

The Kansas Supreme Court Sounds the Death Knell of the “Civil” Juvenile Court Proceeding [*In re L.M.*, 186 P.3d 164 (Kan. 2008)]

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I. INTRODUCTION

The first English settlers brought the right to a jury trial to America, and the First Congress of the American colonies adopted it as an essential right.¹ Today, the Sixth Amendment guarantees the right to a trial by an impartial jury in every criminal prosecution.² The United States Supreme Court has held that this is a fundamental right and applicable to the states;³ however, the Court, in *McKeiver v. Pennsylvania*,⁴ restricted this right and applied it only to adult criminal trials.⁵ The *McKeiver* Court held that juveniles have no constitutional right to a jury because the juvenile justice system is civil in nature, which eliminates juvenile delinquency adjudications from the scope of the Sixth Amendment to the United States Constitution.⁶

In 1984, the Kansas Supreme Court in *Findlay v. State*,⁷ relied on the reasoning of *McKeiver* to deny a child a constitutional right to a jury

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1. See *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (explaining that the first English colonists brought with them the criminal jury trial from England and declared “[t]hat trial by jury is [an] inherent and invaluable right” and that the colonists were entitled to “the great and inestimable privilege of being tried by their peers”).

2. See U.S. CONST. amend. VI (stating, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”).

3. See *Duncan*, 391 U.S. at 148-49 (holding that the right to a trial by jury is “fundamental to the American scheme of justice” and therefore incorporated into the Fourteenth Amendment and applicable to the states).

4. 403 U.S. 528 (1971).

5. See *id.* at 533-34, 551 (denying the right to a jury in a delinquency proceeding and noting that *Kent v. United States*, 383 U.S. 541 (1966), stopped short of stating that all constitutional rights afforded to adults applied to juveniles).

6. See *id.* at 550-51 (finding that the juvenile adjudication proceeding is different from the criminal adjudication because it incorporates aspects “of fairness, of concern, of sympathy, and of paternal attention” thus making the procedural formalities of the adult criminal proceeding unnecessary).

7. 681 P.2d 20 (Kan. 1984).

trial in juvenile proceedings.⁸ On June 20, 2008, however, the Kansas Supreme Court, in *In re L.M.*,⁹ overruled its decision in *Findlay*, rejected the United States Supreme Court's holding in *McKeiver*, and granted juveniles the right to a jury trial.¹⁰ The court rested its holding on the grounds that legislative changes to the juvenile justice system made it much more like the adult criminal system.¹¹ This decision effectively transformed the juvenile adjudication from a civil proceeding to a criminal proceeding.¹² The court's decision now affords the Kansas Legislature an opportunity to cure the deficiencies of the current juvenile justice system. This Comment advocates for a split juvenile justice system that accounts for both the significant differences and the rapid development in cognitive abilities between children and adolescents.¹³ This solution can both cure the current juvenile justice system's problems and address society's concern about the culpability of adolescent offenders.¹⁴

This Comment examines the *In re L.M.* decision, which held that juveniles have a constitutional right to a jury trial.¹⁵ Part II of this Comment provides the relevant facts of the case. Part III consists of a brief discussion of the history of juvenile courts, both nationwide and in Kansas, as well as several important cases that helped shape the evolution of the juvenile justice system. Part IV examines the court's decision. Part V explores the need for legislative action to fix what the court has determined is a defective juvenile justice system, and it proposes a possible solution to address the problems identified by the court.

II. CASE DESCRIPTION¹⁶

While walking home from a local bar late in the evening on August

8. *Id.* at 21-22.

9. 186 P.3d 164 (Kan. 2008).

10. *Id.* at 170 (stating that the changes to the Kansas juvenile justice system "have superseded the *McKeiver* and *Findlay* Courts' reasoning and those decisions are no longer binding precedent for us to follow").

11. *Id.* (reasoning that "the juvenile justice system is now patterned after the adult criminal system" and "has become more akin to an adult criminal prosecution").

12. *See id.*

13. *See infra* note 220. This Comment splits the term "juvenile" into two categories, herein referred to as "adolescent" and "child." *See infra* Part V.B.2.

14. Kansas' common-law presumption that a person fourteen years old or older is capable of committing a crime, as discussed in the concurring opinion of Justice Luckert in *In re L.M.*, provides the basis for the split between child and adolescent in the proposed remedy. 186 P.3d at 174 (Luckert, J., concurring). The common law presumption lays the historical foundation for society's concern about culpability, whereas the proposed remedy's recognition of childhood and adolescence comports with the contemporary view that children and adolescents are not as culpable as adults.

15. *Id.* at 172 (majority opinion).

16. The Kansas Supreme Court limited the discussion of the facts to a single sentence. *See id.* at 165. The 2006 Kansas Court of Appeals' decision limited the facts to a few sentences. *See In re L.M.*, No. 96,197, 2006 WL 3775275, at *1 (Kan. Ct. App. Dec. 22, 2006). The following presentation of facts is based on the parties' appellate briefs filed with the Kansas Court of Appeals and the transcript of the bench trial in the district court.

10, 2005, R.P. encountered sixteen-year-old L.M. in front of L.M.'s home.¹⁷ At the outset of the encounter, L.M. asked R.P. for a cigarette.¹⁸ R.P. responded by giving him a cigarette.¹⁹ L.M. next asked R.P. for her name and if she liked to drink, to which she replied by telling him her name and that she did not like to drink.²⁰ She then attempted to continue walking to her home.²¹

L.M. held out his hand as if he were going to shake R.P.'s hand and thanked her.²² He then grabbed her by the arm and pulled her toward him so that they were face-to-face.²³ L.M. then asked R.P. for a kiss.²⁴ R.P. refused, but L.M. grabbed R.P. around her shoulders, kissed her and licked the side of her face.²⁵ R.P. tried to push L.M. away from her but was unable to get away.²⁶ R.P. continued to walk toward her home with L.M. still holding on to her.²⁷ Before releasing R.P., L.M. asked her if she enjoyed intercourse.²⁸ L.M. finally released R.P. after they approached her home and she informed him that her boyfriend was there waiting for her.²⁹ As L.M. walked away, he said, "Bye Baby."³⁰

L.M. was arrested and after a hearing held on August 11, 2005, the court ordered that L.M. be detained.³¹ Counsel for L.M. filed a motion for trial by jury and a motion to suppress the statements given by L.M. to the arresting officers, but both motions were denied and the trial date was set for February 7, 2006.³² At trial before the Finney County District Court, L.M. was convicted of aggravated sexual battery³³ and of the purchase or consumption of an alcoholic beverage by a minor.³⁴ The court sentenced L.M. to eighteen months in a juvenile correctional facil-

17. Brief of Appellant at 2-3, *In re* L.M., No. 06-96197 (Kan. Ct. App. Dec. 22, 2006). L.M. was sixteen years old when the events that led to his trial for aggravated sexual battery occurred. *Id.* L.M. had no prior record with law enforcement at the time of the encounter with R.P., the victim in this case. *Id.*

18. Amended Brief of Appellee at 2, *In re* L.M., No. 06-96197 (Kan. Ct. App. Dec. 22, 2006).

19. *Id.*; Brief of Appellant, *supra* note 17, at 3.

20. Amended Brief of Appellee, *supra* note 18, at 2; Transcript of Bench Trial at 7-8, *In re* L.M., No. 06-96197 (Kan. Ct. App. Dec. 22, 2006).

21. Amended Brief of Appellee, *supra* note 18, at 2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Brief of Appellant, *supra* note 17, at 3; Amended Brief of Appellee, *supra* note 18, at 2.

27. Amended Brief of Appellee, *supra* note 18, at 3.

28. *Id.*; Transcript of Bench Trial, *supra* note 20, at 9.

29. Amended Brief of Appellee, *supra* note 18, at 3.

30. *Id.* R.P.'s boyfriend was not in fact home at that time, so she waited in front of her home for his arrival. *Id.* After the boyfriend arrived home and learned of the event between R.P. and L.M., he called the police. *Id.*

31. Brief of Appellant, *supra* note 17, at 1.

32. *Id.*

33. Aggravated sexual battery is a violation of the Kansas Criminal Code. *See* KAN. STAT. ANN. § 21-3518 (2007).

34. Brief of Appellant, *supra* note 17, at 1, 2. The purchase or consumption of an alcoholic beverage by a minor is a violation of the Kansas liquor control act. *See* KAN. STAT. ANN. § 41-727 (Supp. 2007).

ity but stayed his sentence and placed him on probation until he was twenty years old.³⁵ In addition, the court ordered L.M. to complete sex-offender treatment and to register as a sex offender.³⁶ L.M. appealed, and made three arguments to the Kansas Court of Appeals: (1) he had a constitutional right to a jury trial; (2) his statements to police should have been suppressed; and (3) there was insufficient evidence to support his convictions.³⁷

The court of appeals reviewed the district court's denial of L.M.'s request for a jury trial, the denial of the suppression motion, and the sufficiency of the evidence used to establish that L.M. committed aggravated sexual battery.³⁸ First, after discussing Kansas Supreme Court precedent concerning a juvenile offender's right to a jury trial, the appellate court noted that L.M. made "some rather good arguments as to why the rationale of the *Findlay* decision is no longer compelling."³⁹ Nevertheless, the court determined that it was bound to follow precedent.⁴⁰ Second, the court reviewed the testimony presented regarding the suppression motion and held that there was sufficient evidence for the district court to find that L.M. freely and voluntarily gave his statements to police.⁴¹ Finally, the court reviewed L.M.'s argument that the evidence did not establish an essential element of the offense of aggravated sexual battery.⁴² The statute only requires that the victim be "overcome by force or fear."⁴³ The court noted that L.M. used force to kiss R.P. and lick her face as she tried to push him away, which was sufficient to establish the "force" element of the crime.⁴⁴ Therefore, the court of appeals affirmed the district court's rulings.⁴⁵

L.M. filed a petition for review with the Kansas Supreme Court on the single issue of whether he had a constitutional right to a jury trial in a juvenile offender proceeding.⁴⁶ The court granted his petition for review.⁴⁷

III. BACKGROUND

Judicial treatment of child offenders has evolved from a retributive

35. *In re L.M.*, 186 P.3d 164, 165 (Kan. 2008).

