidated in 1933 when the General Assembly passed comprehensive legislation dealing with the care, trial, placement, and commitment of delinquent, dependent, and neglected children under sixteen years of age.[54] The 1933 act clearly distinguished juvenile court powers from those powers exercised in the ordinary administration of the criminal law.[55]

Although the philosophy of *parens patriae* was perpetuated in the Act of 1933, the Act provided that juvenile courts could not exercise original jurisdiction over children who had committed murder.[56] The

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helpless members: to protect them. *Id.* at 201.

52. Commonwealth v. Fisher, 62 A. 198 (Pa. 1905).

53. One amendment provided that juvenile court orders were subject to change or extension until minors under sixteen years of age reached twenty-one. Act of April 22, 1909, No. 73, 1909 Pa. Laws 119 (repealed 1933). A second amendment gave juvenile courts exclusive jurisdiction over all proceedings which may have been brought before them. Act of June 28, 1923, No. 345, 1923 Pa. Laws 898 (repealed 1933). Where, however, the interests of the State required prosecution of a particular case, a judge could certify the case to the district attorney, who would proceed with it as if the juvenile court had never obtained jurisdiction. *Id.* § 11. The amendment specified that the powers of the juvenile court could be exercised whenever any magistrate or justice of the peace committed a child arrested for any indictable offense *other than murder*. § 2(2), 1923 Pa. Laws at 899.

54. *See* Act of June 2, 1933, No. 311, 1933 Pa. Laws 1433 (repealed 1972).

55. *Id.* For a discussion of the decision-making process of juvenile court judges and the factors associated with judicial decisions, see generally Frank R. Scarpitti & Richard M. Stephenson, *Juvenile Court Dispositions: Factors in the Decision-Making Process*, 17 CRIME & DELINQ. 142 (1971).

56. § 4(2), 1933 Pa. Laws at 1435.

Legislature's decision to withhold from juvenile courts original jurisdiction over murder cases was evidence of the Legislature's intent to treat murder differently from any other crime that could be committed by children. Where a prima facie case of felonious homicide was alleged, the juvenile had to be held for further proceedings in criminal court.[57] Jurisdiction would be transferred to a juvenile court only if the trial judge decided that it was in the best interests of both the child and society not to pursue criminal prosecution.[58] Thus, even when the charge against a juvenile was murder, the best interests of the child were still evaluated in keeping with the *parens patriae* philosophy.

The establishment of a juvenile justice system in Pennsylvania implied that the common-law approach for dealing with the special needs of children was no longer the best way to protect their welfare. Clearly, the rehabilitative foundation of *parens patriae* was beneficial to children accused of committing crimes, including murder. Under *parens patriae*, children who committed murder were less likely to face the punitive sanctions of an adult criminal court. Unless a child posed a danger to society, jurisdiction over the case would be transferred from criminal to juvenile court. This had not been the case under common law, when there were no separate juvenile courts.

Although the *parens patriae* concept has been credited with the development of a judicial system that focused on individual diagnosis and treatment,[59] that focus virtually ignored traditional criminal safeguards, such as the right to a jury trial.[60] *In re Holmes*[61] brought concern for the lack of such traditional safeguards to the attention of the Pennsylvania Supreme Court.[62] In upholding the provisions of the Act of 1933, the supreme court emphasized that juvenile courts were not criminal courts.[63] Therefore, the constitutional rights guaranteed to adult criminals were not applicable to children brought before juvenile courts.[64]

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57. *See, e.g.*, Commonwealth v. Schmidt, 299 A.2d 254, 264 (Pa. 1973); Commonwealth v. Moore, 270 A.2d 200, 202 (Pa. 1970); *In re* Gaskins, 244 A.2d 662, 669 (Pa. 1968).

58. *In re Gaskins*, 244 A.2d at 669.

59. Packel, *supra* note 10, at 8.

60. *Id.*

61. 109 A.2d 523 (Pa. 1954).

62. In *Holmes*, the Superior Court of Pennsylvania had adjudicated a thirteen-year-old boy delinquent on larceny charges despite his parents' alleged failure to receive adequate notice of his hearing and the admission of hearsay evidence in the proceeding. *In re* Holmes, 103 A.2d 454 (Pa. Super. Ct. 1954).

63. *In re Holmes*, 109 A.2d at 525.

64. *Id.* In his dissent, Justice Musmanno previewed the future controversy that would arise over according juvenile delinquents constitutional rights:

The controversy over the appropriate constitutional criminal procedure in juvenile adjudications would be a major issue facing the U.S. Supreme Court during the 1960s. Throughout the country, pressure was building for a constitutional overhaul of particular procedures within the juvenile courts.[65] At the same time, however, children were being denied fundamental rights, including the privilege against self-incrimination, the right to adequate notice, and the right to confront witnesses. While juvenile courts were not considered criminal courts, they still had broad discretion to decide the fates of children who were accused of crimes.[66] The type and duration of a child's treatment program depended on the evidence presented to the juvenile court.[67] Therefore, children needed the ability to assert fundamental constitutional rights in order to mitigate possible abuses of discretion by juvenile courts. Pressures for constitutional reform of the juvenile justice system, both in Pennsylvania and in other states, culminated in a series of responses from the United States Supreme Court.

III. Constitutional Safeguards in the Juvenile Court: A Movement Away from *Parens Patriae* Toward the Criminalization of Juvenile Proceedings

Four cases decided by the United States Supreme Court during the late 1960s and early 1970s had a significant effect on the philosophical underpinnings of the juvenile justice system in Pennsylvania.[68] The decisions ultimately sparked new legislation in Pennsylvania that was once again designed to reform the treatment of children who were accused of crimes.[69]

> The 14th Amendment to the Constitution of the United States guarantees to all citizens of the United States due process of law. . . . I cannot bring myself to accept[] the self-revolting [sic] idea that the Legislature intended that children should be deprived of their liberty on evidence that would walk their grown-up elders triumphantly out of Criminal Court.

