

JUVENILE RIGHT TO JURY TRIAL—POST McKEIVER

I. INTRODUCTION

The Supreme Court in *McKeiver v. Pennsylvania*¹ held a trial by jury is not constitutionally required in state juvenile court delinquency proceedings. Balancing a jury trial's attributes against its adverse effects on the juvenile process, the Court was reluctant to shackle the "juvenile court's ability to function in a unique manner;"² a manner that concurring Justices White and Brennan found to supplant the traditional safeguards served by jury trials in criminal proceedings. Responding to the criticisms of the juvenile process the Court stated:

In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States further to experiment and to seek in new and different ways the elusive answers to problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. *If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature.* That, however, is the State's privilege and not its obligation.³ (Emphasis added).

The state juvenile codes provide varying bases for a right to a jury

1. 403 U.S. 528 (1971). The case came to the Supreme Court on appeal from the Supreme Court of Pennsylvania, Eastern District [*In re Terry*, 438 Pa. 339, 265 A.2d 350 (1970)] and was joined with *In re Burrus* on certiorari to the Supreme Court of North Carolina [*In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969)]. Representing themselves a joinder of cases at the state level, the cases provided a broad spectrum of fact patterns and charges.

The Pennsylvania case joined cases involving felonies and misdemeanors. Joseph McKeiver, then 16, was charged with robbery, larceny, and receiving stolen goods after participating with 20 or 30 youths who took 25¢ from three young teenagers. Edward Terry, then age 15, was charged with assault and battery on a police officer and conspiracy after striking a police officer who broke up a fight.

The North Carolina case represented a consolidation of approximately 45 cases which resulted from charges of wilfully impeding traffic during a protest over school plans [singing, shouting, clapping and playing basketball along the highway]. Another charge was filed against one member of the group for wilfully making riotous noise and disorderly conduct in a public school. A jury trial was requested in all the cases and was denied.

2. *Id.* at 547.

"The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact finding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process."

3. *Id.*

trial. Generally the right arises in six situations: (1) when the juvenile has committed a crime outside the scope of the juvenile court's jurisdiction;⁴ (2) when the criminal court has concurrent jurisdiction over the juvenile and exercises it;⁵ (3) when the juvenile court exercises a discretionary power to waive the juvenile to the criminal court; (4) if a right to a jury trial is provided within the juvenile court proceeding; (5) if a right to a jury trial is afforded on appeal; or (6) if a right to a jury trial is afforded in the criminal court after a judge has waived jurisdiction at the request of the juvenile.

Within these broad categories the right to a jury trial exists in various forms. Despite apparent language to the contrary, *McKeiver* may not foreclose future challenges to state experimentation with the juvenile's right to a jury trial. Consequently, this note analyzes the statutory provisions a juvenile could utilize should he desire a jury trial⁶ and the implications of exercising that choice. The discussion of these implications focuses on the dispositional provisions a juvenile exposes himself to if he opts for a jury trial. Finally the note examines the interplay of these provisions and suggests possible constitutional infirmities remaining after the *McKeiver* decision.

II. SURVEY OF JUVENILE RIGHT TO JURY TRIAL

A. Right to Jury Trial Within Juvenile System

In fifteen of the fifty-one jurisdictions, juveniles have a right to a trial

4. See, e.g., DEL. CODE ANN. tit. 10, §§ 957, 1159 (1953) (capital offenses); IND. ANN. STAT. § 9-3204 (Supp. 1970) (capital crime or crimes punishable by life imprisonment.); FLA. STAT. ANN. § 39-02(e) (Supp. 1971) (capital crimes); NEV. REV. STAT. § 62.050 (1967) (capital crime); N.C. GEN. STAT. § 7A-280 (Supp. 1969) (capital crimes); S.C. CODE ANN. § 15-1103 (9)(a) (crimes punishable by death or life imprisonment); W. VA. CODE ANN. § 49-5-3 (1966) (capital crimes); WYOM. STAT. ANN. § 14-35 (1965) (homicide). See Frey, *The Criminal Responsibility of the Juvenile Murderer* 1970 WASH. U.L.Q. 113.

5. See, e.g., NEB. REV. STAT. § 43-202 (1968) (gives concurrent jurisdiction); NEV. REV. STAT. § 62.050 (1967) (capital offenses); VA. CODE ANN. § 16.1-176 (Supp. 1971) (over fourteen and punishable by death); WYO. STAT. ANN. §§ 14-98b, 14-100a (1968).

In Iowa the criminal courts have been given concurrent jurisdiction, IOWA CODE ANN. § 232.62 (1969). In *State v. Stueve*, 260 Ia. 787, 150 N.W.2d 597 (1967) this statute was construed to give a criminal court the right to assume jurisdiction. Directly after this the Iowa legislature enacted § 232.64, which has been construed to give the juvenile court original handling of all juvenile cases, *Mallory v. Paradise*, 173 N.W.2d 264 (Ia. 1969). The juvenile court determines whether a juvenile will be prosecuted just as a juvenile court makes a waiver determination.

Several states have provisions that give the juvenile court original jurisdiction. These provisions give the juvenile court the initial right to determine whether the case should be handled. See, e.g., ARK. STAT. ANN. §§ 45-206-241 (1964).

6. The juvenile has no control over the first two categories mentioned. Since the scope of this note is limited to how a juvenile might obtain a jury trial if he desires one, only the last four categories are discussed.

by jury in the juvenile court proceedings. Ten of these jurisdictions provide jury trial by statute⁷ and five by judicial mandate.⁸ In Alaska, Iowa, New Mexico, Rhode Island and Tennessee, the state courts have held the due process clause of the federal constitution,⁹ the state constitution¹⁰ or both mandate the right to a jury trial. After *McKeiver*, the continuing existence of the right to a jury trial seems questionable in Tennessee where only the federal constitution was relied on. In New York and Iowa, on the other hand, the effect of *McKeiver* is uncertain since the specific constitutional provisions relied on are unclear.¹¹ In New Mexico, Rhode Island and Alaska the state, as well as federal, constitutions were relied on. In these states the state constitutions should still support the decisions.¹²

7. COLO. REV. STAT. ANN. § 22-8-2 (1963); D.C. CODE ANN. § 16-2307 (1967); MICH. STAT. ANN. § 27.3178 (1962); MONT. REV. CODES ANN. § 10-604.1 (Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1110 (Supp. 1970); TEX. REV. CIV. STAT. ANN. art. 2338-1 (13)(b) (1971); W. VA. CODE ANN. § 49-5-6 (1966); WIS. STAT. ANN. § 48.25(2) (Supp. 1971); WYO. STAT. ANN. § 14-108 (1965); see also S.D. CODE tit. 26, § 8-31 (1969) (judge may request a jury). In Oklahoma and Michigan only six-member juries are provided; in Colorado a six-member or twelve-member jury may be requested.