36. *Id.* The court's requirement to register as a sex offender was in accordance with a Kansas statute. *Id.*; see KAN. STAT. ANN. § 22-4906 (2007).

37. *In re L.M.*, 186 P.3d at 165.

38. See *In re L.M.*, No. 96,197, 2006 WL 3775275, at *1-*2 (Kan. Ct. App. Dec. 22, 2006).

39. *Id.* at *1.

40. *Id.*

41. *Id.* at *2.

42. *Id.*

43. KAN. STAT. ANN. § 21-3518(a)(1) (2007).

44. *In re L.M.*, No. 96,197, 2006 WL 3775275, at *2.

45. *Id.* at *3.

46. *In re L.M.*, 186 P.3d 164, 165 (Kan. 2008).

47. *Id.*

system in which adults and children were treated equally, to a separate juvenile court system focused on rehabilitation of the child, and now into a system including both rehabilitation and retribution.⁴⁸ A historical view of this progression is presented below.

A. *Child Offenders at Common Law*

Prior to the creation of separate juvenile courts, the criminal common law treated adults and children of the age of criminal responsibility the same.⁴⁹ At common law, children under the age of seven—age ten in some states—were not criminally prosecuted because they were believed to be incapable of possessing the requisite mens rea.⁵⁰ Conversely, children who attained the age of criminal responsibility could be arrested, imprisoned, indicted, tried, and, if convicted, punished as an adult.⁵¹ If convicted, children generally were imprisoned with adult criminals⁵² and in rare cases, were even executed for their crimes.⁵³ Therefore, at common law, if a child was of age, he was prosecuted and afforded the same procedural rights as an adult.⁵⁴

B. *Creation of the Juvenile Court*

Reformers of the juvenile justice system were troubled by the fact that children were being tried and imprisoned the same as adult offenders in a retributive court system.⁵⁵ These reformers believed that society's goal for child offenders should focus on rehabilitation, not just punishment.⁵⁶ They believed that, when dealing with a child offender, society should seek to answer the questions, "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁵⁷ The belief was that once the child was removed from a negative environment, cared for, and reformed, he could be rehabilitated and returned to society as a worthy citizen.⁵⁸

The juvenile court system was established with the idea that criminal behavior in children is "determined": they are neither inherently

48. See generally Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

49. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

50. *In re Gault*, 387 U.S. 1, 16 (1967); Mack, *supra* note 49, at 106.

51. Mack, *supra* note 49, at 106.

52. *Id.* at 107.

53. Sheila L. Sanders, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line*, 19 S.U. L. REV. 141, 147 (1992).

54. *In re Gault*, 387 U.S. at 16-17.

55. *Id.* at 15.

56. See Mack, *supra* note 49, at 107.

57. *In re Gault*, 387 U.S. at 15 (quoting Mack, *supra* note 49, at 119-20).

58. See Mack, *supra* note 49, at 107.

criminal nor do they choose to act in a criminal manner.⁵⁹ The reformers believed deterministic forces beyond a child's control, such as neglect and poverty, were the compelling forces behind delinquency, thus reducing a child's culpability.⁶⁰ In 1899, Cook County, Illinois established the nation's first separate juvenile court.⁶¹ By 1927, nearly every state had established some form of a juvenile justice system separate from its adult criminal courts.⁶²

Under the doctrine of *parens patriae*,⁶³ juvenile courts adopted a compassionate and rehabilitative role in the lives of at-risk children, whether delinquent or neglected.⁶⁴ The belief was that children who committed offenses were not acting of their own free will but rather were victims of an imperfect environment or development process.⁶⁵ The purpose of the new juvenile court was to focus on the social needs of the child with the aim of ensuring his "future welfare" rather than focusing on the offense with an objective of just punishment.⁶⁶ In order for the court to be more flexible in its approach to supervision and treatment of child offenders,⁶⁷ the juvenile court proceedings were characterized as civil, not criminal.⁶⁸ The purpose of the juvenile court was to rehabilitate the child and make him a worthy citizen whereby the state acts as *parens patriae*, not to decide guilt or innocence whereby the state acts as a punisher.⁶⁹

59. See Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1137 (2003).

60. See *id.* at 1137.

61. JOHN C. WATKINS, JR., *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS* 43 (1998).

62. *Id.* at 45.

63. "*Parens patriae*" is Latin, meaning "parent of his or her country." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). The term implies the idea that "the state is the ultimate parent of all its citizens." THOMAS J. BERNARD, *THE CYCLE OF JUVENILE JUSTICE* 88 (1992). The doctrine of *parens patriae* originated in Chancery Court as a power that was "designed to help children who lacked proper parental care because their parents had died." *Id.* The juvenile courts tailored the doctrine to include children who "lacked proper parental care because their parents were weak and criminal." *Id.*

64. BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 62 (1999).

65. *Id.*

66. *Id.*

67. *Id.*

68. *In re Gault*, 387 U.S. 1, 17 (1967). In describing the juvenile justice system as civil, the United States Supreme Court stated:

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attend to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

Id. (citations omitted).

69. *Id.* at 15-16 (distinguishing between the purpose of the juvenile court and the criminal court; noting that children were to be treated and rehabilitated, not punished; and stating that the proce-

The characterization of the juvenile court as a civil court caused the courts to change much of the terminology and procedure to distinguish it from the criminal courts.⁷⁰ Due process rights—fundamental for all adults in criminal court—were nonexistent for children in the juvenile court.⁷¹ Adversarial “truth-finding” and the determination of factual issues were not serious matters in juvenile court.⁷² The judge would work hand-in-hand with the probation officer, the parents, and the child to find a rehabilitative solution serving the child’s best interests.⁷³ Sentencing options were discretionary, and the length imposed could be indeterminate and non-proportional, lasting until the child reached adulthood or was reformed.⁷⁴ The juvenile court began with good intentions geared toward rehabilitation of child offenders.⁷⁵ However, the private, relaxed, and casual nature of the proceedings, coupled with the “unbridled discretion” of the judge, often resulted in arbitrary and indeterminate dispositions and punitive sentences.⁷⁶

C. *Kansas Juvenile System*

Prior to Kansas adopting a separate juvenile court system, the State practiced a *parens patriae* philosophy by establishing the State Industrial School for Boys in 1881 and passing legislation allowing a court to sentence boys under the age of sixteen to this institution.⁷⁷ In 1901, the State created the Industrial Reformatory to provide an alternative to the penitentiary for males between the ages of sixteen and twenty-five, to separate adult criminals from young offenders, and to tailor discipline to the needs of the young offenders.⁷⁸

Kansas created its juvenile court in 1905⁷⁹ to advance its objective of providing for the welfare of children under the doctrine of *parens patriae*.⁸⁰ Consistent with this parental capacity, Kansas law repeated the rehabilitative philosophy that the juvenile court “has for its object, not the punishment of juvenile offenders for misconduct, criminal or otherwise, but their removal from the path of temptation and their direction

dures against the child, from arrest to institutionalization, were to be clinical, not punitive).

70. WATKINS, *supra* note 61, at 47.

71. *See id.*

72. *Id.* at 142.

73. *See id.*; FELD, BAD KIDS, *supra* note 64, at 245.

74. FELD, BAD KIDS, *supra* note 64, at 70.

75. *See In re Gault*, 387 U.S. 1, 18-20 (1967).

76. *Id.*

77. *State v. Dubray*, 250 P. 316, 316 (Kan. 1926) (discussing the historical perspective of juvenile justice in Kansas).

78. *Id.*

79. KAN. STAT. ANN. §§ 4412-4427 (1905); *see Dubray*, 250 P. at 316-17.

80. *In re McCoy*, 334 P.2d 820, 826 (Kan. 1959) (“The action of a juvenile court is deemed to have been taken and done in the exercise of the parental power of the state. These statutes are an assertion upon the part of the state of its right to exercise its power as *parens patriae* for the welfare of such of its minor citizens as are deprived of proper parental control and oversight, and are disposed to go wrong.”).

into the paths of rectitude by preventive and corrective means.”⁸¹ The question was not whether the child was guilty of a crime and needed punishment, the question was whether the child was delinquent and needed rehabilitation.⁸² At that time the policy statement of the Juvenile Court Act read:

This act shall be liberally construed, to the end that its purposes may be carried out, to wit, that the care, custody and discipline of a child shall approximate, as nearly as may be proper, parental care; and in all cases where the same can be properly done, that a child may be placed in an approved family home, by legal adoption or otherwise. And in no case shall any proceedings, order or judgment of the juvenile court, in cases coming within the purview of this act, be deemed or held to import a criminal act on the part of any child; but all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state.⁸³

*Hall v. Brown*⁸⁴ is one of several early twentieth century Kansas cases to affirm the objective of the Juvenile Court Act.⁸⁵ In *Hall*, the defendant was charged with violating “the laws of the state of Kansas and the ordinances of the city of Neodesha.”⁸⁶ The facts indicate that Doris Hall was under the age of sixteen, used intoxicating liquor, stayed out late at night, was incorrigible, associated with known criminals, and frequented pool halls and gambling establishments.⁸⁷ Doris was growing up in the streets “in idleness and crime.”⁸⁸ Doris argued that she deserved a jury trial—the same constitutional right afforded adults in criminal proceedings—because she was tried in a criminal proceeding that could have resulted in a restraint of her liberty interest.⁸⁹ The court noted that nothing Doris was charged with was actually a crime, including the use of liquor, although there may have been moral repercussions.⁹⁰ The court then clearly expressed the purpose of the Juvenile Court Act and the *parens patriae* doctrine when it said:

A proceeding against a delinquent and neglected child is not a criminal one. It is an inquiry to ascertain whether the child shall be placed under the direct and immediate control of the state for the good of the child, in securing for it proper nurture, training, and education, not for the purpose of punishing it for any acts that it ought not to have committed The judgment of the district court is not a punishment for crime committed; it is a finding of fact on which action for the good of the child is based.⁹¹

81. *In re Turner*, 145 P. 871, 871 (Kan. 1915).