Id. at 535.

65. Packel, *supra* note 10, at 9.

66. *See In re* Holmes, 109 A.2d 523 (Pa. 1954); Commonwealth v. Fisher, 62 A. 198 (Pa. 1905); *In re* Mont, 103 A.2d 460 (Pa. Super. Ct. 1954).

67. *See* cases cited *supra* note 66.

68. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966). *See generally* Walkover, *supra* note 14, at 517-23 (analyzing the purported demise of the *parens patriae* philosophy in juvenile courts and the recharacterization of juvenile courts as criminal in nature).

69. *See infra* part IV.

With *Kent v. United States*,[70] the Supreme Court began to apply traditional criminal justice principles to juvenile proceedings.[71] The Court recognized that such proceedings were considered to be civil rather than criminal in nature[72] and, accordingly, children could not complain when they were deprived of the numerous rights that were guaranteed to criminal defendants.[73] Nevertheless, the Supreme Court held that the philosophy of *parens patriae* was not an invitation to procedural arbitrariness.[74] Thus, the failure to comply with statutorily mandated procedural safeguards was improper.[75] The Court declined, however, to rule that the constitutional rights guaranteed to adult criminals must be applied in juvenile proceedings.[76]

The relationship between the procedural informality of juvenile courts and the constitutional right to due process of law was further developed by the Supreme Court in *In re Gault*.[77] In his appeal, Gault claimed that the Arizona juvenile court had violated his constitutional rights to notice of the charges against him, to counsel, to confrontation and cross-examination of witnesses against him, and to the exercise of a privilege against self-incrimination.[78] The Supreme Court agreed with Gault, finding that despite the highest benevolent motives,

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70. 383 U.S. 541 (1966).

71. *Id.* Morris Kent was arrested at the age of sixteen on charges of housebreaking, robbery and rape. *Id.* at 543, 548. As a juvenile, he was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court unless that court waived its jurisdiction after a "full investigation" of the facts. *Id.* at 547-48. Instead of ruling on Kent's motion for a hearing on the issue of waiver, the juvenile court entered an order waiving its jurisdiction, and Kent was sent to the district court for trial as an adult. *Id.* at 546. The court made no findings and provided no reasons for its waiver of jurisdiction. Kent v. United States, 383 U.S. 541, 546 (1966). For a general discussion of waiver proceedings, see SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 4-1 to 4-32 (1980).

72. *Kent*, 383 U.S. at 555. In a juvenile adjudication, the state was supposed to act as *parens patriae* and not as an adversary.

73. *Id.*

74. *Id.*

75. *Kent v. United States*, 383 U.S. 541, 552-53 (1966).

76. *Id.* at 556. The court noted that in juvenile proceedings in other jurisdictions, a child was not entitled to bail, to indictment by grand jury, to a speedy and public trial, to trial by jury, to immunity against self-incrimination and to confrontation of his accusers. *Id. See also* Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959). *But cf.* Black v. United States, 355 F.2d 104 (D.C. Cir. 1965) (holding that a juvenile court's waiver of jurisdiction was invalid where a juvenile was not advised of his right to either retained or appointed counsel).

77. 387 U.S. 1 (1967). Fifteen-year-old Gerald Gault was committed to the Arizona Industrial School until he reached the age of majority for having made obscene telephone calls. *Id.* at 4, 7-8. If Gault had been over eighteen and not subject to the jurisdiction of the juvenile court, his maximum punishment would have been a fine of $5 to $50 or imprisonment for not more than two months. *Id.* at 29.

78. *Id.* at 9-10.

departures from established principles of due process had frequently resulted in depriving some juveniles of fundamental rights.[79] The Court acknowledged that due process of law is the primary and indispensable foundation of individual freedom.[80] The Court held that some constitutional safeguards guaranteed to adult criminals by the Fourteenth Amendment should similarly be accorded to juveniles.[81] The Supreme Court, however, did not undermine the basic philosophy of the juvenile courts which was to treat and rehabilitate children, rather than punish them.[82] It was not the intention of the Supreme Court to convert juvenile courts into criminal courts for young people.[83]

The constitutional safeguards articulated in *In re Gault* were carried one step further in 1970 when the Supreme Court considered the appropriate standard of proof in juvenile adjudications.[84] The Court stated in *In re Winship*[85] that the essentials of due process and fair treatment mandated proof beyond a reasonable doubt when a juvenile is charged with an act that would constitute a crime if committed by an adult.[86] The Court concluded that requiring proof beyond a reasonable

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79. *Id.* at 18-19. For a discussion of a juvenile's rights to due process of law, see Gallegos v. Colorado, 370 U.S. 49 (1962) (holding that a coerced confession on which a conviction of first degree murder may have rested was obtained in violation of the Due Process Clause); Haley v. Ohio, 332 U.S. 596 (1948) (holding that the Due Process Clause barred the use of a juvenile's coerced confession); Black v. United States, 355 F.2d 104 (D.C. Cir. 1965) (holding that a juvenile court's waiver of jurisdiction was invalid where the juvenile had not been advised of his right to counsel).

80. *In re* Gault, 387 U.S. 1 (1967).

81. *Id.* In *Gault*, the Supreme Court held that juvenile offenders were constitutionally entitled to timely and adequate written notice, the privilege against self-incrimination, and the assistance of counsel in juvenile delinquency proceedings. *Id.* The Court noted that its decision addressed only the adjudicatory stage of juvenile proceedings, not the procedures or constitutional rights applicable to the pre-judicial or post-adjudicative stages of the juvenile process. *Id.* at 13. For a multistate analysis of how the presence of an attorney affects the disposition of cases in juvenile courts, see Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988).