8. *RLR v. State*, ___ Alaska ___, 487 P.2d 27 (1971); *State ex rel Shaw v. Breon*, 244 Iowa 49, 55 N.W. 2d 565 (1962); *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968); *In re McCloud*, 8 CRIM. L. REP. 2340 (R.I. Fam. Ct. 1970); *In re Rindell*, 2 CRIM. L. REP. 3121 (Prov. R.I. Fam. Ct. 1968); *Arwood v. State*, 463 S.W.2d 943 (Tenn. App. 1970).

But compare, New York has found that a jury trial must be provided in Young Adult and Youthful Offender proceedings (ages 16-21). *People v. A.C.*, 27 N.Y.2d 79, 313 N.Y.S.2d 695, 261 N.E.2d 620 (1970); *Browne v. Kendall*, 62 Misc.2d 196, 308 N.Y.S.2d 572 (Co. Ct. 1970); *People v. Day*, 61 Misc.2d 786, 306 N.Y.S.2d 610 (Co. Ct. 1969); *Hogan v. Rosenberg*, 58 Misc. 2d 585, 296 N.Y.S.2d 584 (Sup. Ct. 1968); *Saunders v. Lupiano*, 30 App. Div. 2d 803, 292 N.Y.S.2d 44 (App. Div. 1968). These cases have effectively superseded the earlier New York holdings that denied the right of a jury trial to Young Adults and Youthful Offenders: *People v. Anonymous*, 56 Misc. 2d 725, 289 N.Y.S.2d 782 (Sup. Ct. 1968); *People v. "Y.O. 2404"*, 57 Misc.2d 30, 291 N.Y.S.2d 510 (Sup. Ct. 1968); *People v. K.*, 58 Misc. 2d 526, 296 N.Y.S.2d 404 (Sup. Ct. 1968). The New York Youthful Offender Act has been amended and now youths 16-18 initially receive a criminal trial. If they are convicted, a Youthful Offender finding can be made after the pre-sentence investigation. This finding vacates the conviction and replaces it with a Youthful Offender finding and somewhat limits the possible sentence. This shift from pre-trial to post-trial action effectively means juveniles 16 and over now receive a normal adult trial, N.Y. CRIM. PROC. LAWS § 720.25-.25 (McKinney 1971).

9. *Arwood v. State*, 463 S.W.2d 943 (Tenn. App. 1970).

10. *RLR v. State*, ___ Alaska ___, 487 P.2d 27 (1971); *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

11. *State ex rel Shaw v. Breon*, 244 Iowa 49, 55 N.W.2d 565 (1952). Juveniles 16-18 years of age in New York are tried first in the criminal court and after a conviction may receive Youthful Offender treatment. All would probably receive a jury trial except those who were assured of Youthful Offender finding and a sentence of no more than six months. N.Y. CRIM. PROC. LAWS §§ 720.20-.25 (McKinney 1971).

12. See *In re McCloud*, 8 CRIM. L. REP. 2340 (R.I. Fam. Ct. 1971); *In re Rindell*, 2 CRIM. L. REP. 3121 (Prov. R.I. Fam. Ct. 1968). Even in those cases, however, the extent to which the court is using the Federal Constitution as a standard in interpreting its state's constitution is unclear.

Among the states that provide for jury trials in the juvenile court, only nine grant the right to every juvenile who comes before them.¹³ Alaska, Iowa, New Mexico and Rhode Island grant jury trials only to those juveniles who commit a crime.¹⁴ In Tennessee, jury trials are available only to juveniles who commit felonies.¹⁵ In South Dakota, a jury trial is available to every juvenile if the judge, in his discretion, deems it appropriate.¹⁶

Since juveniles in these fifteen jurisdictions receive jury trials within the juvenile system, they receive the same disposition as others before the juvenile court. There is no difference in confinement or treatment, and the consequence of requesting a jury is limited to the formalizing of the adjudicatory phase of the juvenile proceedings.

B. *Right to Jury Trial Outside Juvenile System*

Although the other jurisdictions do not permit a jury trial in the juvenile court,¹⁷ a juvenile might be able to obtain a jury trial after appealing an unfavorable decision to another court or after the juvenile court waives jurisdiction. In three jurisdictions, the juvenile can request

13. COLO. REV. STAT. ANN. § 22-8-2 (1963); D.C. CODE ANN. § 16-2307 (1967); MICH. STAT. ANN. § 27.3178 (1962); MONT. REV. CODES ANN. § 10-604.1 (Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1110 (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1(13)(b) (Supp. 1971); W. VA. CODE ANN. § 49-5-6 (1966); WIS. STAT. ANN. § 48.25 (2) (Supp. 1971); WYO. STAT. ANN. § 14-108 (1965).

In pre-1963 juvenile proceedings Colorado afforded the right to a trial by jury only when at least a misdemeanor had been committed, COLO. REV. STAT. ANN. § 37-8-2 (1963).

14. *RLR v. State*, ___ Alaska ___, 487 P.2d 27 (1971); *State ex rel Shaw v. Breon*, 244 Iowa 49, 55 N.W.2d 565 (1952), In Iowa, a jury trial is constitutionally compelled if the only issue is the commission of a crime. If there are issues pertaining to general delinquency and the crime is just evidence of that delinquency, the jury trial may not be compelled; *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968); *In re McCloud*, 8 CRIM. L. REP. 2340 (R.I. Fam. Ct. 1971); *In re Rindell*, 2 CRIM. L. REP. 3121 (R.I. Fam. Ct. 1968).

15. *Arwood v. State*, 463 S.W.2d 943 (Tenn. Ct. App. 1970).