82. *See id.* at 872.

83. KAN. STAT. ANN. § 4426 (1905).

84. 284 P. 396 (Kan. 1930).

85. The Juvenile Court Act is codified at KAN. STAT. ANN. §§ 5099-5129 (1909).

86. *Hall*, 284 P. at 396.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 397 (citations omitted).

D. Due Process Rights Extended to Juvenile Court

Half a century after the development of the first juvenile court, society began to recognize that juveniles should have more due process rights in juvenile court.⁹² Society began to question the effectiveness of the juvenile court and its *parens patriae* philosophy in rehabilitating child offenders.⁹³ Then in 1966, the United States Supreme Court, in *Kent v. United States*,⁹⁴ held that a juvenile judge's waiver of jurisdiction over a minor is subject to due process protections.⁹⁵

In *Kent*, the district judge failed to provide a hearing on the waiver issue, the child and his counsel did not have access to social records and probation reports, and the judge did not provide a statement of his reasons for granting waiver.⁹⁶ The Supreme Court opined that the reality of the juvenile court system was such 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."⁹⁷ The Court recognized that juveniles should be afforded some basic due process protections because they face a potential loss of liberty; nevertheless, the Court preserved the juvenile court's goal of rehabilitation and its designation as a civil court.⁹⁸

In dicta, the *Kent* Court implied that, at least in some juvenile court systems, due process rights should be extended to children.⁹⁹ The chance to do just that—extend due process rights to all children—came in 1967.¹⁰⁰ In *In re Gault*,¹⁰¹ the Supreme Court noted that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁰² The Court cited previous holdings in which child offenders were ex-

92. BERNARD, *supra* note 63, at 108.

93. *See id.*

94. 383 U.S. 541 (1966). *Kent* is a case concerning waiver of a minor to adult court and the first of several cases extending due process rights to juveniles in juvenile court. *See id.* at 543.

95. *Id.* at 563. Jurisdictional waiver is used to transfer juveniles to adult court, and can take on various forms in the many different state justice systems, such as judicial, legislative, or prosecutorial. *See* Feld, *Transformation*, *supra* note 48, at 701-08; Paula R. Brummel, Article, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids*, 16 LAW & INEQ. 541, 546 (1998). Legislative and prosecutorial waivers are particularly problematic for a juvenile since the choice to waive is either statutory or made by the prosecutor without a full hearing on the circumstances supporting waiver. *See* Feld, *Transformation*, *supra* note 48, at 701-08; *see also* BERNARD, *supra* note 63, at 30 (giving a general description of waiver in juvenile proceedings). Judicial waiver that includes a hearing gives the judge an opportunity to hear all the facts weighing both for and against jurisdictional waiver. *See* Feld, *Transformation*, *supra* note 48, at 703-06; *see also* BERNARD, *supra* note 63, at 30 (describing a basic judicial waiver hearing). Judicial waiver was the type of waiver under scrutiny in *Kent*. *See Kent*, 383 U.S. at 545-46.

96. *Kent*, 383 U.S. at 546.

97. *Id.* at 556.

98. *Id.* at 554-56.

99. *Cf. id.* at 555-56 (noting the shortcomings of, and expressing concern for, the current juvenile justice system).

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

101. 387 U.S. 1 (1967).

102. *Id.* at 13.

tended various due process rights.¹⁰³ The Court ultimately held that the Due Process Clause of the Fourteenth Amendment required that a child in a proceeding to determine whether he is a delinquent be given notice of the charges, a right to counsel, and the right to cross-examine witnesses.¹⁰⁴ The Court further held, pursuant to the Fifth Amendment, that the privilege against self-incrimination applied to children.¹⁰⁵ The Court declared that judges cannot use the philosophy of *parens patriae* and the promise of rehabilitation instead of punishment to justify withholding certain due process rights from children.¹⁰⁶ The Court stated, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."¹⁰⁷ The Court's holding, however, was limited to the adjudicatory process.¹⁰⁸ The Court reiterated its holding in *Kent* by stating that not all due process rights should be extended to children and that the extension of due process rights only needs to ensure that the proceedings "measure up to the essentials of due process and fair treatment."¹⁰⁹

In 1970, in *In re Winship*,¹¹⁰ the Supreme Court examined the question of the proper standard of proof required in juvenile proceedings.¹¹¹ A twelve-year-old defendant was charged with stealing \$112 from a woman's purse.¹¹² A sales clerk claimed to have seen the defendant running from the scene just before the woman noticed her money was missing.¹¹³ A defense witness then testified that the sales clerk was in a different part of the store and could not have seen the defendant.¹¹⁴ Under state law, the prosecution was only required to prove by a preponderance of the evidence that the crime occurred.¹¹⁵ Despite the conflicting witness testimony, the defendant was adjudicated delinquent and placed in a training school for eighteen months, with the potential for an

103. *Id.* at 12-13 (citing *Kent*, 383 U.S. at 541, wherein the Court stated the basic requirements of due process and fairness are to be satisfied in waiver proceedings; and citing *Haley v. Ohio*, 332 U.S. 596 (1948), wherein the Court held that the Fourteenth Amendment applied to prohibit the use of a child's coerced confession against him).

104. *Id.* at 33, 41, 57.

105. *Id.* at 55.

106. *Id.* at 27-28.

107. *Id.*

108. *Id.* at 13 ("We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.").

109. *Id.* at 30-31.

110. 397 U.S. 358 (1970).

111. *Id.* at 359 ("This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.").

112. *Id.* at 360.

113. BERNARD, *supra* note 63, at 120.

114. *Id.*

115. *In re Winship*, 397 U.S. at 360.

extension to six years.¹¹⁶

On review, the Supreme Court held that, in the adjudicatory stage of a delinquency proceeding, due process and fair treatment required a standard of proof beyond a reasonable doubt.¹¹⁷ The Court said that “[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.”¹¹⁸ The Court noted that the reasonable-doubt standard would not undercut the objective of the juvenile court because it would not affect the confidentiality, informality, flexibility, or speed of the proceeding.¹¹⁹ Furthermore, a reasonable-doubt standard would have no effect on the dispositional phase of the proceeding because the court could still consider the child’s social history when establishing an individualized treatment plan.¹²⁰

Only one year after deciding *Winship*, the Supreme Court rejected the claim that a child has a constitutional right to a jury.¹²¹ The Court then reaffirmed its finding in *Gault* and *Winship* that due process rights in juvenile court should be examined using the “fundamental fairness” standard, which emphasizes factfinding procedures.¹²² The Court stated, “[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding.”¹²³ Therefore, the Court held that the Sixth Amendment right to a jury trial was not essential to the factfinding process and that denial of this constitutional safeguard was not fundamentally unfair.¹²⁴

E. Modern Kansas Juvenile Justice

In the early 1980s, the Kansas Legislature set about to reform the juvenile justice system.¹²⁵ The Legislature sought to bifurcate the exist-

116. *Id.*

117. *Id.* at 368.

118. *Id.* at 365. The Court articulated the policy behind the proof beyond a reasonable doubt standard when it stated:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”

Id. at 363 (citation omitted).

119. *Id.* at 366.

120. *Id.*

121. *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 540-45 (1971). The Court relied on the Due Process Clause of the Fourteenth Amendment, although it noted that the Sixth Amendment right to a jury applied to the states. *See id.* at 540. The sixteen-year-old defendant was charged with three felonies: robbery, larceny, and receiving stolen goods. *Id.* at 534. His counsel asked for a jury trial, but the request was denied. *Id.* at 535.

122. *Id.* at 543.

123. *Id.*

124. *Id.* at 543, 545.

125. *See* Sheila Reynolds, *Changes Made by the New Juvenile Codes*, 51 J. KAN. B. ASS’N. 181, 181 (1982).

ing system by separating proceedings for abused and neglected children from those for delinquency.¹²⁶ After the statutory reforms, courts afforded delinquents the right to an attorney rather than appointing a guardian ad litem.¹²⁷

In 1984, two years after the enactment of the new juvenile justice code, the Kansas Supreme Court decided *Findlay v. State*.¹²⁸ The child argued that he had a constitutional right to a jury because his adjudication was essentially a criminal trial and the acts with which he was charged would be felonies if committed as an adult.¹²⁹ The court, relying on the newly adopted Kansas Juvenile Offenders Code and the reasoning in *McKeiver*, held that juveniles had no constitutional right to a jury trial.¹³⁰ The changes to the code were subtle and the policy statement read:

K.S.A. 1982 Supp. 38-1601 through 38-1685 shall be known and may be cited as the Kansas juvenile offenders code and shall be liberally construed to the end that each juvenile coming within its provisions shall receive the care, custody, guidance, control and discipline, preferably in the juvenile's own home, as will best serve the juvenile's rehabilitation and the protection of society. In no case shall any order, judgment or decree of the district court, in any proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state.¹³¹

The Kansas Legislature revised the juvenile code again in 1996, this time removing the doctrine of *parens patriae* from the code.¹³² The changes were much less subtle, and the policy statement read, "The primary goal of the juvenile justice code is to *promote public safety, hold juvenile offenders accountable* for such juvenile's behavior and improve the ability of juveniles to live more productively and responsibly in the community."¹³³ Not only was the primary goal of the act changed to "promote public safety" and to "hold juvenile offenders accountable," but the Legislature also removed the section stating that no proceedings under the code would be deemed to import a criminal act.¹³⁴ Then in 1996, the Kansas Supreme Court decided *State v. LaMunyon*.¹³⁵

In *LaMunyon*, the issue was whether a child's prior adjudications under the juvenile system could be used in calculating his criminal history score as an adult, which might result in a longer sentence.¹³⁶ The

126. *Id.*

127. *Id.* at 188.