82. *In re* Gault, 387 U.S. 1 (1967). The Supreme Court reiterated the opinion expressed in Kent v. United States, 383 U.S. 541 (1966), that while a juvenile court adjudication of delinquency need not conform with all of the requirements of a criminal trial, it must measure up to the essentials of due process and fair treatment. *Id.* at 30.

83. *Commonwealth v. Johnson*, 234 A.2d 9, 17 (Pa. Super. Ct. 1967) (interpreting *In re* Gault).

84. *In re* Winship, 397 U.S. 358 (1970). The Court noted that it was only analyzing a single, narrow question and was not considering whether there were other "essentials of due process and fair treatment" required during the adjudicatory stage of a delinquency proceeding. *Id.* at 359 n.1.

85. 397 U.S. 358 (1970).

86. *Id.* at 361-68. The extent to which the juvenile justice system had begun to take on the characteristics of the adult criminal system was reflected in Justice Harlan's concurring opinion: "When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that,

doubt would not force states "to abandon or displace any of the substantive benefits of the juvenile process."[87]

The holdings in *Kent*, *Gault* and *Winship* indicated a shift from judicial informality in the juvenile justice system to reliance on safeguards of constitutional criminal procedure. However, any recharacterization of the juvenile court as criminal in nature was halted by the Supreme Court's decision in *McKeiver v. Pennsylvania*.[88] In *McKeiver*, the Supreme Court held that juveniles are not constitutionally entitled to trials by jury in delinquency proceedings.[89] The Court reaffirmed that a juvenile court proceeding had not yet been equated with a criminal prosecution within the meaning of the Sixth Amendment.[90] Although the Court upheld its earlier conclusion that a juvenile adjudication must measure up to the essentials of due process and fair treatment,[91] it concluded that a jury was no more fair or accurate a factfinder than a judge alone.[92] Finally, the Court recognized that juvenile courts needed to retain their flexibility to deal with the varying needs of delinquent children and that jury trials would not encourage such flexibility.[93]

In these four decisions, the Supreme Court did not specifically address the adjudication of children who committed murder. Yet, the Court set forth the constitutional safeguards which were to be accorded to such children if they were tried for murder in juvenile proceedings. Although a child who committed murder would be guaranteed such

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while the consequences are not identical to those in a criminal case, the differences will not support a distinction in the standard of proof." *Id.* at 373-74 (Harlan, J., concurring).

87. *Id.* at 367 (quoting *In re* Gault, 387 U.S. 1, 21 (1967)).

88. 403 U.S. 528 (1971).

89. *Id.* The Court noted that the constitutional rights provided to juveniles during delinquency proceedings include the privilege against self-incrimination, the standard of proof of beyond a reasonable doubt, and the rights to appropriate notice, to confrontation and cross-examination of witnesses, and to counsel. *Id.* at 533.

90. *Id.* at 541. *See also* Kent v. United States, 383 U.S. 541, 554 (1966); *In re* Gault, 387 U.S. 1, 17, 49-50 (1967); *In re* Winship, 397 U.S. 358, 365-66 (1970). If a juvenile court proceeding had fallen within the reach of the Sixth Amendment, "the right to a speedy and public trial, by an impartial jury," would have been mandated. U.S. CONST. amend. VI.

91. *See McKeiver*, 403 U.S. at 543. The Court noted that some of the constitutional requirements attendant upon a criminal trial had equal application to a juvenile adjudication. *Id.* at 533. Yet, the Court refrained from saying that all rights which were constitutionally assured to adult criminals were to be made available to juveniles at delinquency proceedings. *Id.*

92. *Id.* at 543.

93. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551-53 (1971). In his concurring opinion in *McKeiver*, Justice White asserted that juries need not be mandated as long as a juvenile justice system is reasonably based on a *parens patriae* philosophy, even if its implementation is not perfect. *Id.*

constitutional rights if tried as an adult, the Supreme Court emphasized the importance of such rights in juvenile courts.

The importance placed on constitutional criminal procedures in juvenile courts signaled a shift away from the *parens patriae* philosophy. Juvenile courts appeared to become less treatment-oriented and more criminally-oriented.[94] It would be a mistake, however, to characterize the juvenile courts as having become synonymous with adult criminal courts. The Supreme Court stopped well short of effecting such a transformation. Rather, the Court merely instituted procedural safeguards to prevent abuses of discretion within the juvenile justice system. Without such safeguards, children accused of crimes would be subject to the unfettered power of juvenile court judges. The fact that juvenile courts had not become criminal courts for children supports the idea that the philosophy of *parens patriae* continued to play a role, albeit diminished, in the country's juvenile justice systems. In Pennsylvania, the continued importance of *parens patriae* was emphasized by the promulgation of new juvenile justice legislation, which is the focus of the next section.

IV. Pennsylvania's Response to Constitutional Safeguards: The Juvenile Act of 1972 and Reinforcement of the *Parens Patriae* Philosophy

In an effort to comply with the constitutional standards enunciated by the Supreme Court, the Pennsylvania Legislature passed the Juvenile Act of 1972.[95] The Act has four express purposes: to preserve the family unit and protect children; to substitute care and rehabilitation for criminal sanctions when dealing with delinquent children; to separate children from their parents only when necessary for their welfare or for public safety; and to protect the legal rights of all parties in a juvenile proceeding.[96] Although the Supreme Court's rulings had eliminated the procedural informality inherent in the *parens patriae* philosophy,

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94. *See In re* Javier A., 159 Cal. App. 3d 913 (1984); *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983); *In re* K.V.N., 283 A.2d 337 (N.J. Super. Ct. App. Div. 1971); State v. Lawley, 591 P.2d 772 (Wash. 1979); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401 (W. Va. 1980). *See also* Barry C. Feld, *The Juvenile Court Meets the Principle Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821 (1988).