16. S.D. CODE tit. 26, § 8-31 (Supp. 1971).

17. ALA. CODE tit. 13, § 354 (1958) (hearing before a judge); ALASKA STAT. § 47.10.080 (1970) (without a jury); ARIZ. REV. STAT. ANN. § 8-231 (Supp. 1970) (before a judge or referee); ARK. STAT. ANN. §§ 45.202.1-.202.2 (Supp. 1969) (referee or judge); CAL. WELF. & INST'NS §§ 553, 558, 560, 680 (Deering, 1969) (referee or judge); CONN. GEN. STAT. REV. § 17-67 (1968) (before a judge, informal with the public excluded); DEL. CODE ANN. tit. 10, § 1175 (Supp. 1968) (without a jury); FLA. STAT. ANN. § 39.09 (1961) (without a jury); GA. CODE ANN. § 24A-2420 (1971) (without a jury); HAWAII REV. LAWS § 571-41 (1968) (without a jury); IDAHO CODE ANN. § 16-1707 (Supp. 1971) (without a jury); ILL. ANN. STAT. ch. 37, § 701-20 (Smith-Hurd Supp. 1971) (proceedings not to be adversary); IND. ANN. STAT. § 9-3215 (BURNS SUPP. 1970) court makes findings); KAN. STAT. ANN. § 38-832 (1963) (before judge as if before justice of peace for misdemeanor); KY. REV. STAT. ANN. § 209.060 (1970) (without a jury); LA. REV. STAT. ANN. § 13:1579 (1968) (without a jury); MD. ANN. CODE art. 26, § 83 (Supp. 1971) (without a jury); MASS. ANN. LAWS ch. 119, §§ 54-58 (1965) (court will make findings); MINN. STAT. ANN. § 260.155 (1971) (without a jury);

a jury trial when he appeals to the circuit or superior court following an unfavorable decision in the juvenile court.¹⁸

In Massachusetts the superior court assumes original jurisdiction over the proceeding¹⁹ just as if the case had originated there. In Delaware and Kentucky, on the other hand, the superior or circuit courts exercise appellate jurisdiction.²⁰

If appellate courts exercise original jurisdiction, presumably they could dispose of the juvenile either as an adult or as a juvenile. The Massachusetts statute, however, requires Massachusetts superior courts to utilize juvenile dispositional facilities in these instances.²¹ Since the Delaware and Kentucky courts exercise appellate jurisdiction, their dispositional powers should also be derived from the juvenile court; however, there is no clear statutory limitation as in Massachusetts.²²

MISS. CODE ANN. §§ 7187-08 (Supp. 1971) (without a jury, informal manner); MO. REV. STAT. § 211.171 (1962) (proceeding as a court of equity); NEB. REV. STAT. § 42-206.3 (1968) (without a jury); NEV. REV. STAT. § 62.090 (1967) (hearing before a master or the court); N.H. REV. STAT. ANN. § 169.9 (Supp. 1970) (informal hearing); N.J. REV. STAT. ANN. § 2A:4-35 (1952) (without a jury); N.C. GEN. STAT. art. § 7A-285 (1969 Supp.) (court makes findings); N.D. CENT. CODE § 27-20-24 (Supp. 1971) (without a jury); OHIO REV. CODE ANN. § 2151.35 (Supp. 1969) (without a jury); ORE. REV. STAT. § 419.490 (1969) (without a jury); PA. STAT. ANN. tit. 11, § 297 (1965) (without a jury); S.C. CODE ANN. § 15-1095.19 (Supp. 1970) (without a jury); UTAH CODE ANN. § 55-10-94 (Supp. 1971) (without a jury); VT. STAT. ANN. tit. 33, § 651 (Supp. 1971) (without a jury); VA. CODE ANN. § 16.1-154 (Supp. 1971) (judge will publish rules to regulate proceedings); WASH. REV. CODE ANN. § 13.04.030 (1962) (without a jury).

18. DEL. CODE ANN. tit. 10, §§ 988, 989, 1181, 1182 (1953) (If a defendant is given \$100 fine or a month-confinement appeal to a criminal court of general jurisdiction, tit. 10, § 563 (anyone before superior court may demand and receive a jury trial); Letter to *Wash. U.L.Q.* Sept. 21, 1971 from Delaware Family court judge indicates that a juvenile probably has a right to a jury trial upon appeal before the superior court; KY. REV. STAT. ANN. § 208.380; *see Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1970), indicates trial de novo in circuit court with strong probability for right to jury; MASS. ANN. LAWS ch. 119, § 56 (1965) (superior court shall have jurisdiction of the case and a jury trial is available there).

In Arkansas the right to a jury trial may also be available to a juvenile. ARK. STAT. ANN. tit. 45, § 237 (1964) provides for an appeal to the circuit court, *see also* ARK. STAT. ANN. tit. 27, § 2007 (1964) (appeals give the court original jurisdiction), ARK. STAT. ANN. tit. 27, § 2008 (1964) (trial de novo). However, the circuit court is given jurisdiction of appeals from justices courts, probate courts, and juvenile courts in title 27 and it appears likely that no jury trial is available since the predecessor to title 45, § 237, which was title 45, § 208, provided that appeals to this circuit court would be without a jury.

19. MASS. ANN. LAWS ch. 119, § 56 (1965).

20. DEL. CODE ANN. tit. 10, § 541 (1953); *Joseph v. Comm.*, 310 S.W.2d 279, 280 (Ky. Ct. App. 1958).

21. MASS. ANN. LAWS ch. 119, § 56 (Supp. 1970). Also if there is a jury trial on appeal in the Arkansas system, the case law would indicate that the superior court must enter a juvenile-type disposition. *Cf. Batesville v. Ball*, 100 Ark. 496, 140 S.W. 712 (1911); *Wilson v. Hinton*, 63 Ark. 145, 38 S.W.2d 338 (1896).

22. DEL. CODE ANN. tit. 10, § 542 (1953) (indicating that the superior court has all powers of disposition); DEL. CODE ANN. tit. 11, § 2711 (Supp. 1970); KY. REV. STAT. ANN. § 208.380 (1970), *but see Joseph v. Comm.*, 310 S.W.2d 279, 280 (Ky. Ct. App. 1950) indicating juvenile disposition is available.

In jurisdictions where a jury trial is unavailable within the juvenile court or on appeal, a juvenile might receive a jury trial if the juvenile court waives jurisdiction to the criminal court. However, in four of these states, the jurisdiction of the juvenile court is exclusive without any provision for waiver.²³ In thirteen others, the court is without authority to waive its exclusive jurisdiction for juveniles under a certain age.²⁴ Including these thirteen, however, there are still thirty jurisdictions where juvenile-initiated or court-initiated waiver provisions offer some way to obtain a jury trial.²⁵

In five of these thirty jurisdictions, juveniles (or an interested party) have a statutory right to request a waiver of jurisdiction to the criminal court. This right takes various forms. Any child in Florida who commits an act that would be a crime may request waiver;²⁶ however, only juveniles over 13 in Illinois,²⁷ 16-17 in New Jersey²⁸ and 18-21 in Nevada²⁹ may do so. In Kansas, any juvenile who commits an act that would be a felony may request waiver.³⁰

These five jurisdictions disagree as to whether the juvenile loses his right to a juvenile disposition by requesting and receiving waiver of the juvenile court's jurisdiction. In New Jersey and Nevada, where only older juveniles may request waiver, the juveniles are treated as adults for

23. CONN. GEN. STAT. REV. § 17-59 (Supp. 1969); LA. REV. STAT. ANN. § 13:1570 (Supp. 1971); NEB. REV. STAT. § 42-206.1 (1968); N.Y. FAM. CT. ACT. § 713 (1963).