128. *Findlay v. State*, 681 P.2d 20, 20 (Kan. 1984).

129. *Id.* at 22.

130. *Id.* at 21-22.

131. KAN. STAT. ANN. § 38-1601 (Supp. 1982).

132. *See* KAN. STAT. ANN. § 38-1601 (Supp. 1997).

133. *Id.* (emphasis added).

134. *State v. Hitt*, 42 P.3d 732, 735 (Kan. 2002).

135. 911 P.2d 151 (Kan. 1996).

136. *Id.* at 153.

court held that “the defendant’s juvenile adjudications may properly be used in determining his criminal history score”¹³⁷ It noted, “The mere fact that a juvenile adjudication is not a criminal conviction does not prohibit using a juvenile adjudication in calculating a criminal history score for purposes of sentencing an adult under the [Kansas Sentencing Guidelines Act (KSGA)].”¹³⁸ The court also reasoned that because the KSGA was enacted after the juvenile code, it was controlling.¹³⁹ In *State v. Hitt*,¹⁴⁰ the Kansas Supreme Court upheld *LaMunyon*, reaffirming the rule that prior juvenile adjudications could be used in adult sentencing.¹⁴¹

Kansas’ current approach to juvenile justice is no longer based on the doctrine of *parens patriae*.¹⁴² The juvenile system is essentially a separate criminal prosecution system.¹⁴³

IV. THE COURT’S DECISION

In *In re L.M.*, L.M. asked the Kansas Supreme Court to repudiate 100 years of case law and hold that a constitutional right to a jury trial exists for children being charged with crimes in the juvenile justice system.¹⁴⁴ The specific issue before the court was “whether a juvenile charged with an offense which, if convicted, would cause him to be categorized as a ‘sex offender’ . . . and subjected to [] registration . . . has the right to demand a trial by jury.”¹⁴⁵

L.M. made three arguments to the court: (1) he had the right to a jury trial under the federal Constitution because changes to the Revised Kansas Juvenile Justice Code (KJJC) “eroded the child-cognizant, paternal, and rehabilitative purposes of the juvenile offender process”; (2) the Kansas Constitution granted children a right to a jury trial; and (3) he should have been granted a jury trial because of the possibility of registration as a sex offender.¹⁴⁶ L.M. argued that the changes made to the KJJC since the court last visited the issue in 1984 in *Findlay*, “obliterated[ed]” the parental nature of juvenile offender cases and turned the KJJC into “the bastard child of the criminal code.”¹⁴⁷

In response, the State argued that the reasoning in *Findlay* and

137. *Id.* at 159.

138. *Id.* at 155.

139. *Id.* at 154, 156, 159.

140. 42 P.3d 732 (Kan. 2002).

141. *Id.* at 738-39.

142. *In re L.M.*, 186 P.3d 164, 170 (“These changes to the juvenile justice system have eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system.”).

143. *Id.*

144. *Id.* at 165.

145. Petition for Review at 5, *In re L.M.*, 186 P.3d 164 (No. 06-96197).

146. *In re L.M.*, 186 P.3d at 167-68.

147. Brief of Appellant, *supra* note 17, at 33.

McKeiver was still valid and should be followed by the court.¹⁴⁸ It pointed out that the Legislature made no substantive changes to the particular statute at issue in *Findlay*; therefore, *Findlay* was still valid.¹⁴⁹ Furthermore, it noted that the Kansas Supreme Court decided *In re L.A.*¹⁵⁰ after the KJJC was revised.¹⁵¹ In *In re L.A.*, the court reaffirmed that juveniles had no right to a jury trial under either the federal or the state constitution.¹⁵² The State further argued that the *McKeiver* reasoning should still apply because the Kansas Legislature had sought to keep the juvenile and adult systems separate and had enacted procedures to protect a child's due process rights during a juvenile adjudication.¹⁵³

The Kansas Supreme Court granted review to decide whether a child has a constitutional right to a jury trial pursuant to the current KJJC.¹⁵⁴ In a powerful show of support for L.M.'s position, the court voted six to one, holding that the changes to the KJJC "have eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system," thus "supersed[ing] the *McKeiver* and *Findlay* Courts' reasoning."¹⁵⁵ The court also held that the KJJC proceedings against a child are "prosecutions," and therefore, a right to a jury trial exists under the state constitution.¹⁵⁶ This holding, that the right to a jury trial exists under both federal and state constitutions, invoked the doctrine of "adequate and independent state grounds" and foreclosed any appeal by the State to the United States Supreme Court.¹⁵⁷

Writing for the majority, Justice Eric Rosen analyzed the changes made by the Legislature to the KJJC.¹⁵⁸ He first noted that Kansas had previously held that there was no constitutional right to a jury in juvenile adjudications.¹⁵⁹ He observed that the changes brought the KJJC

148. Amended Brief of Appellee, *supra* note 18, at 11.

149. *Id.* at 8.

150. 21 P.3d 952 (Kan. 2001).

151. Amended Brief of Appellee, *supra* note 18, at 8-9.

152. *Id.*

153. *Id.* at 11.

154. *In re L.M.*, 186 P.3d 164, 165 (Kan. 2008).

155. *Id.* at 170.

156. *Id.* at 172.

157. See *Michigan v. Long*, 463 U.S. 1032, 1038 (1983) ("It is, of course, 'incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment.'" (citing *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931))); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on *adequate and independent state grounds*." (emphasis added)); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (stating that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment"). Under the adequate and independent state grounds doctrine, the United States Supreme Court will not review the final judgments of state courts that rest upon both federal and state law when the decision is based on state law grounds that are adequate to support the judgment and independent of federal law. See cases cited *supra*.

158. *In re L.M.*, 186 P.3d 164, 168-70 (Kan. 2008).

159. *Id.* In *Findlay*, the court adopted the United State Supreme Court's reasoning in *McKeiver*.

more in line with the criminal justice system and removed some of the protections of the old juvenile system.¹⁶⁰

The court detailed that in 1982, the Kansas Juvenile Offender Code (KJOC) focused on the State's role as *parens patriae* and the rehabilitation of juvenile delinquents.¹⁶¹ Since that time, the KJJC has shifted its policy from a rehabilitative and nurturing model to a punitive model in which the goals are to "promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community."¹⁶² These changes mirrored the legislative intent in the criminal code.¹⁶³ The court then analyzed the wholesale changes in the language used in the KJJC.¹⁶⁴

The court observed: (1) that children were previously required to "admit or deny" the allegations, but now must "plead guilty, not guilty"; (2) the "dispositional proceeding" is now a "sentencing proceeding"; (3) the "State youth center" is now a "Juvenile correctional facility"; and (4) the new changes refer to a child's commitment to the facility as a "term of incarceration."¹⁶⁵ All these changes reflect the similarities between the adult criminal system and the juvenile system at both the adjudicatory stage and the post-adjudicatory stage.¹⁶⁶ The court not only discussed the changes aligning the KJJC with the criminal code, but also discussed the protections that were removed from the system.¹⁶⁷

The court noted that under the 1982 KJOC, proceedings against children under the age of sixteen were confidential, whereas under the KJJC, the official file, police records, and municipal records for a child fourteen or older are open to the public.¹⁶⁸ The hearings now are also open to the public.¹⁶⁹ If the child is under the age of sixteen, the court may order the hearing closed, but only if it finds it is in the best interests of the child.¹⁷⁰ All these changes have "eroded the benevolent *parens patriae* character" of the KJJC.¹⁷¹

Justice Rosen then addressed the argument that a right existed under the Kansas Constitution.¹⁷² Section 10 of the Kansas Constitution Bill of Rights states, "In all prosecutions, the accused shall be allowed . . . a speedy public trial by an impartial jury of the county or district in

Id.

160. *Id.* at 168-70.

161. *Id.* at 168.

162. *Id.* (emphasis omitted); KAN. STAT. ANN. § 38-2301 (Supp. 2006).

163. *In re L.M.*, 186 P.3d at 168.

164. *Id.*

165. *Id.* at 168-69.

166. *See id.* at 169.

167. *Id.* at 169-70.