95. Act of December 6, 1972, No. 333, 1972 Pa. Laws 1464, *amended by* Judiciary Act of 1976, No. 142, 1976 Pa. Laws 586, *repealed by* Judiciary Act Repealer Act, No. 53, § 2, 1978 Pa. Laws 202, 346 (codified as amended at 42 PA. CONS. STAT. §§ 6301-6365 (1990 & Supp. 1993)). *See generally* Robert W. Barton, Comment, *Proposed Pennsylvania Juvenile Act*, 75 DICK. L. REV. 235 (1970) (discussing legislative changes to Pennsylvania's juvenile justice system).

96. 42 PA. CONS. STAT. § 6301(b) (1990).

Pennsylvania's new legislation reflected the philosophy's benevolent intent.

A. Jurisdiction of Criminal and Juvenile Courts

The Juvenile Act vests the courts of common pleas with jurisdiction over all children coming within the provisions of the Act.[97] Those courts have jurisdiction over both delinquent and dependent children.[98] A delinquent child is a child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision, or rehabilitation.[99] A dependent child is a child under the age of ten who has committed a delinquent act.[100] A delinquent act is any act that would be a crime in Pennsylvania, a crime in another state if the act occurred in that state, a crime under Federal law, or a crime under local ordinances.[101]

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97. *See id.* §§ 6301 (defining "court"), 6303 (defining scope of Juvenile Act). To distinguish between the different functions performed by the courts of common pleas, this Comment will refer to the these courts as either juvenile or criminal courts, depending on the functions being performed. The Juvenile Act defines a "child" to include the following individuals: (1) those under age 18; (2) those under 21 who have committed an act of delinquency before reaching age 18; and (3) those adjudicated dependent before reaching age 18 and who have requested the court to retain jurisdiction until a course of instruction or treatment has been completed. 42 PA. CONS. STAT. § 6302 (1990).

98. 42 PA. CONS. STAT. §§ 6303(a)(1) (1990).

99. *Id.* § 6302.

100. *Id.* Several factors are considered in determining whether a child is a dependent child. According to the Juvenile Act, a "dependent child" is one who:

> (1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals; (2) has been placed for care or adoption in violation of law; (3) has been abandoned by his parents, guardian, or other custodian; (4) is without a parent, guardian, or legal custodian; (5) while subject to compulsory school attendance is habitually and without justification truant from school; (6) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision; (7) is under the age of ten years and has committed a delinquent act; (8) has been formerly adjudicated dependent, and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in paragraph (6); or (9) has been referred pursuant to section 6323 (relating to informal adjustment), and who commits an act which is defined as ungovernable in paragraph (6).

101. *Id.* The inclusion of crimes committed in other states or under federal law ensures that children residing in Pennsylvania may receive the benefits of the Juvenile Act rather than be subjected to a trial in another state or in a federal court. Packel, *supra* note 10, at 12-13. Such language indicates that while the *parens patriae* philosophy is fundamental to Pennsylvania's Juvenile Act, it does not play the same role in the juvenile justice systems of other states.

Significantly, a "delinquent act" does not include the crime of murder,[102] which continues to be within the original jurisdiction of the criminal courts.[103] The omission of murder from the definition of a delinquent act reflects continued legislative concern for the serious nature and consequences of such a crime.[104] It also indicates an unwillingness to automatically grant jurisdiction to the juvenile courts over all children accused of murder. The Pennsylvania Legislature implicitly recognized that not every child who commits murder will be amenable to the rehabilitative approach of the *parens patriae* philosophy. Yet, for every child who could benefit from treatment, adjudication by the juvenile courts will be appropriate, as reflected by the Act's transfer provision.[105]

B. Transfer of Juvenile Murder Cases from Criminal to Juvenile Courts

According to Section 6322(a) of the Juvenile Act, when a child commits murder, jurisdiction is vested in the criminal court and the child must petition to have his case transferred to a juvenile court.[106] Treatment as a juvenile is not an absolute right in a murder proceeding, but is instead in the discretion of the criminal court.[107] In

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102. 42 PA. CONS. STAT. § 6302(2).

103. *Id.* § 6322(a). The prosecution of all criminal acts involving juvenile offenders, except murder, is within the exclusive jurisdiction of the juvenile court. *Id.* § 6322(a).

104. The seriousness with which some jurisdictions regard murder committed by children is reflected in several state statutes that permit the execution of juvenile capital offenders. *See* Maria M. Homan, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOK. L. REV. 767 (1987). The Supreme Court has held that imposing the death penalty upon juveniles does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Stanford v. Kentucky, 492 U.S. 361 (1989). *But see* Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that imposition of the death penalty on a fifteen-year-old convicted of first degree murder violated the Eighth Amendment prohibition against cruel and unusual punishment). The role of counsel should be to provide sufficient information about the juvenile's family, educational background, and psychological makeup to constitute a convincing defense in mitigation of the death penalty. Homan, *supra.*

105. 42 PA. CONS. STAT. § 6322(a).

106. Section 6322(a) of the Juvenile Act provides that:

> [I]f it appears to the court in a criminal proceeding that the defendant is a child, this chapter shall immediately become applicable, and the court shall forthwith halt further criminal proceedings, and, where appropriate, transfer the case to the division or a judge of the court assigned to conduct juvenile hearings . . . . If it appears to the court in a criminal proceeding charging murder, that the defendant is a child, the case may similarly be transferred and the provisions of this chapter applied.

Id.

107. *Id. See also* Commonwealth v. Pyle, 342 A.2d 101 (Pa. 1975) (holding that a juvenile defendant in a murder case has the burden of showing that his case should not be in criminal court). Under the former Juvenile Court Law, courts had no discretion to transfer murder cases.