24. ALA. CODE tit. 13, § 364 (1959) (14 yrs. old); CAL. WELF. & INST'NS §§ 603, 707 (Deering 1969) (16 yrs. old); HAWAII REV. LAWS §§ 571-11, 571-22 (Supp. 1970) (16 yrs. old); IDAHO CODE ANN. §§ 16-1803, 1806 (Supp. 1971) (16 yrs. old); IND. ANN. STAT. § 9-3214 (Supp. 1970) (15 yrs. old); MINN. STAT. ANN. § 260.125 (1970) (14 yrs. old); MISS. CODE ANN. § 7185-03 and § 7185-15 (1952) (13 years old); MO. REV. STAT. §§ 211.031 and 211.071 (1962) (14 yrs. old); NEV. REV. STAT. §§ 62.040 and 62.080 (1967) (16 yrs. old); N.H. REV. STAT. ANN. §§ 2A:4-14, 2A:4-15 (1952) (16 yrs. old); PA. STAT. ANN. tit. 11, § 260, (1965) (14 yrs. old); VT. STAT. ANN. §§ 633, 635 (1958) (16 yrs. old); VA. CODE ANN. § 16.1-176 (Supp. 1970) (14 yrs. old). Some states also limit waiver by specifying certain conduct, *see* notes 38 & 39 *infra*.

25. In Tennessee jury trials are provided on a limited basis in the juvenile court. Juveniles not meeting the criteria for a jury trial might utilize the waiver provisions. *Arwood v. State*, 463 S.W.2d 943 (Tenn. App. 1970), held a juvenile who commits a felony has a right to a jury trial, but TENN. CODE ANN. § 37-234 (Supp. 1970) is not so limited.

26. FLA. STAT. ANN. § 39.02(b)(16) (1967).

27. ILL. ANN. STAT. ch. 37, § 702-7(5) (Supp. 1971) (committed act that constitutes a crime).

28. N.J. STAT. ANN. § 2A:4-15 (1970).

29. NEV. REV. STAT. § 62-060 (1967). Maryland also has a waiver provision for persons over 18, but since it is limited to offenses that could be categorized as "contributing to the delinquency of a minor", it will not be considered here; MD. CODE ANN. ch. 26, § 70-2(e) (Supp. 1970).

30. KAN. STAT. ANN. § 38-808 (1969). A judge of the Family Court for Kent County, Delaware has indicated that Delaware is contemplating instituting a procedure identical to the Kansas Procedure. Letter to *Wash. U.L.Q.* Sept. 16, 1971.

dispositional purposes.³¹ In Illinois and Kansas, juveniles are sent to juvenile dispositional facilities.³² In Florida, where there is no age limitation, juveniles are sent either to prison or to its juvenile dispositional facilities.³³

If a juvenile does not have a statutory right to request waiver, some states place waiver in the discretion of the juvenile court judge. There are twenty-six states with court-initiated waiver provisions in which a juvenile might receive a jury trial if he is unable to do so by the previously discussed processes.³⁴ In these twenty-six jurisdictions there are four categorical guidelines for determining whether waiver should be exercised. First, if the juvenile is unamenable to a juvenile disposition and there is reasonable cause to believe he is delinquent³⁵ or has committed a crime,³⁶ six jurisdictions may waive him; secondly, if the juvenile is unamenable to the juvenile process, has committed a crime, is sane and waiver would be in his best interests and the best interests of the community, six jurisdictions authorize waiver;³⁷ thirdly, eight jurisdictions leave waiver to the discretion of the judge if the juvenile has committed a felony (or sometimes any crime);³⁸ and fourthly, if a juvenile has committed a felony (or sometimes any crime) and it is in his best

31. N.H. STAT. ANN. § 2A:4-15 (1952); NEV. REV. STAT. § 62.060 (1967).

32. ILL. ANN. STAT. ch. 38, § 119-2(e) (Supp. 1971) (provides that a male under 17 and female under 18 shall be committed to juvenile division of the Department of Correction); KAN. STAT. ANN. § 38-808 (1967) (provides for remand after judgment to juvenile court for disposition).

33. "Where a juvenile judge . . . waives jurisdiction and certifies a case against a juvenile to a municipal court or other court which would have jurisdiction if the child were treated as an adult, the child *may be* treated as an adult by the court to which his or her case is certified and if a sentence of imprisonment could be imposed on an adult it could likewise be imposed on such a child." FLA. OP. ATT'Y GEN. 063-99 (1963).

34. See Appendix, Table I.

35. ALA. CODE tit. 13, § 364 (1959).

36. CAL. WELF. & INST'NS § 707 (Deering, 1969); IDAHO CODE ANN. § 16-1806 (Supp. 1969); MINN. STAT. ANN. § 260.125 (1971); MO. REV. STAT. § 211.071 (1962); NEV. REV. STAT. § 62.080 (1967).

37. ARIZ. RULES JUV. CT. § 14 (1971); GA. CODE ANN. § 24A-2501 (1971); OHIO REV. CODE ANN. § 2151.26 (Supp. 1970); N.D. CENT. CODE § 27-20-34 (Supp. 1971); TENN. CODE ANN. § 37-234 (Supp. 1970); MD. ANN. CODE ch. 26, § 70-16 (Supp. 1971).

38. ARK. STAT. ANN. § 45-241 (1964) (if the juvenile is over 15 and has committed a felony); HAWAII REV. LAWS § 571-22 (Supp. 1970) (if juvenile is over 18 and has committed a crime); IND. STAT. ANN. § 9-3214 (Supp. 1970) (if juvenile is over 15 and is charged with a crime); MISS. CODE ANN. § 7185-15 (1953) (if any crime is committed); N.H. REV. STAT. § 169-21 (1967) (if any crime is committed); VT. STAT. ANN. tit. 13, § 6704 (Supp. 1970) (if the juvenile is over 16 and a crime has been committed); VA. CODE ANN. § 16.1-176 (Supp. 1971) (this statute provides that if the juvenile is over 14 and the offense committed is punishable in the penitentiary, he may be waived or if the juvenile is a repeater and he has committed a felony, he may be waived.); WASH. REV. CODE § 13.040.030 (1962) (if any crime has been committed).

interest and that of the community, then six jurisdictions authorize waiver to the criminal court.³⁹

Since the waiver of jurisdiction in these instances is discretionary, the question arises whether a juvenile can request to be waived to the criminal court if he desires a jury trial. Although such a request might be granted, counsel may find himself in the precarious position of arguing that his client was unamenable to the juvenile process.