168. *Id.* at 170.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 171.

which the offense is alleged to have been committed.”¹⁷³ Focusing on the “all prosecutions” language, the court observed that proceedings under the KJJC are based on allegations that the child violated a criminal law.¹⁷⁴ The court then noted that the KJJC refers to its proceedings as “prosecutions” throughout the Act.¹⁷⁵ As a result, the court held that “the proceedings under the KJJC fit within the meaning of the phrase ‘all prosecutions’ as set forth in § 10, and juveniles have a right to a jury trial under the Kansas Constitution.”¹⁷⁶

Justice Marla Luckert, writing separately and concurring in the result, recognized L.M.’s concern that he would be required to register as a sex-offender without the protection of a jury trial.¹⁷⁷ By focusing on his unique circumstances, L.M. was making an “as applied” argument.¹⁷⁸ Justice Luckert focused on section 5 of the Kansas Constitution Bill of Rights, noting that the “as applied” argument need not be addressed.¹⁷⁹ She noted that an early case construing this section of the Constitution stated:

The constitutional provision that the right of trial by jury shall be inviolate . . . means that a jury trial is preserved in all cases in which it existed prior to the adoption of the constitution. It does not extend the right of trial by jury—it simply preserves it. It remains inviolate, that is, not disturbed or limited.¹⁸⁰

After reviewing the history of juveniles charged with crimes at common law, she noted that under Kansas case law “a person 14 years old or older was deemed presumptively capable of committing a crime.”¹⁸¹ Therefore, because L.M. was sixteen at the time of his offense and was entitled to a jury trial at common law, section 5 of the Kansas Constitution granted him the right to a jury trial.¹⁸²

Justice Kay McFarland, the lone dissenter, wrote a vigorous opinion.¹⁸³ She maintained that while there have been many changes to the KJJC, the majority “overstate[d] and overemphasize[d] the changes while ignoring the many features . . . that remain consistent with the benevolent, protective, rehabilitative, child-cognizant characteristics that distinguish the juvenile system from the criminal system.”¹⁸⁴ She rea-

173. *Id.*; KAN. CONST. Bill of Rights, § 10.

174. *In re L.M.*, 186 P.3d at 172.

175. *Id.*

176. *Id.*

177. *Id.* at 173 (Luckert, J., concurring).

178. *Id.*

179. *Id.*

180. *Id.* at 173 (quoting *In re Rolfs*, 1 P. 523, 525-26 (Kan. 1883)).

181. *Id.* at 174.

182. *Id.* at 175.

183. *Id.* (McFarland, J., dissenting).

184. *Id.* Chief Justice Kay McFarland draws attention to the severity of sentencing faced by juveniles as compared to adults for the same crimes. *See id.* at 177. She notes that the judges are given far more discretion when sentencing a juvenile. *See id.* at 178. Additionally, she highlights the unique intake features of the juvenile system. *See id.* at 179-80.

soned that the policy goals were still very much the same, although the current KJJC is more specific in how those goals are to be achieved.¹⁸⁵ She then addressed the change in language in the statutes and noted that the labeling may sound more like the adult code's language, but there were no substantive changes made to the system through such re-labeling.¹⁸⁶ Her analysis then compared many portions of the KJJC with the adult codes to show there are still significant differences that emphasize rehabilitation of juvenile offenders.¹⁸⁷ She concluded that the "juvenile system still retains significant individualized, protective, rehabilitative, child-cognizant features that distinguish it from the adult system" and the changes have not "so eroded the features" that *Findlay* and *McKeiver* are no longer controlling.¹⁸⁸

V. COMMENTARY

In 1982, the Kansas Legislature completely overhauled the juvenile justice system, splitting the old system into two separate parts.¹⁸⁹ It created the Kansas Juvenile Offenders Code (KJOC),¹⁹⁰ which only applies to children whose offenses are criminal in nature, and the Kansas Code for the Care of Children,¹⁹¹ which applies to children who are abused, neglected, or status offenders.¹⁹² The KJOC reflected a policy decision to treat children more like adults.¹⁹³ The KJOC was again overhauled in 1996 with a more pronounced policy shift toward criminal treatment of children, and the doctrine of *parens patriae* was completely removed from the code.¹⁹⁴ The KJJC replaced the KJOC and continued the shift toward punishment.¹⁹⁵ The Kansas Supreme Court, in recognizing this shift toward treating delinquent children more like adult criminals, found the KJJC to be criminal in nature, and in particular, found sections 38-2344(d) and 38-2357 of the Kansas Statutes unconstitutional under both the United States Constitution and the Kansas Constitution.¹⁹⁶ The Kansas Legislature will need to address this problem because the number of juveniles requesting jury trials is likely to strain the juvenile court system.¹⁹⁷ The current system was not designed to afford

185. *Id.* at 176.

186. *Id.* at 177.

187. *Id.* at 177-81.

188. *Id.* at 181-82.

189. Reynolds, *supra* note 125, at 181.

190. KAN. STAT. ANN. §§ 38-1601 to 1685 (Supp. 1982).

191. *Id.* §§ 38-1501 to 1593.

192. Reynolds, *supra* note 125, at 181.

193. *Id.* at 187.

194. See KAN. STAT. ANN. § 38-1601 (Supp. 1997).

195. See *In re L.M.*, 186 P.3d 164, 170 (Kan. 2008).

196. *Id.* at 170, 172.

197. See generally Steve Fry, *Jury Trials for Youths May Strain Local Court*, TOPEKA CAPITAL-JOURNAL, June 21, 2008, at A1 (discussing potential issues a flood of juvenile jury trials might cause on the burdened juvenile court system).

a juvenile these important due process rights.¹⁹⁸

A. *The Need for Legislation*

A large portion of the majority opinion in *In re L.M.* was devoted to discussing the changes in the language and terminology used in the KJJC.¹⁹⁹ The majority emphasized the language changes made to the policy statements of the KJOC and the KJJC to support its finding that the juvenile code has become punitive in nature and is aligned with the adult criminal system.²⁰⁰ Justice McFarland, in dissent, stressed that “form must not be placed over substance,” and implied that the majority did just that.²⁰¹ In 1982, the policy statement of the KJOC stated that “[the KJOC] shall be liberally construed to the end that each juvenile coming within its provisions shall receive the care, custody, guidance, control and discipline . . . as will best serve the juvenile’s rehabilitation and the protection of society,”²⁰² whereas the KJJC now states, “[t]he primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community.”²⁰³ The majority may well have overemphasized the change in language made by the Legislature as both versions of the juvenile code state that the policy goal is the protection of the public and the rehabilitation of the juvenile.

The majority focused on changed terminology in various provisions of the KJJC and found that these terminology changes show an alignment of the juvenile justice system with the adult criminal system.²⁰⁴ As Justice McFarland observed, the changes that the majority listed as examples of alignment between the adult and juvenile systems are not all substantive in nature.²⁰⁵ To take an example from the opinion, a re-

198. *See generally id.*

199. *In re L.M.*, 186 P.3d at 168-172. The court stated:

We begin our analysis by noting that the Kansas Legislature has significantly changed the language of the Kansas Juvenile Offender Code (KJOC) since the *Findlay* court decided this issue 24 years ago. The juvenile code is now called the Revised Kansas Juvenile Justice Code. L.M. asserts that these changes to the code negated the rehabilitative purpose set forth in the KJOC. According to L.M., the negating of the rehabilitative purpose is evidenced by the replacement of nonpunitive terminology with criminal terminology similar to the adult criminal code

Id. at 168.

200. *Id.* at 168 (discussing the legislative changes made to the KJJC policy statement as compared to the *parens patriae* and rehabilitation-focused KJOC policy statement).

201. *Id.* at 177 (McFarland, J., dissenting) (“If a change in terminology does not reflect any substantive change in the thing or process described, then too much emphasis should not be placed on that terminology. . . . Regardless of their names, these facilities have always been institutions where juvenile offenders are sent to serve a period of court-ordered confinement.”).

202. KAN. STAT. ANN. § 38-1601 (Supp. 1982).

203. KAN. STAT. ANN. § 38-2301 (Supp. 2007).

204. *In re L.M.*, 186 P.3d 164, 168-72 (Kan. 2008).

205. *See id.* at 177 (McFarland, J., dissenting). Justice McFarland noted that:

The facilities denominated as state youth centers, and now juvenile correctional facilities,

quirement to “admit or deny” allegations is not substantively different from a plea of “guilty” or “not guilty.”²⁰⁶ To plead guilty and to admit to the allegations both involve acknowledgement of responsibility for the alleged charge, just as to deny and to plead not guilty both represent a refusal to acknowledge responsibility.²⁰⁷ The majority’s focus on the change in terminology to support its finding that the juvenile system had been aligned with the adult criminal system was misplaced, and its reasoning put form before substance.²⁰⁸

The majority also analyzed the legislative changes made to the sentencing statutes to show how the changes reflect an alignment with the adult criminal system.²⁰⁹ As the dissent pointed out, however, the majority failed to account for the significant differences in the severity of punishment that still exist between the KJJC and the adult criminal system.²¹⁰ Additionally, sentencing under the juvenile matrix is not mandatory; judges retain discretion in deciding whether to sentence a juvenile to a youth center.²¹¹ Also, under the juvenile system, the judge is given the power to alter an already imposed sentence—this option does not exist in the adult sentencing guidelines.²¹² These are just a few of the significant differences that remain between the adult and juvenile sentencing guidelines.²¹³

Sentencing options, although similar to the sentencing guidelines, are just as important to illustrate the unique nature of the juvenile jus-

are one and the same. See K.S.A. 76-2101 (Youth Center at Topeka renamed Topeka Juvenile Correctional Facility); K.S.A. 76-2101b (Youth Center at Atchison renamed Atchison Juvenile Correctional Facility); K.S.A. 76-2201 (Youth Center at Beloit renamed the Beloit Juvenile Correctional Facility); and K.S.A. 76-3204 (Youth Center at Larned renamed Larned Juvenile Correctional Facility).

Id.

206. See *id.* at 168-69 (majority opinion).

207. According to one dictionary, “admit” means “to acknowledge; confess”; “deny” means “to refuse to . . . acknowledge”; “guilty” means “[r]esponsible for . . . a reprehensible act”; and “not guilty” means “to express negation, denial, refusal.” THE AMERICAN HERITAGE DICTIONARY 80, 382, 581, 849 (2d coll. ed. 1985).

208. *In re L.M.*, 186 P.3d at 177 (McFarland, J., dissenting).