Commonwealth v. Pyle,[108] the Pennsylvania Supreme Court held that a juvenile defendant in a murder case bears the burden of showing that his case does not belong in criminal court.[109] The court interpreted the Juvenile Act to permit the transfer of murder proceedings to a juvenile court "where the young offender's need for care, guidance and control as a juvenile outweighs the state and society's need to apply legal restraint and discipline as an adult."[110] The court reasoned that this interpretation was inherent in the Pennsylvania Legislature's decision to "widen[] the avenue for juvenile treatment" by permitting transfer of murder proceedings to juvenile court.[111]

The Juvenile Act did not, however, address the issue of what specific factors courts should evaluate in determining whether a transfer of jurisdiction is appropriate in a particular murder case.[112] Nevertheless, in *Commonwealth v. Pyle*, the Supreme Court of Pennsylvania made transfer to juvenile court contingent on proof of a defendant's need for and amenability to the supervision, care, or rehabilitation that he could receive under the juvenile system.[113] In evaluating Pyle, the court suggested consideration of such factors as the child's personal make-up, the child's previous history, and the nature and circumstances of the alleged murder.[114] The court held that where a child cannot prove that he belongs in a juvenile setting, jurisdiction remains vested in the criminal court.[115]

Act of June 2, 1933, No. 311, 1933 Pa. Laws 1433 (repealed 1972). Once a prima facie case of murder was established, the trial court judge was required to hold the juvenile for further proceedings in the criminal courts. *See, e.g., In re* Gaskins, 244 A.2d 662 (Pa. 1968).

108. 342 A.2d 101 (Pa. 1975). This was the first case to reach the Supreme Court of Pennsylvania that involved the discretionary transfer of a murder case to juvenile court. *Id.* at 104.

109. *Id.* at 106. The decision to transfer a child from adult to juvenile court does not affect the procedural or substantive aspects of a conviction in a criminal court. *Id.* at n.12. Because the Commonwealth still bears the burden of proving murder beyond a reasonable doubt, placing the burden on children to show that they do not belong in criminal court in no way denies them their rights to due process. *Id.*

110. Commonwealth v. Pyle, 342 A.2d 101, 104 (Pa. 1975) (emphasis omitted). Research has suggested that the ultimate fate of a youth who commits a crime may be determined by factors other than the act itself. *See* William H. Barton, *Discretionary Decision-Making in Juvenile Justice*, 22 CRIME & DELINQ. 470 (1976). In addition to the offense and perpetrator's offense history, the defendant's sex, race and social class appear to be salient to decision-makers. *Id.*

111. *Pyle*, 342 A.2d at 104.

112. *Id.*

113. *Id.* at 106.

114. *Id.* at 106-07 n.13. The *Pyle* court developed its criteria by referring to Kent v. United States, 383 U.S. 541, 565-68 (1966). *Id.*

115. *Commonwealth v. Pyle*, 342 A.2d at 107. Pennsylvania courts have had many occasions to determine that, for a variety of reasons, particular children would not be amenable to the Commonwealth's juvenile justice system. *See, e.g.*, Commonwealth v. Romeri, 470 A.2d 498 (Pa. 1983); Commonwealth v. Sourbeer, 422 A.2d 116 (Pa. 1980); Commonwealth v. Wade, 402 A.2d

Because the criminal court has original jurisdiction over all murder charges, irrespective of the age of the alleged perpetrator, there is room for abuse of discretion by the criminal courts.[116] This may be especially true where children accused of murder are young, but society nonetheless demands that they be punished. In recognition of the potential for such abuse, the Juvenile Act sets forth guidelines for assuring that those children who are amenable to treatment will receive rehabilitation and not punishment.[117]

In 1986, the Pennsylvania Legislature amended the Juvenile Act to specify the criteria that should be weighed by a criminal court in deciding whether to transfer a child accused of murder to juvenile court.[118] Section 6322(a) provides that a child shall be required to show the court that he is amenable to treatment, supervision, or rehabilitation as a juvenile by meeting certain criteria.[119] The factors to be considered by a criminal court in determining whether to exercise original jurisdiction over a child accused of murder include the child's age, mental capacity, and maturity; the degree of criminal sophistication displayed by the child; prior records; the nature and extent of prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; whether the child can be rehabilitated prior to the expiration of juvenile court jurisdiction; probation or institutional reports; the nature and circumstances of the acts for which the transfer is sought; and any other relevant factors.[120]

The factors set forth above give a court of common pleas sound discretion to look back to the time of the murder, to look presently at the time of the petition for a transfer to juvenile court, and to look forward to the period of rehabilitation when evaluating whether a child

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1360 (Pa. 1979); Commonwealth v. Leatherbury, 568 A.2d 1313 (Pa. Super. Ct. 1990); Commonwealth v. Cessna, 537 A.2d 834 (Pa. Super. Ct. 1988). *But see, e.g.*, Commonwealth v. Greiner, 388 A.2d 698 (Pa. 1978) (holding that evidence was insufficient to establish that defendant's case should not be transferred to juvenile court).

116. A criminal court's determination about a transfer to juvenile court will not be disturbed absent a showing that the judge committed a "gross abuse of discretion." Commonwealth v. Leatherbury, 568 A.2d 1313, 1315 (Pa. Super. Ct. 1990). In defining "gross abuse of discretion," the superior court has stated that such abuse must consist of "a misapplication of the law or an exercise of manifestly unreasonable judgment based on partiality, prejudice or ill will." Commonwealth v. Brown, 480 A.2d 1171, 1174 (Pa. Super. Ct. 1984). It would appear that anything short of a *gross* abuse of discretion could not be successfully challenged.

