THE JUVENILE JUSTICE REFORM ACT OF 1976: OPERATION, CONSTITUTIONAL VULNERABILITY, AND EFFECT

I
INTRODUCTION

The New York State Legislature, in its first major reevaluation of the juvenile code in over half a century,[1] recently enacted the Juvenile Justice Reform Act of 1976.[2] The Act was passed in response to public concern over what has been considered to be an alarming increase in the frequency and seriousness of crime committed by youths.[3] It was also inspired by two recent studies documenting the weaknesses of the present system of juvenile justice.[4] The Act substantially amends the provisions of juvenile law which were derived from the late nineteenth century theory of juvenile reform.[5] The most important amendment of the Act expands the premise of prior legislation from a regard for the best interests of the youth to include a concern for community protection.

The existing separate system of juvenile justice was designed to remove vulnerable and malleable children from a callous correctional system oriented towards retribution, isolation, and deterrence.[6] Individualized treatment for juveniles was to be the *quid pro quo* for the independent system.[7] Under this

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1. Children's Court Act, CONSOL. LAWS OF N.Y.2d, ch. 547, art. 1-3 (12 Cumming & Gilbert Supp. 1921-1923) (repealed 1962); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

2. Juvenile Justice Reform Act of 1976, ch. 878, 1976 N.Y. LAWS (codified in N.Y. FAM. CT. ACT art. 7 (McKinney 1975 & Supp. 1976-1977)).

3. This increase is virtually undocumented due to the paucity and inaccuracy of statistical data regarding juvenile crime. Although data on the number of police arrests and delinquency adjudications made by the Family Court are available, the number of convictions resulting from specific allegations of serious acts of delinquency is unavailable. REPORT OF THE GOVERNOR'S PANEL ON JUVENILE VIOLENCE 27 (Jan. 5, 1976) [hereinafter cited as GOVERNOR'S REPORT].

> According to the New York City Police Department, there was an overall increase of 8% in crimes against persons (not including assaults) from 1972 to 1974 . . . .
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> The Annual Report for 1974 of the Youth Aid Division of the New York City Police Department shows that juveniles (ages 7-15) represented 16% of the population of New York City and 16.5% of the arrests for murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault. Ages 16-20 [considered adults in New York] represented 9% of the population and 27.7% of the arrests for those categories.

OFFICE OF CHILDREN'S SERVICES, DIVISION OF CRIMINAL JUSTICE SERVICES, JUVENILE VIOLENCE 13 (April, 1976) [hereinafter cited as JUVENILE VIOLENCE REPORT].

4. GOVERNOR'S REPORT, *supra* note 3; JUVENILE VIOLENCE REPORT, *supra* note 3.

5. N.Y. FAM. CT. ACT art. 7 (McKinney 1975 & Supp. 1976-1977).

6. Mack, *supra* note 1, at 106-07; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1188-92 (1970).

7. *Id.*

system the state, as *parens patriae*, appointed a guardian to protect the "best interests" of youths who had strayed from the path leading to socially acceptable adulthood.[8] The primacy of rehabilitation over punishment was viewed as justifying informal proceedings in which the juveniles' rights were adjudicated without regard for procedural due process protections such as trial by jury otherwise deemed fundamental in the American criminal justice system.[9]

The Act codifies the traditional best interests test under which court ordered dispositions are predicated on the rehabilitative needs of each individual youthful offender.[10] It further directs the court, in any juvenile delinquency proceeding, to "consider . . . the need for protection of the community."[11] The drafters of the Act recognized that a potential conflict exists between these two fundamental concerns of the state—the best interests approach to juvenile justice and the concern for community protection. They maintained, however, that "the legislation . . . reflects a belief that neither set of needs can be served unless they both are served."[12]

The inherent power to restrict individual liberty for purposes of community protection is reserved to the states in the United States Constitution as the power to legislate for the protection of the safety, health, morals, and general welfare of society.[13] After introducing the provisions of the Act, this Note will examine whether additional conformity with the constitutional mandates of due process is required by the express recognition of the goal of community protection. The best interests approach to juvenile justice was the *quid pro quo* justifying the suspension of jury trials in juvenile proceedings. Under the Act rehabilitation is no longer the sole justification for commitment. Removing the justification for procedural laxity in juvenile proceedings now requires that the full panoply of constitutional due process protections be afforded to juvenile offenders.

This Note will further examine potential constitutional challenges to the Act and discuss the Act's approach to the deficiencies inherent in the pre-1976 juvenile justice system.

II
Operation of the Juvenile Justice System Before and After the Act

A. Pre-trial Stage

A juvenile deliquency case in New York is initiated by the "arrest" of a person under the age of sixteen who has committed an act which, if committed

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8. For an explanation of the *parens patriae* theory *see* Mack, *supra* note 1, at 107, 111; Douglas, *Juvenile Courts and Due Process of Law*, 19 Juv. Court Judges J. 9, 11 (1968).