Responses to inquiries to a number of juvenile court judges indicate that statutes in the first two of the above categories, which contain provisions such as "unamenable to a juvenile disposition", will not be construed to waive a juvenile over for criminal prosecution simply because the juvenile desires a jury trial. A juvenile is waived only if he is "unamenable"—not because of his request.⁴⁰

In the third and fourth categories, great discretion is afforded the judge. Judges from states utilizing the fourth category, in which "the best interests of the child and community" is a guideline, indicate a willingness to waive jurisdiction if a request is made for purposes of a jury trial.⁴¹ Judges from states utilizing the third category, in which the discretion of the judge is untrammelled, indicate a propensity to read an

39. ME. REV. STAT. ANN. tit. 15, § 2611(2) (1964) (probable cause for grand jury plus dangerous and menace to safety of community); N.C. GEN. STAT. § 7A-280 (Supp. 1970) (if a felony was committed); ORE. REV. STAT. § 419.533 (Supp. 1969) (motor vehicle offenses); PA. STAT. ANN. tit. 11, § 260 (1965) (if the juvenile is over 14 and the offense is indictable); S.C. CODE ANN. § 1095-12 (Supp. 1970) (any juvenile regardless of offense); UTAH CODE ANN. § 55-10-86 (Supp. 1971) (if the juvenile is over 14 and a felony was committed).

40. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile and Domestic Relations Court of Mobile, Alabama. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Family Court of Jefferson Co., Birmingham, Alabama. Letter of Sept. 24, 1971 to *Wash. U.L.Q.* from Judge of the Superior Court of Fairbanks, Alaska. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of Youth Guide Center, San Francisco, California. Letter of Sept. 21, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Center of Minneapolis, Minn. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Court of St. Louis, Mo. Interview on Sept. 4, 1971 with Judge Noah Weinstein of the St. Louis County Juvenile Court. *But see* Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of Dist. Juvenile Magistrate of Pocatello, Idaho, where it is indicated that if the juvenile meets the age and felony requirements of the waiver statute the request by the juvenile may be determinative.

41. State in the Interest of Valdez, Case No. 206, 820 (District Juvenile Court of the Salt Lake County, Utah (1969)).

"If a juvenile is so intent upon having all of the protections of the adult criminal courts and all of the constitutional rights accorded therein, it is possible, under Utah Law, 55-10-86, U.C.A. 1953, as amended, to make a Motion for Certification, providing the juvenile is over fourteen years of age and has allegedly committed a felonious act, as would be the case with Valdez and Hurley. If the juvenile court, after full investigation and a hearing found it would be in the best interest of the child or the public to certify (bind-over) the juvenile to

“unamenable” provision into the statute and achieve the same result as in the first two categories;⁴² this result, however, is not universal.⁴³

If discretionary waiver provisions are utilized to obtain a jury trial, consideration should be given to the possible dispositional consequences. Discretionary waiver statutes⁴⁴ were enacted for juveniles who could not benefit by the juvenile process. Once jurisdiction is waived the criminal court accepts jurisdiction and, if found guilty, the juvenile is sentenced according to the penal statute which he has violated. Six states, however, indicate that the criminal courts may have the power to utilize the juvenile facilities to dispose of the juvenile.⁴⁵

the District Court for trial, it could be done and the full panoply of rights would there be afforded him, including the right to a jury trial.”

In the following letters juvenile judges indicated that statutes containing “the best interest” of the child and/or public would probably be construed to include waiver for a jury trial. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile & Dom. Rel. Ct. of Clayton County, Jonesboro, Georgia. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile Judge of Portland, Oregon. The judge indicated that the incorrigibility or unamenability of the juvenile would also bear on the issue. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Third District Juvenile Court of Provo, Utah. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Second District Juvenile Court of Salt Lake City, Utah. *But see* Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile Judge of Allentown, Pa. who clearly indicated that a request for waiver would have no influence upon the exercise of waiver of jurisdiction.

42. *Summers v. State*, ___ Ind. ___, 230 N.E.2d 320 (1967).

“Something more than the mere state of mind of the judge . . . if the offense has prosecutive merit in the opinion of the prosecuting attorney . . . or if this offense is part of a repetitive standard . . . said juvenile may be beyond rehabilitation . . . and it is in the best interests of the public.”

Id. at ___, 230 N.E.2d at 325. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of 3rd Cir. Family Court Hilo, Hawaii; Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile Court of Akron, Ohio; Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile Judge of Tacoma, Washington; Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile & Domestic Relations Court of Richmond, Va.; Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Lake Co. Juvenile Court, Gary, Indiana; Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of Marion Co. Juvenile Court Indianapolis, Indiana.

43. Letter of September 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Court of the Little Rock, Arkansas.

44. Occasionally these statutes use the terminology “turn over to the proper offices for trial” rather than “waiver of jurisdiction”. *See, e.g.*, WASH. REV. CODE ANN. § 13.04.120 (1962).

45. MISS. CODE ANN. § 7185-19 (1942) (even if the juvenile is certified and convicted the circuit court may utilize a juvenile disposition); N.H. REV. STAT. ANN. § 169-21 (1955) (“cases so certified may be disposed of by the superior court according to the laws of that state relating thereto without any limitations as to orders required by this chapter”); VA. CODE ANN. § 16.1-177 (Supp. 1971) (certified juvenile may be disposed of by the criminal court as a juvenile or as a criminal); VT. STAT. ANN. tit. 13, § 7037 (1958) (if juvenile from 16-21 there is a discretionary right for a criminal court to utilize the juvenile facilities for disposition); WASH. REV. CODE ANN. § 13.04.115 (Supp. 1971) (“No court or magistrate shall commit any child under sixteen years of age to jail or lock-up at police station. . . . When any child shall be confined in an institution to which adults are sentenced, it shall be unlawful to confine them in the same building. . . .” Al-

A second possible consequence to be considered prior to a request for waiver is the possibility that waiver might be binding on all future offenses, particularly if the waiver is based on a finding of "unamenability".⁴⁶ The majority of judges have indicated, however, that each time a juvenile comes before the court the issue of waiver is reconsidered in total.⁴⁷

McKeiver seemingly sanctions this multitude of statutory schemes under the rubric of "experimentation". The next section seeks to discover possible limits on state experimentation; limits which, despite apparent language to the contrary, *McKeiver* does not seem to govern.