117. *See* 42 PA. CONS. STAT.. § 6355(a)(4)(iii)(A) (1990). The guidelines set forth in the Juvenile Act codified the criteria for amenability to treatment enunciated by the court in Commonwealth v. Pyle, 342 A.2d at 101, 106-07 n.13.

118. Act of Dec. 11, 1986, no. 165, Sec. 7, § 6322, 1986 Pa. Laws 1521, 1526.

119. 42 PA. CONS. STAT. § 6322(a).

120. *Id.* § 6355(a)(4)(iii)(A).

is amenable to care as a juvenile.[121] Such a determination is to be made only after careful scrutiny of the child's personal make-up, the child's previous history, and the nature and circumstances of the alleged homicide.[122] While a child accused of murder continues to be subject to the original jurisdiction of the criminal courts in Pennsylvania, the provision for transfer to the juvenile courts reflects the viability of the rehabilitative philosophy of *parens patriae* and its important role in Pennsylvania's juvenile courts. It also reflects the fact that some children who commit murder will not be amenable to the juvenile justice system and should properly be tried in adult criminal courts.

C. Age as a Factor for Juvenile Adjudication

Although the Juvenile Act does not specify a minimum age requirement for criminal court jurisdiction over children accused of murder,[123] the Legislature intended children to be treated differently depending upon their age.[124] The Juvenile Act contains a statutory scheme in which the treatment of children charged with criminal offenses changes with age.[125] The Act provides that in order to be considered a "dangerous juvenile offender," a child must be fifteen years of age or older and have committed specified violent crimes.[126]

The use of fifteen years of age as a *flexible* dividing line to separate "older" from "younger" juvenile offenders has considerable merit.[127] The older a child is, the more likely that child will pose a threat to society and will need legal restraint.[128] Moreover, older children are more likely to be aware of the inappropriate nature of their

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121. Commonwealth v. Kocher, 602 A.2d 1308, 1315 (Pa. 1992).

122. Commonwealth v. Pyle, 342 A.2d 101, 106 n.13 (Pa. 1975). *See also, e.g.*, Commonwealth v. Morningwake, 595 A.2d 158 (Pa. Super. Ct. 1991) (concluding that there was no evidence that a juvenile accused of murder would be amenable to treatment where he had committed prior crimes, had shunned all efforts to rehabilitate his behavior, had been aware of the inappropriateness of his conduct, and had rejected all help that was offered to enable him to change his destructive lifestyle).

123. Pennsylvania is one of only four states that does not specify a minimum age requirement for criminal court jurisdiction over children accused of murder. Amy M. Winebrake, Recent Decision, 66 TEMPLE L. REV. 563, 573 (1993). In the majority of states, the minimum age requirement is fifteen years. *Id.* The lowest minimum age requirement is fourteen years. *Id.*

124. *See generally* 42 PA. CONS. STAT. §§ 6301-6365.

125. *Id.*

126. *Id.* § 6302.

127. For a discussion of common law presumptions regarding juvenile offenders, see *supra* notes 17-20 and accompanying text.

128. *See* Commonwealth v. Zoller, 498 A.2d 436 (Pa. Super. Ct. 1985); Commonwealth v. Brown, 480 A.2d 1171 (Pa. Super. Ct. 1984).

behavior.[129] Older children are also less likely to be effectively rehabilitated during the time within which the juvenile court has jurisdiction.[130] Indeed, the older juvenile offenders are, the more likely it is that previous attempts to rehabilitate them have failed.[131]

The flexibility inherent in Pennsylvania's Juvenile Act avoids the dangers of a rigidly enforced age-specific dividing line for juvenile adjudication. There will certainly be instances when children fifteen years of age and older who have committed murder will be amenable to treatment in the juvenile system, and the Juvenile Act can be relied upon to protect the welfare of such children. The transfer provision of the Juvenile Act allows courts to consider the needs of society and the needs of children in an effort to find the best way of protecting the interests of both.[132]

Subjecting some older children to the punitive sanctions of adult criminal courts may appear harsh. Yet, the basic philosophy and purpose of the juvenile courts will have no value to children who are not amenable to treatment in the juvenile justice system. By placing the burden on children to prove their amenability to juvenile court adjudications, the Juvenile Act has not undermined the philosophy of *parens patriae*. Rather, it has given credibility to the implementation of such a philosophy by protecting it from abuse by older children who are not amenable to its benefits and should be properly subjected to adult criminal courts.

V. How Pennsylvania Should Treat Children Who Commit Murder

The provisions of the Juvenile Act indicate that the philosophy of *parens patriae* is firmly in place as the foundation of Pennsylvania's juvenile justice system. The fact that it took several years to resolve Cameron Kocher's status as either a juvenile or an adult indicates that Pennsylvania courts continue to be troubled when deciding how to treat children who have committed murder. Nonetheless, Pennsylvania courts must strive to remain committed to the *parens patriae*

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129. *See, e.g.*, Commonwealth v. Morningwake, 595 A.2d 158, 162 (Pa. Super. Ct. 1991).

130. *See, e.g., Morningwake*, 595 A.2d at 162; Commonwealth v. Zoller, 498 A.2d 436 (Pa. Super. Ct. 1985).

131. Commonwealth v. Leatherbury, 568 A.2d 1313 (Pa. Super. Ct. 1990). For a discussion of the juvenile justice system's failure to rehabilitate young offenders, see Anna L. Simpson, Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984 (1976).

132. *See* 42 PA. CONS. STAT. §§ 6322(a), 6355 (1990); Commonwealth v. Pyle, 342 A.2d 101 (Pa. 1975).

philosophy, despite trends in other jurisdictions towards criminalizing juvenile courts.