209. *Id.* at 169 (majority opinion) (“The legislature . . . emulated the structure of the Kansas Sentencing Guidelines when it established a sentencing matrix for juveniles based on the level of the offense committed and, in some cases, the juvenile’s history of juvenile adjudications.”).

210. See *infra* notes 240-242 and accompanying text.

211. *In re L.M.*, 186 P.3d at 178 (McFarland, J., dissenting). Justice McFarland stated:

Commitment to a juvenile correctional facility for a term under the matrix is only *one* of a number of sentencing alternatives available to a juvenile judge. Thus, the judge has discretion in deciding whether to sentence a juvenile to a juvenile correctional facility. If that option is chosen, however, the court must impose the applicable sentence specified in the matrix. While the court may depart upward, downward departures are not authorized, presumably because a commitment to a juvenile correctional facility is discretionary in the first instance.

Id. (citations omitted).

212. *Id.* (citing *State v. Anthony*, 58 P.3d 742, 743 (Kan. 2002), for the proposition that “the Kansas Sentencing Guidelines Act eliminated the discretionary power to modify a lawful sentence once imposed”).

213. See *id.* at 178-79 (listing numerous points that the majority failed to analyze when looking at the sentencing guidelines of the juvenile and adult courts).

tice system. The majority contended that the similarity between the two systems—adult criminal and juvenile—indicates juvenile sentencing is more in line with adult sentencing options.²¹⁴ The majority failed to address the unique intake procedures used in the juvenile system.²¹⁵ Justice Byron White relied on these unique intake procedures in *McKeiver* to find that a juvenile was not entitled to a jury trial.²¹⁶ In *McKeiver*, Justice White said, “The extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury.”²¹⁷

The Kansas Supreme Court has interpreted the changes to the juvenile justice system in Kansas as imparting a punitive approach to juvenile justice, and as a result, now requires a jury trial for juveniles.²¹⁸ The analysis used by the majority found the KJJC to be criminal in nature and left open the question of whether juveniles are entitled to all the procedural rights afforded adults in the adult criminal system.²¹⁹ The legislature is the lawmaking body in the state and therefore should step forward to address the issues raised by the court’s decision, rather than simply relying upon the court to reshape the current juvenile justice system.

B. Proposed Legislative Solution: Return to Parens Patriae and Split the Juvenile Justice System into Separate Categories

In re L.M. has left the Legislature with an opportunity to cure the deficiencies of the current juvenile justice system and at the same time

214. *Id.* at 169 (majority opinion) (“Both adults and juveniles may be sentenced to probation; a community-based program; house arrest; a short-term behavior-modification program like a sanctions house or conservation camp; placement in an out-of-home facility; or incarceration in a correctional facility. . . . Sentencing of juveniles has become much more congruent with the adult model.”).

215. *Id.* at 179-80 (McFarland, J., dissenting) (discussing how the majority’s overly broad discussion of the sentencing options under the KJJC overlooks the unique options the juvenile court has when determining sentencing, including the unique intake system). Justice McFarland stated:

Under the Juvenile Intake and Assessment Program, a juvenile taken into custody by law enforcement is taken to a local juvenile intake and assessment program for evaluation. . . . The intake and assessment worker administers assessments and gathers information about the juvenile, including criminal history, abuse history, history of substance abuse, educational history, and family history. After completing the assessment process . . . [t]he worker may release the juvenile to a parent . . . or other legal guardian . . . with or without conditions, if the worker believes that is in the child’s best interests. The conditions may include counseling for the juvenile and/or the child’s family, participation by the juvenile, family members and other relevant persons in mediation, inpatient treatment, and referral to available community services. The worker may also refer the juvenile to the county or district attorney for the filing of charges and make recommendations concerning intermediate intervention programs that may be beneficial for the juvenile.

Id. at 179 (citations omitted).

216. *See id.* at 180 (discussing Justice White’s opinion in *McKeiver*).

217. *Id.*; *McKeiver v. Pennsylvania*, 403 U.S. 441, 552 (1971) (White, J., concurring).

218. *In re L.M.*, 186 P.3d at 172 (majority opinion) (holding jury trial by judge’s discretion as unconstitutional in Kansas).

219. *See* Motion for Rehearing and Clarification at 2-3, *In re L.M.*, 186 P.3d 164 (No. 06-96197).

address society's concern about the culpability of adolescent offenders. One of the best alternatives is to split the KJJC into two sections, based upon the age of the offender, and to return to the doctrine of *parens patriae*.²²⁰ The split would coincide with Kansas' recognition of the common-law presumption that persons fourteen years old or older possess the mental capacity to commit criminal acts.²²¹ Splitting the categories by age of the child would better recognize the progressive maturity of children as they approach adulthood. It has been noted that "[c]hildren, especially by adolescence, are more competent than the law acknowledges."²²²

One commentator argues that the current state of juvenile justice requires an all-or-nothing choice: the offender is categorized as either a child or an adult, and there is "no middle ground, no sliding scale of responsibility."²²³ Numerous commentators have noted the failure of the juvenile justice system to deliver on its promises to rehabilitate and reform child offenders, and have argued for abolishing the juvenile court system and returning to a unified criminal justice system.²²⁴ These abolitionist commentators argue that the juvenile court may differ procedurally from the adult criminal court because it continues to deprive children of the constitutional right to a jury, but the two are functionally equivalent.²²⁵ Accordingly, the solution may be to abolish the juvenile court and send all offenders, both adults and children, to adult criminal court.²²⁶

The abolitionists argue that today, the juvenile court functions only to punish child offenders and to bring them under social control.²²⁷ As a result, the state should prosecute all offenders in one court and use "youthfulness as a mitigating factor."²²⁸ One abolitionist notes, "[y]outhfulness . . . long has been recognized as a mitigating . . . condition at sentencing."²²⁹ This "youth discount" will ensure that children will continue to get shorter sentences as they do in today's juvenile

220. See JOHN T. WHITEHEAD & STEVEN P. LAB, *JUVENILE JUSTICE: AN INTRODUCTION* 336-45 (4th ed. 2004) (discussing several proposals for reforming juvenile court, one being a basic framework for a juvenile court with two branches, such as the one for which this Comment advocates).

221. See *In re L.M.*, 186 P.3d at 174 (Luckert, J., concurring) (discussing the history of the common law and the age of criminal culpability).

222. Feld, *Transformation*, *supra* note 48, at 725.

223. Ainsworth, *supra* note 48, at 948.

224. *Id.* at 929 ("The severe shortcomings of the juvenile justice system and its intractability to meaningful reform have led a number of commentators, myself included, to press for its total abolition.").

225. See Feld, *Transformation*, *supra* note 48, at 722-23.

226. WHITEHEAD & LAB, *supra* note 220, at 338.

227. FELD, *BAD KIDS*, *supra* note 64, at 327.

228. *Id.* at 302-03. Professor Feld promotes the "youth discount," a sliding scale based on age, to reduce the sentences of juveniles convicted of crimes. See *id.* at 315-19; see also Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 115-21 (1997) (discussing his proposal for a "youth discount" in sentencing juveniles to account for their reduced culpability).

229. Feld, *Transformation*, *supra* note 48, at 724.

court.²³⁰ Shorter sentences are appropriate not only because of the reduced culpability of children, but also because they allow children to “survive the mistakes of adolescence with a semblance of their life chances intact.”²³¹ The problem with such optimism is that while age “long has been recognized as a mitigating [factor],”²³² the reality is that children are being waived into adult court in growing numbers and “[o]nce waived[,] . . . the juvenile is transformed into an ‘adult,’ with all that the designation entails.”²³³ The original juvenile court was established, in part, “to remove children from the harsh criminal justice system” because age was not being considered as a mitigating circumstance.²³⁴ There is no assurance in today’s “get tough” society that age will be used as a mitigating factor.²³⁵

A unified criminal court may cure the abolitionists’ perceived procedural injustices;²³⁶ nevertheless, it most likely will result in more punishment for children. Even if age is used as a mitigating factor for sentencing, this may still lead to more punishment in adult criminal court.²³⁷ One commentator suggests discounting sentences for children on a percentage scale.²³⁸ For example, a sixteen-year-old might receive fifty to sixty-six percent of the sentence of an adult.²³⁹ Currently, a sixteen-year-old sentenced in Kansas for a nondrug, level-one felony would face a minimum sentence of 24 months and a maximum sentence extending until the juvenile reaches the age of twenty-two and six months,²⁴⁰ at which point the juvenile court would no longer have jurisdiction over the child.²⁴¹ An adult with no prior convictions, however, would face between 147 and 165 months.²⁴² In a percentage scale discount system,

230. FELD, *BAD KIDS*, *supra* note 64, at 304.

231. *Id.*

232. Feld, *Transformation*, *supra* note 48, at 724.

233. Ainsworth, *supra* note 48, at 947 (discussing the increased use of waiver to usher juveniles into adult criminal court and the complete lack of concern for age as a mitigating factor during sentencing).

234. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 43 (Margaret K. Rosenheim et al. eds., 2002) (discussing the process and reasons for the development of the first juvenile court in 1899 in Illinois).

235. See Feld, *Abolish*, *supra* note 228, at 79-86 (discussing sentencing and waiver changes made in the juvenile justice system in the “get tough” era of the late 1980s to the late 1990s); Mark Soler, *Juvenile Justice in the Next Century: Programs or Politics?*, 10 *CRIM. JUST.* 27, 27 (Winter 1996) (discussing the “get tough” attitudes of public officials and the changes to the juvenile justice system as a result).

236. See Feld, *Transformation*, *supra* note 48, at 723-24 (discussing the benefits of adult criminal court in administering justice to children). Professor Feld believes the only virtue of the traditional juvenile court was its shorter sentences for children adjudged delinquent. See *id.* at 724.