III. CONSTITUTIONAL CONSIDERATIONS

Prior to *McKeiver*, constitutional arguments advocating a juvenile's right to trial by jury followed two lines of reasoning. Some directly attacked the lack of jury trial as violative of the sixth amendment applicable to the states through the fourteenth.⁴⁸ Others argued collaterally by attacking jurisdictional waiver provisions. These arguments centered on the "impermissible choice" doctrine.⁴⁹ Basically the proponents of this view thought asserting one's right to a jury trial was laden with the

though this provision does not preclude sentencing of a juvenile under 16 as an adult it severely burdens that ability). The courts of Missouri have the power under §§ 211.191 and 219.160 of the Criminal Code to dispose of a certified juvenile to a juvenile institution. Interview with Judge Noah Weinstein of St. Louis County Juvenile Court.

46. MD. CODE ANN. art. 26, § 70-16 (Supp. 1970) (after a juvenile is waived once, there need be only a summary review to waive him again). Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Juvenile Judge of Tacoma, Washington. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile and Domestic Relations Court of Clayton County, Jonesboro, Georgia. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Second District Juvenile Court of Salt Lake City, Utah. Letter of Sept. 21, 1971 to *Wash. U.L.Q.* from Judge of the Delaware Family Court. Letter of Sept. 21, 1971 to *Wash. U.L.Q.* from Judge of Hawaii Family Court.

47. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Court of Little Rock, Arkansas. Letter of September 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Court of Indianapolis, Indiana. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Juvenile Court of Gary, Indiana. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Hawaii Family Court. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Akron, Ohio Juvenile Court. Letter of Sept. 20, 1971 to *Wash. U.L.Q.* from Judge of the Salt Lake City, Utah Juvenile Court. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Allentown, Pennsylvania Juvenile Court. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Portland, Oregon Juvenile Court. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Rhode Island Juvenile Court. Letter of Sept. 16, 1971 to *Wash. U.L.Q.* from Judge of the Florida Juvenile Court. *But see* letter of Sept. 16, 1971 to *Wash. U.L.Q.* from another judge of the Hawaii Family Court indicating a different result.

48. *See, e.g.*, 403 U.S. at 557-63 (Douglas J., dissenting); *see generally*, Note, *Juveniles and their Right to a Jury Trial*, 15 VILL. L. REV. 972 (1970).

49. *See generally* United States v. Jackson, 390 U.S. 570 (1968) (procedure which discourages or burdens a defendant's utilization of his Sixth Amendment right to a trial by jury is unconstitutional).

burdens of criminal adjudication and harsher penalties.⁵⁰ Although *McKeiver* has settled the basic issue of whether jury trials are a fundamental right in juvenile proceedings, the "impermissible choice" issue remains unsettled. In order to find an "impermissible choice" for this discussion, it is first necessary to find a possibility of a jury trial.

In *Nieves v. United States*,⁵¹ a federal court in New York found a right to a jury trial within the existing statutory framework. The defendant in that case was arrested for violation of the federal marijuana laws. Following arrest, he was under the jurisdiction of the criminal court. He could avail himself of the benefits of the Federal Juvenile Delinquency Act;⁵² however, requesting disposition under the Juvenile Act would be construed as a waiver of the defendant's right to a jury trial.⁵³ The juvenile, therefore, was originally outside the juvenile system and attempting to gain access to it. To do so he was forced to waive his right to a jury. This necessarily meant that by exercising the right in the criminal system he lost the benefits of the juvenile system, *i.e.* an "impermissible choice".⁵⁴

In a similar case the New York state court invalidated a waiver provision of its Youth Code. The appellate court determined that for juveniles under 16 a right to a jury trial is "neither constitutionally compelled nor desirable";⁵⁵ but for juveniles over 16 being tried under the Youthful Offenders or Young Adults sections of the Criminal Code, a jury trial is constitutionally compelled.⁵⁶ The court supported this distinction by noting that Youthful Offender adjudication "had all the essential features of a conviction. . . .": the retention of records, possibility of commitment (for four years), indictment by Grand Jury, and trial in the criminal court.⁵⁷ Thus the use of a jury in the proceedings would have little disruptive effect upon the procedure. Additionally, due process required

50. See generally, *Nieves v. United States*, 280 F. Supp. 994 (D.C.N.Y. 1968). Right to a trial by jury for juveniles founded on the following basis: if the defendant chose to avail himself of the benefits of the Federal Juvenile Delinquency Act, he would be unable to obtain a trial by jury, but if he were tried criminally he could have a jury trial. The court saw the same impermissible choice as in *Jackson*.

51. *Id.*

52. 18 U.S.C. §§ 5031-37 (1964).

53. 18 U.S.C. § 5033 (1964). ". . . [t]he consent required to be given by the juvenile shall be given by him in writing. . . . [s]uch consent shall be deemed a waiver of a trial by jury".

54. 280 F. Supp. at 1003-06. (The court reached an alternative holding that, regardless of the waiver provision, due process mandated a right to a jury trial in the juvenile system).

55. *In re D.*, 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970).

56. *People v. A.C.*, 27 N.Y.2d 79, 261 N.E.2d 620, 313 N.Y.S.2d 695 (1970).

57. *Id.* at 85, 261 N.E.2d at 624, 313 N.Y.S.2d at 700.

a trial by jury because of the consequences of the adjudication in these situations. The New York statute that granted Youthful Offender adjudication and disposition only after the juvenile had waived his right to a jury trial was, therefore, an unconstitutional burden on that right.⁵⁸

In both these cases, the juvenile had a right to a jury prior to having to make a choice. This finding is crucial and its importance is exemplified by the decision of the Illinois court in *In re Fucini*.⁵⁹ The court in that case also considered the "impermissible choice" issue. The court disagreed with the *Nieves* court's decision and determined there was no right to a jury trial within the juvenile proceedings.⁶⁰ Although the court rejected *Nieves*, there is a key distinction between the two cases. Under the Illinois statute the defendant was within the juvenile system and was requesting waiver to the criminal. The *Nieves* situation was the reverse of this. Under the Illinois scheme, the juvenile *had no right* to a jury at the time of his decision to waive jurisdiction, *i.e.* "choice". If anything was burdened in *Fucini*, it was the juvenile's right to request waiver. Although this waiver could ultimately result in a jury trial in the criminal court, the right that was burdened was statutory rather than constitutional. The "impermissible choice" argument, therefore, loses much of its force. In this context it must be argued that burdening even a statutory right is impermissible. This premise lacks judicial support. The cases that have considered the "impermissible choice" doctrine have clearly involved constitutional rights.⁶¹ *McKiever's* holding that jury trials are not required in the juvenile system should settle, therefore, many conflicts in this area. As demonstrated in *Fucini*, lack of a right to a jury trial prior to a request for waiver seriously undercuts the "impermissible choice" argument.