A. The Criminalization of Juvenile Courts in Other Jurisdictions

Following the Supreme Court's pronouncements that many traditional procedural safeguards should be available in juvenile adjudications,[133] the juvenile statutes in several jurisdictions began to emphasize accountability and punishment, rather than treatment and rehabilitation.[134] These jurisdictions interpreted the Supreme Court's decisions as standing for the proposition that juvenile proceedings impose "almost criminal" liability.[135] Because the infancy defense is a criminal defense, courts have begun to hold that it should be available in delinquency proceedings.[136] The renewed acceptance of the infancy defense in juvenile adjudications[137] protects the welfare of children in "almost criminal" proceedings.[138]

Concern about crime and frustration over the apparent ineffective treatment of juvenile offenders has led to a tougher stance toward

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133. *See supra* part III.

134. Walkover, *supra* note 14, at 523.

135. In amending juvenile laws, legislatures have acknowledged the importance of public safety, punishment, and individual accountability in the juvenile justice system. *See, e.g.*, MINN. STAT. ANN. § 260.011(2)(c) (West 1992) (stating that the purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote public safety and reduce juvenile delinquency by prohibiting certain behavior and by developing individual responsibility for lawful behavior); *see also In re* D.F.B., 430 N.W.2d 475 (Minn. Ct. App. 1988) (recognizing the criminal aspect of juvenile proceedings); *In re* Seven Minors, 664 P.2d 947 (Nev. 1983) (endorsing punishment as a legitimate purpose of juvenile courts).

136. State v. Q.D., 685 P.2d 557, 560 (Wash. 1984); *In re* Devon T., 584 A.2d 1287, 1293 (Md. Ct. Spec. App. 1991). *But see* Jennings v. State, 384 So. 2d 104 (Ala. 1980) (holding inapplicable the presumption that a child between the ages of seven and fourteen is incapable of forming criminal intent); State v. D.H., 340 So. 2d 1163 (Fla. 1976) (holding that the common-law presumptions of incapacity are inapplicable in a delinquency proceeding).

137. *See, e.g., In re* Gladys R., 464 P.2d 127 (Cal. 1970); *In re* William A., 548 A.2d 130, 131-34 (Md. 1988); *In re* Andrew M., 398 N.Y.S.2d 824, 825-27 (1977). For a discussion of the role that criminal responsibility should play in juvenile courts, see McCarthy, *supra* note 17 (arguing that the criminal law concepts of culpability and responsibility should be reintegrated into juvenile court proceedings because of the similarity between the philosophical bases of criminal sanctions and the new punitive juvenile courts).

138. The function of the infancy defense is to screen the culpable from the non-culpable. *See supra* notes 15, 17-20 and accompanying text. The defense, therefore, has meaning only in relation to the broader question of whether the juvenile court is, in general, in the business of ascertaining blameworthiness rather than diagnosing and treating troubled youths. For cases holding that the infancy defense is inconsistent with the *parens patriae* philosophy of juvenile proceedings, see Gammons v. Berlat, 696 P.2d 700 (Ariz. 1985); *In re* Tyvonne, 558 A.2d 661 (Conn. 1989); State v. D.H., 340 So. 2d 1163 (Fla. 1976); *In re* Robert M., 441 N.Y.S.2d 860 (1981); *In re* G.T., 597 A.2d 638 (Pa. Super. Ct. 1991); *In re* Michael, 423 A.2d 1180 (R.I. 1981); *Ex rel* Humphrey, 201 S.W. 771 (Tenn. 1918).

children who commit crimes.[139] Courts have not specifically addressed the issue of whether a child who is before a juvenile court on *murder* charges can assert the infancy defense. Jurisdictions which have embraced the infancy defense in juvenile court proceedings have done so with respect to less serious crimes.[140] Nonetheless, the trend towards criminalizing juvenile courts would indicate that such a criminal defense would be allowed.

Acceptance of the infancy defense in juvenile murder proceedings treats more leniently older children for whom punishment may be warranted. Older children are frequently found to be less amenable to rehabilitative treatment[141] and are thus ineligible for transfer to juvenile court.[142] A successful infancy defense allows these children to escape the penal sanctions imposed by criminal courts,[143] despite the fact that their behavior may warrant such penal sanctions. An unsuccessful infancy defense means that these same children will be in no worse a position than if their petitions for transfer to juvenile court were denied.

In contrast, younger children who successfully raise the infancy defense will not have the benefit of rehabilitative guidance. Younger children who commit murder are more likely to be found amenable to treatment and thus will be transferred to juvenile courts. A successful infancy defense raised in juvenile court means that children who have committed murder will not be subject to penal sanctions. While this may appear to be an excellent result, it may in fact create another bad situation. Children who most need the care afforded by juvenile adjudication and who need to be taught the capacity to refrain from anti-social behavior will be deprived of the care they need.[144] The

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139. Ralph A. Weisheit & Diane M. Alexander, *Juvenile Justice Philosophy and the Demise of* Parens Patriae, FED. PROBATION, Dec. 1988, at 56, 57. The "safety valve theory" suggests that society constantly seeks to punish juveniles more strictly so that they do not "get off easy." Jeffrey S. Schwartz, *The Youth Offender: Transfer to the Adult Court and Subsequent Sentencing*, 6 CRIM. JUST. J. 281, 294-95 (1983). Society generally does not wish to afford juveniles a right to rehabilitation in the juvenile justice system unless it can retain some control over sanctions. *Id.* at 295.

140. *See* Breed v. Jones, 421 U.S. 519 (1975) (armed robbery); *In re* William A., 548 A.2d 130 (Md. 1988) (storehouse breaking, felony theft and malicious destruction of property); *In re* Devon T., 584 A.2d 1287 (Md. Ct. Spec. App. 1991) (possession of heroin with intent to distribute); State v. Q.D., 685 P.2d 557 (Wash. 1984) (trespass).

141. *See supra* notes 129-31 and accompanying text.