9. *In re* Gault, 387 U.S. 1, 15-17 (1966).

10. Caldwell, *The Juvenile Court: Its Development Problems*, in Juvenile Delinquency 393, 400 (3d ed. Giallombardo 1976); Langley, Graves, & Norris, *The Juvenile Court and Individualized Treatment*, *id.* at 441, 442-43.

11. N.Y. Fam. Ct. Act § 711 (McKinney Supp. 1976-1977).

12. Gottfried & Barsky, *Supplementary Practice Commentaries*, N.Y. Fam. Ct. Act § 711 (McKinney Supp. 1976-1977).

13. U.S. Const. amend. X; Beer Co. v. Mass., 97 U.S. 25, 33 (1878); People v. King, 110 N.Y. 418, 423, 18 N.E. 245, 246, 1 L.R.A. 293, 6 Am. St. Rep. 389 (1888), *aff'g* 42 Hun 186 (1886).

by an adult, would be a crime.[14] The police have a number of options after arrest.[15] They may take no action, reprimand and release the juvenile, or refer the juvenile to the police department's juvenile aid bureau.[16] The final option is to refer the case to the Intake Bureau of the Probation Department at Family Court [Intake] where either the complainant or the police themselves may file a petition in Family Court alleging that the arrested child is a juvenile delinquent.[17] In some departments, such as the New York City Police Department, petitions containing allegations that the juvenile has committed a felony act must be referred to court, whereas referral of petitions alleging misdemeanors is discretionary.[18]

Some cases referred to Intake may be "adjusted," *i.e.* terminated by the Probation Department [Probation] without judicial action.[19] Adjustment is appropriate when the court lacks jurisdiction, when the probation officer feels that a community agency is better suited than the court to deal with the offender, or when the complainant withdraws the complaint against the child. Before the new Act,[20] Probation was not permitted to adjust, without written approval of the director of probation, a petition that charged a class A or B felony.[21] The Act[22] requires the approval of a judge before allowing adjustment of petitions alleging certain serious class A and B felony offenses, defined in § 753-a of the Act as designated felony acts [DFA].[23] In prior law, unconditional adjustment was an option only for petitions not alleging class A or B felonies.[24] Under the current Act adjustment without prior approval is permitted on all charges involving youths under fourteen years of age.[25]

If the case is not adjusted, a petition against the child is drafted and filed. An initial hearing is held at which jurisdiction is determined, the case is placed on the calendar,[26] and a determination is made whether or not to detain the

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14. N.Y. FAM. CT. ACT § 731(1)(a-c) (McKinney Supp. 1976-1977).

15. *Id.* § 724 (McKinney 1975 & Supp. 1976-1977).

16. 113 police departments in New York State have separately staffed juvenile aid bureaus which provide counselling and guidance for youths, deal with community agencies, and educate the public regarding delinquency. Office of Children's Services, Division of Criminal Justice, The Juvenile Justice System in the State of New York (undated) (unpublished study) (unpaginated).

17. N.Y. FAM. CT. ACT § 733 (McKinney 1975).

18. The Juvenile Justice System in the State of New York, *supra* note 16.

19. N.Y. FAM. CT. ACT § 727 (McKinney 1975). In practice, release at this stage is predicated upon the seriousness of the offense and the prior record of the juvenile.

20. *Id.* § 734(a)(ii) (McKinney Supp. 1976-1977).

21. Act of Aug. 9, 1975, ch. 836, § 1, 1975 N.Y. LAWS (amending N.Y. FAM. CT. ACT § 3(a)(ii) (repealed 1976)).

22. N.Y. FAM. CT. ACT § 734(a)(ii) (McKinney Supp. 1976-1977). This provision may raise jurisdictional problems. The juvenile court judge is given the power of judicial review prior to the filing of a petition but under § 713 the court proceeding is not begun until the petition is filed. Perhaps, however, the judges' function here is analogous to the arraignment function of a criminal court judge who is deemed competent to bind-over a defendant.

23. A designated felony act is defined as an act, committed by a person fourteen or fifteen years of age, which, if done by an adult, would be first or second degree murder, kidnapping, or arson; first degree manslaughter, robbery, rape, sodomy, or assault; or an attempt to commit first or second degree murder or first degree kidnapping [hereinafter cited as DFA]. *Id.* § 712(h).