237. See *infra* notes 240-244 and accompanying text.

238. FELD, *BAD KIDS*, *supra* note 64, at 317.

239. *Id.*

240. The maximum sentence for a sixteen-year-old child could theoretically extend to 78 months if the sentence began on his sixteenth birthday and extended to age twenty-two years and six months. See *KAN. STAT. ANN.* § 38-2369(a)(1)(B) (Supp. 2007).

241. See *id.*

242. *KAN. STAT. ANN.* § 21-4704 (2007); see *In re L.M.*, 186 P.3d 164, 177 (Kan. 2008)

such as the commentator proposes, the child would face a minimum of 73 to 97 months and a maximum of 82 to 109 months. Even within a percentage scale discount system, a child's minimum sentence in adult criminal court would be, at best, five months shorter than the maximum sentence under the KJJC;²⁴³ however, the maximum sentence would be two years and seven months longer than the KJJC maximum.²⁴⁴

Splitting the KJJC into two sections and returning to a doctrine of *parens patriae* would alleviate many of the concerns of the abolitionist commentators. A split system such as the one advocated below would consider youthfulness when sentencing adolescent offenders, and a return to the doctrine of *parens patriae* would ensure a rehabilitative approach for the least culpable child offenders.

1. Return to the Doctrine of *Parens Patriae*

The first order of business for the Legislature should be to fix the juvenile justice system by returning to a *parens patriae* approach. In 1996, the Legislature removed the *parens patriae* language from the policy statement of the juvenile justice code.²⁴⁵ This move by the Legislature signaled the end of the rehabilitative approach to the juvenile justice system; the precise approach that courts employed for more than 100 years to justify granting limited procedural rights to juveniles.²⁴⁶

It can be argued that a split system is not required to fix the current system and bring it back into constitutional conformity. In order for the Kansas Legislature to maintain the current juvenile justice system, return it to a *parens patriae* system, and cure it of the deficiencies identified by the court, the Legislature would need to undertake an extensive statutory overhaul.²⁴⁷ This same statutory overhaul would be required for a split system. The principal problem with undertaking a statutory overhaul of the current system, however, is that making statutory changes is both a time consuming and inefficient way to address the deficiencies regularly identified by the courts.²⁴⁸ The juvenile code in Kan-

(McFarland, J., dissenting).

243. Applying an age discount of fifty percent to the minimum adult sentence, the resulting sentence would be 73 months, or 5 months shorter than the potential maximum under the KJJC. See *supra* note 240.

244. Applying an age discount of sixty-six percent to the maximum adult sentence, the resulting sentence would be 109 months, or 31 months longer than the potential maximum under the KJJC. See *supra* note 240.

245. See *supra* notes 132-134 and accompanying text.

246. *Findlay v. State*, 681 P.2d 20, 21-22 (Kan. 1984) (discussing *McKeiver's* paternalistic approach to juvenile courts).

247. See *In re L.M.*, 186 P.3d 164, 168-70 (Kan. 2008) (discussing statutory changes made to the Kansas juvenile justice system through the years that "eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system").

248. See Feld, *Transformation*, *supra* note 48, at 723 ("After more than two decades of . . . legislative reform, juvenile courts continue to deflect, co-opt, ignore, or absorb ameliorative tinkering with minimal institutional change."); see generally Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 194-95 (2007) (discussing juve-

sas has not only undergone many amendments throughout the years, but has also been completely rewritten multiple times.²⁴⁹ The Legislature would have to continually add, remove, or revise individual sections of the code to keep up with court-identified problems. As evidenced by the history of the juvenile code in Kansas, a statutory overhaul is not the answer. A one-size-fits-all juvenile justice system cannot address all the unique circumstances faced by the courts. A split system can address the court's concerns and withstand a constitutional attack.

The current policy statement of the code can still be read to impart a rehabilitative and *parens patriae* approach.²⁵⁰ The policy statement of the KJJC states that the intent of the act is to, among other things, "recognize that the ultimate solutions to juvenile crime lie in the strengthening of families and educational institutions, the involvement of the community and the implementation of effective prevention and early intervention programs," and to "be family centered when appropriate."²⁵¹ The removal of the explicit *parens patriae* language, however, may also indicate an abandonment of that approach. This is just one of the factors on which the court relied in *In re L.M.* to find the denial of the right to a jury trial unconstitutional.²⁵²

The policy statement can be easily amended by the Legislature to explicitly provide for the *parens patriae* approach and remain faithful to its current goals. The addition of the final sentence of the 1982 version of section 38-1601 is a good compliment to the current policy statement.²⁵³ After amendment, the policy statement would read (added material in italics):

This act shall be known and may be cited as the revised Kansas juvenile justice code. The primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community. To accomplish these goals, juvenile justice policies developed pursuant to the revised Kansas juvenile justice code shall be designed to: (a) Protect public safety; (b) recognize that the ultimate solutions to juvenile crime lie in the strengthening of families and educational institutions, the involvement of the community and the implementation of effective prevention and early intervention programs; (c) be community based to

nile courts as a "work-in-progress" with changes made through the years in response to court decisions and local politics).

249. The original juvenile code was found in chapter 38, article 4 of the Kansas Statutes. KAN. STAT. ANN. §§ 4412-4427 (1905). In 1957, the juvenile code was rewritten and could be found in chapter 38, article 8 of the Kansas statutes. *Id.* §§ 38-801 to 838 (Supp. 1957). In 1983, the Kansas Juvenile Offenders Code replaced the previous juvenile code and could be found in Chapter 38, article 16 of the Kansas statutes. *Id.* §§ 38-1601 to 1685 (Supp. 1982). The current code, the Revised Kansas Juvenile Justice Code, has replaced article 16 and is found in Chapter 38, article 23 of the Kansas statutes. *Id.* §§ 38-2301 to 2387 (Supp. 2007).

250. See KAN. STAT. ANN. § 38-2301 (Supp. 2007).

251. *Id.* § 38-2301(b), (d).

252. See *In re L.M.*, 186 P.3d 164, 168 (Kan. 2008).

253. Compare KAN. STAT. ANN. § 38-1601 (1982), with KAN. STAT. ANN. § 38-2301 (Supp. 2007).

the greatest extent possible; (d) be family centered when appropriate; (e) facilitate efficient and effective cooperation, coordination and collaboration among agencies of the local, state and federal government; (f) be outcome based, allowing for the effective and accurate assessment of program performance; (g) be cost-effectively implemented and administered to utilize resources wisely; (h) encourage the recruitment and retention of well-qualified, highly trained professionals to staff all components of the system; (i) appropriately reflect community norms and public priorities; and (j) encourage public and private partnerships to address community risk factors. *In no case shall any order, judgment or decree of the district court, in any proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state.*²⁵⁴

2. Expressly Recognize Children and Adolescents as Separate Classifications

Adolescents are more mature and, therefore, more culpable than children, yet not as culpable as adults.²⁵⁵ Because of this evolving maturity throughout adolescence, there needs to be recognition of this classification in the juvenile justice system.²⁵⁶ The current minimum age that would bring a juvenile under the KJJC's jurisdiction is ten years.²⁵⁷ There are no other classifications for prosecution as a delinquent; the only other option is to transfer to the adult criminal system.²⁵⁸ The proposed system would split the juveniles that fall within the KJJC's current jurisdiction into two age classifications: "child," age ten to thirteen; and "adolescent," age fourteen to seventeen.

The primary difference between the classifications is culpability recognition. At common law, as recognized by the Kansas courts,²⁵⁹ children below the age of fourteen were presumed to be inculpable.²⁶⁰ In the proposed system, classification as a "child" would be accompanied by a rebuttable presumption of inculpability. The *parens patriae* doctrine would need to be applied in full force, with rehabilitation of the child as the principal focus of the court.²⁶¹ In addition, any criminal

254. *Cf.* KAN. STAT. ANN. § 38-2301 (Supp. 2007); KAN. STAT. ANN. § 38-1601 (1982).

255. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (recognizing the lack of maturity, underdeveloped sense of responsibility, and reckless behavior of juveniles under the age of eighteen, along with their vulnerability and susceptibility to negative influences and peer pressure); Feld, *Transformation*, *supra* note 48, at 724 (discussing the maturity and culpability of adolescents to support his proposed "youth discount" for sentencing in criminal court).

256. *See* Ainsworth, *supra* note 48, at 948 (discussing a lack of middle ground in criminal courts between youth and adulthood).

257. KAN. STAT. ANN. § 38-2302(i)(1) (Supp. 2007).

258. *See Id.* § 38-2347 (concerning the requirements for prosecuting a juvenile as an adult and the rebuttable presumption of adulthood for certain crimes charged).

259. *See In re L.M.*, 186 P.3d 164, 174 (Kan. 2008) (Luckert, J., concurring) (discussing the history of the common law and the age of criminal culpability).

260. *See* Feld, *Transformation*, *supra* note 48, at 724 (discussing maturity and culpability of adolescents).

261. As the holding in *Findlay* explained, a *parens patriae* approach to the juvenile justice code

charge should be categorized as “petty” for this class, with a maximum detention of six months. This limitation on the gravity of the criminal charge against a child would not only minimize the punitive nature of the proceeding, but it would also meet the constitutional requirements for denying the right to a jury trial.²⁶²

Research has shown that there are very effective interventions that can significantly reduce recidivism rates among juveniles.²⁶³ These programs are inexpensive to implement and with proper execution, the “juvenile court could be the ideal youth court” as envisioned by its original proponents.²⁶⁴ Parent training is one of the more effective programs identified,²⁶⁵ and the court has the power to hold parents accountable for their child-rearing duties.²⁶⁶

The second category in the proposed juvenile justice system is “adolescent”—juveniles of the ages fourteen to seventeen. This category would recognize the culpability of the adolescent.²⁶⁷ The *parens patriae* doctrine would still be applicable, but there would be more of an emphasis on punishment in recognition of the adolescent’s more culpable mind.²⁶⁸ Additionally, criminal charges may be categorized, as they are today in the KJJC.²⁶⁹ The adolescent charged with a serious crime—one that typically results in detention longer than six months—would have the right to request a jury trial.