Another aspect of the "impermissible choice" question warrants discussion. In *Jackson v. United States*⁶² the burden placed on the defendant's choice was the possibility of the death penalty if he chose to be tried by jury. In the juvenile context, however, the burdens are the rigors of criminal prosecution and the harshness of adult disposition. It is these concomitants of the adult system, however, that necessitate the constitutional right to a jury in the first place. It could be argued, therefore, that in reality there is no burden since the increased risk a juvenile is exposed

58. The New York Youthful Offenders Act has now been significantly amended, *see* notes 8, 11 *supra*.

59. 44 Ill.2d 305, 255 N.E.2d 380 (1970).

60. *Id.* at 311, 255 N.E.2d at 383 ("[w]e do not perceive the same 'Hobson's choice'. . .").

61. *See, e.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967) (fifth amend.); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (fifth amend.); *see also*, 1969 *Wash. U.L.Q.* 231.

62. *See* note 49 *supra*.

to by requesting a jury is actually offset by the jury once his request is granted. This analysis indicates another possible constitutional infirmity.

Once a juvenile statute makes *some* provision for a jury, it must then meet equal protection standards. Since *McKeiver* found juvenile jury trials not to be a fundamental right, the state must only demonstrate a reasonable basis for its classification of those entitled to a jury trial.⁶³ This inquiry must focus on the right to a jury within the juvenile system as well as a right obtained by going outside the system.

A. *Jury Trials Outside the Juvenile System—on Appeal or by Waiver*

In determining the reasonableness of classification in this process, the threshold issue is similar to the "impermissible choice" question. Obtaining a jury trial outside the juvenile system is laden with the burdens of criminal adjudication and harsher penalties. Instead of being an "impermissible choice" question, however, the question now becomes the reasonableness of denying a jury in the juvenile system and allowing it in the criminal. Using a constitutional equation, does: [No Jury] + [Informal Juvenile Proceedings] + [Individualized Juvenile Disposition] = [Jury] + [Rigorous Criminal Proceedings] + [Adult Disposition]? The result of this inquiry is dependent on the extent to which jury trials offset the burdens attendant to the criminal process.

Juries serve both a factfinding and social function.⁶⁴ Two concurring justices in *McKeiver* thought the unique manner in which the juvenile court operated supplanted the social function of juries in criminal proceedings.⁶⁵ This finding was crucial to their due process inquiry, but it can also be useful here.

If the protections afforded by a jury serve to offset both the rigors of the criminal proceedings and the harshness of adult disposition, the constitutional equation can balance.⁶⁶ The juvenile receives the same

63. See *In re Wilson*, 438 Pa. 425, 264 A.2d 614 (1970) (equal protection question raised by length of possible confinement).

64. *Duncan v. United States*, 391 U.S. 145, 156 (1965); see also Note, *Juveniles and Their Right to a Jury Trial*, 15 VILL. L. REV. 972, 981-83 (1970).

65. 403 U.S. at 551-57.

66. 403 U.S. at 552.

"To 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. As for the necessity to guard against judicial bias, a system achieving blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice." (White, J. concurring).

In discussing these jury protections, it is not intended to focus only on situations in which juries

protections in both systems, and hence there is no unequal treatment, *i.e.* no violation of equal protection. If, on the other hand, the focus of jury trial and juvenile court protections is limited to the adjudication phase,⁶⁷ the equation does not balance. A juvenile must accept harsher adult disposition merely to insure equal procedural treatment.

As indicated earlier, this analysis is also useful in any "impermissible choice" inquiry. It is this same inequality in treatment that is considered the "burden" in that situation. The extent of this burden also depends on the scope of jury trial protections. Because of this similarity it is possible to merge both analyses at this point. In any equal protection inquiry there must be some reasonable justification for the difference in treatment. The "impermissible choice" inquiry, on the other hand, focuses on whether the burden is excessive.⁶⁸ In both instances, it is necessary to determine who is being subjected to this procedure—and why. Therefore, an equal protection and possibly an "impermissible choice" issue might arise in those states that: (1) allow a juvenile to obtain a jury trial on waiver or appeal, but (2) fail to require juvenile disposition following the adjudicatory proceedings.⁶⁹

Theoretically a juvenile who receives a jury trial after being *involuntarily* waived to a criminal court is neither advantaged nor disadvantaged as compared with a juvenile in the same jurisdiction who is kept within the system. The juvenile has been excluded from the juvenile system because it is no longer beneficial to him. He receives the right to a jury trial as a necessary concomitant to a criminal prosecution, not because he desires it.

There are different considerations when a juvenile can *voluntarily* obtain a jury trial by requesting that jurisdiction be waived, or by being afforded one on appeal. Although the juvenile has knowingly subjected

determine the sentence. It is intended rather to suggest the concept that if one is subjected to rigorous criminal proceedings and harsh disposition, juries serve as a buffer between the state and the individual. This societal input into the judicial proceedings is necessary to conform to the "American scheme of justice", *Duncan v. Louisiana*, 391 U.S. 145, 149 (1965). The extent of the jury protections for this analysis then must focus on the possible consequences that juries are intended to serve as a buffer against. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

67. 403 U.S. at 547 & 550. Although Mr. Justice Blackmun does not address himself specifically to this question, his opinion seems to focus on the adjudicatory phase when discussing juries and their impact or necessity. Regardless of Mr. Justice Blackmun's opinion, however, this is the argument one would have to make if he were advocating this position.

68. 390 U.S. at 582.

69. Some of the states that might fit this criterion include: Arkansas, Delaware, Florida, Kentucky, Nevada, New Jersey, Pennsylvania, South Carolina and Washington. *See* Appendix, Table I.

himself to possible or certain punishment as an adult, this may not justify the harsh consequences of confinement in a penal institution.

In states where waiver is discretionary, the problem will not arise if the "best interests" of the child exclude the juvenile's desire for a jury trial. In those states where a jury trial is available on appeal or mandatory on request, the problem is inevitable if the juvenile could be sentenced as an adult. As long as a finding is made that the juvenile can no longer benefit from the juvenile process, it seems reasonable and proper to subject him to adult disposition. The reasonableness is more questionable when the "community's interest" is the governing factor for waiver. It seems unsupportable when the only element is the juvenile's desire to be waived or to exercise an appeal, *i.e.* to obtain a jury trial.

B. Jury Trial Within Juvenile System

As discussed above, when juries are allowed within the juvenile system, the right is sometimes conditioned on the charges brought.⁷⁰ An equal protection claim must therefore focus on whether there is any reasonable basis for allowing juries for some charges and not others.