24. Act of Aug. 9, 1975, ch. 836, § 3(a)(ii), 1975 N.Y. LAWS (repealed 1976).

25. This is permitted under the act because there is no express provision to the contrary.

26. N.Y. FAM. CT. ACT § 747 (McKinney 1975).

child pending the fact-finding hearing.[27] The Act further requires the court to state for the record its reasons and the facts upon which the decision to detain was made.[28] Before the Act, removal of a juvenile from society for purposes of community protection was theoretically only possible under the preventive detention provision.[29] Confinement for the community's protection may now be imposed at a later stage in the proceeding.[30]

The preventive detention provision states that a child may be held pending adjudication when release poses a serious risk that the juvenile will commit an act in the interim which, if committed by an adult, would be a crime.[31] In *Wayburn v. Schupf*[32] the preventive detention provision was upheld against an equal protection challenge. The youth contended that his pre-trial detention violated the equal protection clause of the fourteenth amendment because there was no similar provision for adults. Applying a strict scrutiny standard, the New York Court of Appeals found there to be a greater likelihood that juveniles would commit criminal acts than would adults because juveniles are generally less responsible for their conduct and more susceptible to peer pressure than are adults. The additional absence of second offender sentencing in juvenile cases was also seen as contributing to the lack of any real deterrent to juvenile crime. Thus the court found there to be a valid basis for classification between juveniles and adults. The court further held that preventive detention was the least restrictive method of serving the compelling state interest of community protection.[33]

B. At Trial

At the fact-finding hearing the burden is on the state, as petitioner, to prove beyond a reasonable doubt that the respondent[34] committed an act which, if committed by an adult, would be a crime.[35] At this point, or after the fact-finding hearing, the proceeding may be adjourned in contemplation of dismissal. Under this procedure, if the child is not referred to court within six

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27. *See id.* § 739 (McKinney 1975 & Supp. 1976-1977). Also, the fact-finding hearing must be held within three days of the filing of a petition if the child is detained and, in cases of A, B, or C felonies, within two weeks. *Id.* § 734. Provisions for adjournment of the fact-finding hearing for a reasonable length of time appear in *id.* § 748.

28. *Id.* § 739(a) (McKinney Supp. 1976-1977).

29. *Id.* § 739(b) (McKinney 1975). In practice, such removal has been effected at other stages of the proceeding despite the absence of statutory authority. The Act does not alter this preventive detention provision. *Id.* § 739(a)(ii) (McKinney Supp. 1976-1977).

30. *See* text accompanying notes 42-45 *infra*.

31. N.Y. FAM. CT. ACT § 728(b)(iii) (McKinney 1975).

32. 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976).

33. *Id.* 689, 350 N.E.2d at 909-10, 385 N.Y.S.2d at 520-21. Judge Cooke concurred solely on the basis of protection of the children. *Id.* at 694, 359 N.E.2d at 913, 385 N.Y.S.2d at 524. Judge Fuchsberg noted that the statutory history was not concerned with the interests of the children and thought the statutory provision to be unconstitutional for want of objective criteria at its foundation. He attributed this to the unpredictability of any likelihood or propensity for future criminal behavior. *Id.* at 691-94, 350 N.E.2d at 911-13, 385 N.Y.S.2d at 522-24.

34. The term "respondent" in juvenile proceedings is equivalent to the term "defendant" in criminal proceedings.

35. N.Y. FAM. CT. ACT § 744(b) (McKinney Supp. 1976-1977) conforms its predecessor, N.Y. FAM. CT. ACT § 744(b) (McKinney 1975), to the rule established in *In re* Winship, 397 U.S. 358 (1970) that proof beyond a reasonable doubt is required in delinquency fact-finding hearings.

months, the petition will be dismissed.[36] Under the Act, adjournment in contemplation of dismissal is not available in DFA cases;[37] the court must hear all such petitions. If the fact-finding hearing results in an adjudication of delinquency, the case proceeds to a dispositional hearing to determine whether or not the child is in need of supervision, treatment, or confinement.[38] If the court does not find such a need, it must dismiss the petition regardless of the outcome of the fact-finding hearing.

Prior to the 1976 Act, when the need for supervision, treatment, or confinement was found, the court could order the following dispositions: (1) suspend judgment for up to one year,[39] (2) place the child on probation for up to two years,[40] (3) place the child within his home or in one of four other specified settings for up to eighteen months with possible one year extensions of placement up to the child's eighteenth birthday,[41] or (4) place a fifteen year old class A or B felony offender in a specified adult correctional facility.[42] If the juvenile was found to be mentally ill, special provisions applied.[43]

The Act made two changes affecting non-DFA cases. No placements in adult correctional facilities may be made[44] and restitution by offenders aged ten to sixteen may be ordered as a condition of placement or probation.[45] Once the need for supervision, treatment, or confinement in a DFA case is found, the court must determine whether restrictive placement is required.[46] If restrictive placement is not required, the disposition process proceeds as if the case were not a DFA case, with the exception that an adjournment in contemplation of dismissal is not available.[47]