3. Waiver

The court in *In re L.M.* did not address the issue of waiver, neither jurisdictional waiver nor procedural rights waiver, as it was not an issue on appeal.²⁷⁰ Yet a proposal to fix a broken juvenile justice system

would pass constitutional muster. See *Findlay v. State*, 681 P.2d 20, 22 (Kan. 1984).

262. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (concluding “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized”); see also *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968) (refusing to find a bright line between petty offenses and serious crimes, but citing the federal petty offense definition of no more than six months in prison, and noting that 49 of the 50 states limit trials without a jury to individuals charged with crimes punishable by no more than one year in jail).

263. WHITEHEAD & LAB, *supra* note 220, at 336.

264. *Id.* Examples of intervention programs suggested by the authors include parent training, restitution and community service programs, training of probation officers as moral educators, and anger management and social skills programs, among others. *Id.* (citations omitted).

265. See *id.*

266. See *In re L.M.*, 186 P.3d 164, 180-81 (Kan. 2008) (McFarland, J., dissenting) (discussing parental requirements within the KJJC).

267. The current juvenile code does not discuss culpability, but the nature of a juvenile justice system is to recognize that juveniles are less culpable than their adult counterparts. See FELD, *BAD KIDS*, *supra* note 64, at 304. When discussing the recognition of culpability of adolescents, I do not mean to imply a level equivalent to an adult. Maintaining a separate juvenile justice system implies a lower level of culpability.

268. Feld, *Transformation*, *supra* note 48, at 724 (“Youths older than fourteen are mature enough to be responsible for their behavior, but immature enough as not to deserve punishment commensurate with adults.”).

269. See generally KAN. STAT. ANN. § 38-2369 (Supp. 2007).

270. See Motion for Rehearing and Clarification, *supra* note 219, at 2-3.

would not be complete without a discussion of this important issue. Safeguards must be available to ensure that the cases that ought to be tried in adult criminal court end up there and the cases that ought to be handled in juvenile court are not removed. The split-system proposal addresses both of these waiver considerations.

a. Jurisdictional Waiver

There is an ever-increasing use of jurisdictional waiver to transfer juveniles to adult criminal court.²⁷¹ Although waiver takes on various forms,²⁷² legislative and prosecutorial waiver pose the greatest threat to a child because the choice to waive is not supported by a full hearing on the circumstances supporting waiver.²⁷³ The proposed model juvenile justice system confines jurisdictional waiver to apply only between successive age classifications: a child may only be waived into the adolescent category, and an adolescent may only be waived into the adult category.²⁷⁴ Waiver must be decided by a judicial hearing that complies with the holding in *Kent*.²⁷⁵ The current KJJC allows for such a hearing.²⁷⁶

b. Waiver of the Right to Counsel

In addition to jurisdictional waiver by the court, there is the concern of procedural rights waivers by the juvenile.²⁷⁷ Juveniles simply do not have the same decision-making ability and comprehension of their legal rights as adults.²⁷⁸ Although some state statutes account for this lack of cognitive maturity by imposing civil restrictions on drinking, driving, and voting, most states allow a juvenile to waive critical procedural rights.²⁷⁹ In the proposed split system, waiver of the juvenile's right to counsel would be prohibited.²⁸⁰ A proposed amended statute

271. See Ainsworth, *supra* note 48, at 947 (discussing the increased use of waiver to usher juveniles into adult criminal court).

272. See *supra* note 95.

273. See Feld, *Transformation*, *supra* note 48, at 701-08 (contrasting judicial and legislative waivers); see also BERNARD, *supra* note 63, at 30 (giving a general description of waiver in juvenile proceedings).

274. See WHITEHEAD & LAB, *supra* note 220, at 341.

275. See *Kent v. United States*, 383 U.S. 541, 554-57 (1966).

276. See generally KAN. STAT. ANN. § 38-2347 (Supp. 2007).

277. See Feld, *Transformation*, *supra* note 48, at 721-22 (discussing the problem with children making a "knowing, intelligent, and voluntary" waiver of a right to counsel).

278. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 629 (2002).

279. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."). *But see* Feld, *Transformation*, *supra* note 48, at 722 n.175 (noting that at least two states have prohibited waiver of the right to counsel by juveniles).

280. See Berkheiser, *supra* note 278, at 636-40. Berkheiser advocates for a nonwaivable right to counsel for juveniles and suggests this is the only way to guarantee a juvenile's access to representa-

would read (the amended language is italicized):

38-2306. Right to an attorney

(a) **Appointment of attorney to represent juvenile.** A juvenile is entitled to have the assistance of an attorney at every stage of the proceedings. If a juvenile appears before any court without an attorney, the court shall inform the juvenile and the juvenile's parent of the right to employ an attorney. Upon failure to retain an attorney, the court shall appoint an attorney to represent the juvenile. The expense of the appointed attorney may be assessed to the juvenile, the parent, or both, as part of the expenses of the case.

(b) **Continuation of representation.** An attorney appointed for a juvenile shall continue to represent the juvenile at all subsequent court hearings in the proceeding under this code, including appellate proceedings, unless relieved by the court upon a showing of good cause or upon transfer of venue.

(c) **Attorney fees.** An attorney appointed pursuant to this section shall be allowed a reasonable fee for services, which may be assessed as an expense in the proceedings as provided in K.S.A. 2007 Supp. 38-2314, and amendments thereto.

(d) **Waiver of right to an attorney.** *The juvenile's right to an attorney under subsections (a) and (b) of this section shall not be waived by a juvenile of any age.*²⁸¹

The proposed model juvenile justice system is designed to better account for the maturing process from childhood to adulthood. The court system itself need not be overhauled because the expertise is already in place to meet the needs of children brought into the system. What is needed is better guidance of the experts running the juvenile justice system. To provide this guidance, there must be a clear policy statement and a statutory structure that addresses the needs of the children within the juvenile justice system.

VI. CONCLUSION

In issuing its opinion in *In re L.M.*, the Kansas Supreme Court rejected both federal and state court precedent that recognized the juvenile justice system is focused on rehabilitation and the doctrine of *parens patriae*—the state's responsibility to provide children with guidance, control, and discipline.²⁸² The court systematically analyzed the entire KJJC and found that the changes were significant enough to align

tion. *Id.* at 637-38. She argues that such a law would pass constitutional muster and overcome any hurdle presented by *Faretta v. California*, 422 U.S. 806 (1975). *Id.* at 638. She maintains that the constitutional right established for adults in *Faretta* is not equivalent to the right enjoyed by juveniles. *Id.* A juvenile's right to counsel is found in the Due Process Clause of the Fourteenth Amendment whereas the right established in *Faretta* is found in the language of the Sixth Amendment. *Id.* at 639. Additionally, "a nonwaivability rule is consistent with *Gault* and its progeny." *Id.*

281. *Cf.* KAN. STAT. ANN. § 38-2306 (Supp. 2007).

282. *See In re L.M.*, 186 P.3d 164, 170 (Kan. 2008).

the KJJC with the adult criminal system.²⁸³ It found that the KJJC has been amended to be more punitive toward those children committing serious crimes and toward those children found to be more culpable than the average child.²⁸⁴ As a result, the court held that juveniles have a constitutional right to a jury trial, and that 38-2344(d) and 38-2357 of the Kansas Statutes are therefore unconstitutional.²⁸⁵

In re L.M. changed the law governing juvenile adjudications in the State of Kansas and effectively redefined the civil nature of juvenile adjudications as criminal proceedings. The Legislature needs to respond by addressing the issues raised by the court's decision and clearly state the purpose of the KJJC as ensuring a rehabilitative court system. The KJJC retains significant advantages for children brought into the system over those afforded to adults in the adult criminal system.

This Comment has attempted to provide one alternative approach for addressing both the needs of a child offender and the needs of society. Children, particularly the youngest offenders, are less culpable than their adult counterparts, and therefore are in need of a rehabilitative approach. At the same time, society needs to be protected from serious crime. The proposed split juvenile system could address both of these needs by focusing on the maturity of the child and his or her increased culpability with age. The proposed split system is not precluded by the court's decision and it can withstand constitutional muster. The majority rejected the rehabilitative-approach reasoning in *McKeiver* and *Findlay* because it held that the KJJC was punitive in nature. The dissent disagreed and interpreted many aspects of the KJJC as rehabilitative in nature. The split system proposal does not take an all-or-nothing approach but addresses both concerns by advancing a rehabilitative model for children and a punitive model for adolescents. With an increase in culpability, and therefore punishment, a young offender will be afforded more procedural protections. The proposal advocated in this Comment will eliminate the current constitutional and procedural problems in the KJJC.

The court reasoned that the juvenile system had become aligned with the adult criminal system. Its holding in *In re L.M.* was the death knell to the *civil* juvenile justice system and one can hope that the Legislature heard it loud and clear. The court answered the narrow question of whether a juvenile has a constitutional right to a jury, yet it left many questions unanswered.²⁸⁶ Are juveniles now entitled to the same procedural rights as adults? If so, this decision may provide the foothold

283. *See id.*

284. *See id.* at 168-70.

285. *See id.* at 170, 172.

286. *See* Motion for Rehearing and Clarification, *supra* note 219, at 2-3.

needed to take the next step and abolish the juvenile court system altogether, incorporating all offenders into a single criminal justice system. The Legislature must preserve the juvenile justice system because children are our most valuable asset and their protection should be our most pressing concern.