Alaska and New Mexico allow jury trials for juveniles who have committed a crime but do not extend the procedure to delinquents.⁷¹ Similarly, Tennessee's right to a jury trial is conditioned upon the commission of a felony.⁷² Arguably the acts committed by a juvenile are irrelevant to a consideration of his rights to a jury trial. In criminal prosecutions the Supreme Court has focused on the length of possible confinement to determine whether a jury trial should be available.⁷³ Here, there is no difference in length of possible confinement for the juvenile. Usually every juvenile receives the same procedural treatment and may receive the same disposition regardless of his acts.⁷⁴ It would seem that "charges" are inadequate grounds for drawing a reasonable line to offer a jury trial to some juveniles and not to others.

70. See notes 14 & 15 *supra* and accompanying text.

71. See note 14 *supra*.

72. See note 15 *supra*.

73. *Duncan v. Louisiana*, 391 U.S. 145 (1965).

74. Unlike the criminal system, the disposition selected by the juvenile judge is not statutorily fitted to specific conduct. Much discretion is left to the judge, *see, e.g.*, MO. REV. STAT. ANN. § 211. 231 (1) (1962) "All commitments made by the juvenile court shall be for an indeterminate period of time and shall not continue beyond the child's twenty-first birthday."; IOWA CODE ANN. § 232.34 (Supp. 1970); *but see* GA. CODE ANN. § 24A-2701 (b) (Supp. 1971) (limits term to 2 years unless extended after hearing); Standard Juvenile Court Act 24 (N.P.P.A. 1959) (3 years). *See also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 143 (1967) (factors affecting length of confinement).

Several responses to this argument are possible. First, the legislature may have thought that juveniles who commit crimes or felonies tend to be confined for longer periods than others and, by the standards of *Duncan v. Louisiana*,⁷⁵ should receive jury trials. It should be kept in mind, however, that most juveniles' terms of confinement depend primarily on the juveniles' behavior in the institution, not on what law they violated. Secondly, juries should only deal with concrete factual determinations. Many of the juvenile crimes are ill-defined and indefinite (e.g., growing up in immorality); therefore, the juvenile right to a jury should be confined to criminal situations. But this response does not pertain to states where the line is drawn at a felony. Furthermore, many juvenile offenses are specific enough for a jury (truancy, disobedience), or at least as specific as some crimes (vagrancy). Thirdly, another reason for drawing the line at crimes may be an attempt to instill sixth amendment standards in the juvenile system, and concern over the constitutionality of the state statute if a jury were not provided in these situations.

Despite the possible validity of equal protection arguments, they have limited usefulness. Although some have a place when arguing for juvenile disposition or reversal, they clearly do not mandate a far-reaching right to jury trial for juveniles. Faced with the Court's holding in *McKeiver*, it is clear that a state does not have to provide *any* right to trial by jury within the juvenile system.⁷⁶ If an equal protection claim resulted in the invalidation of a state juvenile code, an appropriate remedy could be the denial of jury trials to *all* juveniles. In addition, in equal protection arguments arising from waiver or appeal provisions, it is the party receiving the jury that is the complainant—not the one seeking the jury.⁷⁷

IV. CONCLUSION

The states as a rule have refused to recognize an overriding importance in providing a trial by jury within the juvenile system. In structuring the juvenile process to provide safeguards served by juries in criminal proceedings, the function of the jury has been limited to that of a fact

75. 391 U.S. 145 (1965).

76. See note 3 *supra* and accompanying text.

77. Cf. *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); defendants were faced with same choice as in *Jackson* but pleaded guilty and thereby waived their right to a jury rather than go to trial. The Court, however, would not deem the guilty plea involuntary and affirmed. The impermissible choice questions, therefore, present a spectrum whereby defendants who exercise their right to jury trial are protected but those who yield to the burden and plead guilt are not.

finder. In this context, the adverse effects of imposing trial by jury upon the juvenile system outweigh its importance as a factfinder. The Supreme Court in *McKeiver* sanctioned this theory in the hope of attaining the goals of the juvenile philosophy.

Although the Court settled most constitutional questions concerning juvenile jury trials, some equal protection or impermissible choice questions may remain. The usefulness of such arguments, however, is limited. They can afford relief only in collateral areas such as disposition. Any liberalization of the right of juveniles to a jury trial now seems a question for the state legislatures—not the courts.

APPENDIX

TABLE I
Juvenile Right to Jury

State or District	Jury Trial in Juvenile System	Jury on Appeal	Juvenile Initiated Waiver	Judge Initiated Waiver	Guideline Category	Disposition
Alabama				X	1	
Alaska	X [crime]					J
Arizona				X	2	
Arkansas				X	3	
California				X	1	
Colorado	X					J
Connecticut			None			
Delaware		X		See note C		J or A
Dist. of Columbia	X					J
Florida			X			J or A
Georgia				X	2	
Hawaii				X	3	
Idaho				X	1	
Illinois			X [13 and over]			J
Indiana				X	3	
Iowa	X [crime]					J
Kansas			X [felony]			J
Kentucky		X		See note C		
Louisiana			None			
Maine				X 4		J
Maryland				X 2		
Mass.		X		See note C		J
Michigan	X					J
Minn.				X	1	
Miss.				X	3	J (poss)
Missouri				X	1	J (poss)
Montana	X					J
Nebraska			None			
Nevada			X [18-21]	X [17 and under]	1	A
New Hamp.				X	3	J (poss)
New Jersey			X [16-17]			A
New Mexico	X [crime]					J

New York	See note D					J
North Carolina				X	4	
North Dakota				X	2	
Ohio				X	2	
Okla.	X					J
Oregon				X	4	
Pennsylvania				X	4	
Rhode Island	X [crime]					J
South Carolina				X	4	
South Dakota	X [judge desires]					J
Tenn.	X [felony]			X	2	J
Texas	X					J
Utah				X	4	
Vermont				X	3	J (poss)
Virginia				X	3	J (poss)
Washington				X	3	J (poss)
West Virginia	X					J
Wisc.	X					J
Wyoming	X					J

Key: A. Guideline Categories

- 1.—“unamenable to juvenile process plus reasonable cause to believe delinquent or committed crime.”
- 2.—“unamenable to juvenile process, committed crime, sane and in best interest of community.”
- 3.—“discretion of judge if committed a felony (or sometimes a crime).”
- 4.—“committed a felony (or sometimes a crime) and in best interest of community and child.”

B. Disposition

1. J—juvenile
2. J (poss)—possible juvenile
3. A—adult

C. The states affording a right to a jury trial on appeal also have discretionary waiver provisions but they are omitted here. It is assumed in those jurisdictions that the juvenile would attempt to obtain a jury on appeal rather than through waiver; see DEL. CODE ANN. tit. 10, § 2711-2713 (1968); KY. REV. STAT. ANN. § 208.170 (1969); MASS. ANN. LAWS ch. 119, § 61 (1965).

D. See notes 8 & 11 *supra* for Youthful Offender provisions.

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