142. *See, e.g.*, 42 PA. CONS. STAT. § 6322(a).

143. *See supra* note 17 and accompanying text.

144. Failure to deliver the treatment and care promised by juvenile statutes results in simple custodial confinement and is the essence of a due process violation. Nelson v. Heyne, 491 F.2d 352, 358-60 (7th Cir. 1974) (holding that juveniles have a Fourteenth Amendment due process

result could be lives of continued criminal behavior. More importantly, where an infancy defense is not successful, younger children will be subject to the sanctions of a juvenile justice system that has become more penal in nature.[145] Imposing penal sanctions on young children is arguably not in their best interests.[146] The trend toward criminalizing juvenile courts may satisfy public demands for a tougher stance on crime,[147] but it increases the negative social and psychological impact that punitive sanctions are likely to have on young children.

B. Suggestions for the Pennsylvania Approach

The trend toward criminalizing juvenile courts is inconsistent with the philosophy of Pennsylvania's juvenile laws. Pennsylvania's adherence to *parens patriae* as the means for dealing with children who commit murder is clearly designed to address the best interests of children in the Commonwealth. However, judicial divisiveness over the fate of Cameron Kocher reinforces the idea that, despite the heinous nature of the crime of murder, a child's amenability to treatment must be broadly analyzed. Clearly, children who are incapable of understanding the wrongfulness of their actions should not be subject to penal sanctions. Such children should always be able to successfully meet the criteria in the Juvenile Act for a transfer to juvenile court.[148]

The fact that Cameron Kocher's case was not immediately transferred to a juvenile court suggests that Pennsylvania courts need to reanalyze the basic philosophy of the Commonwealth's Juvenile Act. First and most importantly, the language of the Act suggests that the Pennsylvania Legislature did not intend to subject a young juvenile, like

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right to rehabilitative treatment), *cert. denied*, 417 U.S. 976 (1974). *See also* Martarella v. Kelly, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (noting that state-imposed detention under *parens patriae* must include adequate treatment to meet the constitutional requirements of due process and the prohibition against cruel and unusual punishment). *But see* Commonwealth v. Lucas, 622 A.2d 325 (Pa. Super. Ct. 1993) (holding that a juvenile's incarceration in an adult prison did not constitute cruel and unusual punishment in violation of the Eighth Amendment).

145. *See In re* Javier, 159 Cal. App. 3d 913 (1984) (noting that the purposes of the juvenile process have become more punitive, the procedures more formalistic, adversarial and public, and the consequences of conviction much more harsh).

146. Evaluations of juvenile correction facilities in the years since *In re* Gault, 387 U.S. 1 (1967), reveal a continuing gap between the rhetoric of rehabilitation and its punitive reality. Feld, *supra* note 94, at 892. *See also* Barry Krisberg, et al., *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 31-32 (1986) (reporting on cases of abuse in juvenile facilities).

147. Proponents of "law and order" and "get tough" legislation contend that juveniles must be held more accountable and must be punished for their delinquent acts, especially those of a violent nature. Feld, *supra* note 94, at 910 n.428. *See also supra* note 136.

148. *See supra* notes 118-20 and accompanying text.

Cameron Kocher, to criminal court jurisdiction. Pursuant to the Juvenile Act, children under ten years old are treated as "dependent" children who are in need of special care and protective supervision.[149] Subjecting a child under ten years of age to the jurisdiction of an adult criminal court would be completely inconsistent with this philosophy of special care and protection. Moreover, a determination that any child under the age of ten could not be criminally prosecuted for murder would comply with national standards.[150]

Second, the feasibility of trying a nine-year-old in an adult criminal court contradicts the benevolent intent of *parens patriae*. The possibility that a young child could be convicted of murder in an adult criminal court would have a potentially devastating effect on that child. Children who are imprisoned in adult jails face conditions hardly less oppressive than those that existed in prisons during the nineteenth century.[151] In addition, states have appeared unable or unwilling to correct hazardous conditions and remove children completely from adult jails.[152]

The idea that a period of incarceration for a young child who commits murder will either benefit the offender or have a significant deterrent effect on other children appears to be without foundation.[153] The best interests of a young child, even one who commits murder, can hardly be served by such penal sanctions. The reality is that the adjudication of a nine-year-old who has committed murder should not be the same as that for a fifteen-year-old who has committed the same crime. The criminal courts in Pennsylvania must review and consider more scrupulously the criteria in the Juvenile Act's transfer provision.

VI. Conclusion

Pennsylvania's Juvenile Act offers the most realistic and fair approach for dealing with children who commit murder. Its transfer provision allows criminal courts to evaluate a wide range of criteria when deciding whether there exists some basis for transferring a case to juvenile court. Despite the heinous nature of the crime of murder

149. *See* 42 PA. CONS. STAT. §§ 6302, 6351.

150. Winebrake, *supra* note 123, at 573.

151. For a discussion of the abusive treatment of children in adult jails, see D.B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1982); Swansey v. Elrod, 386 F. Supp. 1138 (N.D. Ill. 1975); Baker v. Hamilton, 345 F. Supp. 345 (W.D. Ky. 1972); Soler, *supra* note 24, at 190-91, 195-97, 200-01.

152. *See* Soler, *supra* note 24, at 191.

153. Shirley M. Hufstedler, *Should We Give Up Reform?*, 30 CRIME & DELINQ. 415, 420 (1984).

and the potential public demands for punitive sanctions, Pennsylvania courts must remain focused on the basic goals and philosophy of the Commonwealth's juvenile justice system. Children, especially younger children, who commit murder and are amenable to treatment should be rehabilitated, not punished. No juvenile justice system is perfect, but as long as Pennsylvania courts remain faithful to the *parens patriae* philosophy of the Juvenile Act, children who commit murder will hopefully receive the treatment they need and deserve.

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