Restrictive placement is defined in the Act as "[a] placement pursuant to [§ 753-a]"[48] which provides that DFA offenders who satisfy certain criteria receive commitments of a given duration to be spent in specified facilities.[49] The need for restrictive placement is determined on the basis of the following considerations: the needs and best interests of the youth; the record and background of the youth; the nature and circumstances of the offenses, including whether any injuries were inflicted and if so, by whom; and the need for protection of the community.[50] The record and background of the youth includes, but is not limited to, the information disclosed in the probation investigation

36. N.Y. FAM. CT. ACT § 749(a) (McKinney 1975).
37. *Id.* § 749(d)(i) (McKinney Supp. 1976-1977).
38. *Id.* § 743 (defines dispositional hearing); *id.* § 746(a) (McKinney Supp. 1976-1977) (authorizes sequence of hearings); *id.* § 752 (requires the court to record the grounds for the finding and the facts upon which they are based).
39. *Id.* § 753(a), 755(b) (McKinney 1975).
40. *Id.* § 753(c), 757(b).
41. *Id.* § 753(b), 756.
42. *Id.* § 753(d), 758(b).
43. *Id.* § 753(e), 760.
44. Act of July 26, 1976, ch. 878, § 2, 4, 1960 N.Y. LAWS (repealing Act of Apr. 28, 1960, ch. 882, § 2, 4, 1960 N.Y. LAWS, codified in N.Y. FAM. CT. ACT § 758 (McKinney 1975)).
45. N.Y. FAM. CT. ACT § 758-a (McKinney Supp. 1976-1977).
46. *Id.* § 753-a(1).
47. *Id.* § 749(d)(i).
48. *Id.* § 712(k).
49. *Id.* § 753-a(3)(a)(i-iii), (4)(a)(i-iii).
50. *Id.* § 753-a(2)(a-d).

and diagnostic assessment (*i.e.*, history of previous conduct, family situation, psychological and psychiatric reports, and school adjustment). The order of disposition must include specific findings as to each consideration, based on a preponderance of the evidence.[51]

If the court finds that restrictive placement is required it must order, in the case of a class A felony offender, a placement with the Division for Youth [DFY] for an initial period of five years.[52] The first year is to be spent in a secure facility,[53] defined by the Act as "[a] facility . . . characterized by physically restricting construction, hardware and procedures."[54] The second year is to be spent in a residential facility.[55] During the first year, motions, hearings, or orders, with the limited exception of a motion to vacate the order, will not be entertained.[56] A two year prohibition against release is also imposed in cases of DFA offenders.[57] Any release from a residential facility requires written approval of the director of DFY.[58] Further, the youth may be discharged from DFY's custody only by order of the court, and only after three years have expired.[59] The period of confinement may be extended for successive one year periods not to continue beyond the respondent's twenty-first birthday.[60] Such extensions may be granted only after a dispositional hearing, pursuant to a motion by a party, DFY, or the court.[61] The Act also contains extensive provisions for committing mentally ill juvenile DFA offenders in need of restrictive placement to facilities of the Department of Mental Hygiene.[62]

Similar procedures are followed in cases of youths found to have committed DFAs other than class A offenses. The initial DFY placement is for three years.[63] Six to twelve months must be spent in a secure facility and six to twelve months must be spent in a residential facility as specified in the court order.[64] Motions are similarly limited.[65] In all designated felony act cases, the respondent shall be subject to intensive supervision whenever he is not con-

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51. *Id.* § 753-a(1).
52. *Id.* § 753-a(3)(a)(i).
53. *Id.* § 753-a(3)(a)(ii).
54. *Id.* § 712(j).
55. *Id.* § 753-a(3)(a)(iii). The term "residential facility" is nowhere defined in the Act but is understood to mean group homes and foster homes. *Cf.*, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, Kressel, 5 N.Y.U. REV. L. & SOC. CHANGE 137, 154 n.114 (1975).
56. N.Y. FAM. CT. ACT § 753-a(3)(b) (McKinney Supp. 1976-1977). Pursuant to the criminal procedure provisions, a judgment may be vacated under eight circumstances. Vacation is proper when there is no jurisdiction over the defendant, or where evidence or a judgment was procured in violation of the defendant's rights, or when other material defects in the proceeding exist. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1971).
57. N.Y. FAM. CT. ACT § 753-a(3)(a)(iv) (McKinney Supp. 1976-1977).
58. *Id.* § 753-a(3)(c)(i).
59. *Id.* § 753-a(3)(c)(iii).
60. N.Y. FAM. CT. ACT § 753-a(3)(d) (McKinney Supp. 1976-1977). Although there is no explicit provision for extension of a period of secure confinement beyond twelve months, presumably DFY will retain the power to extend this period under the Act after a dispositional hearing. *Id.*; floor debate of A. 12108-A (June 27, 1976) (remarks of Mr. Hect) (unpublished).
61. N.Y. FAM. CT. ACT § 753-a(3)(d) (McKinney Supp. 1976-1977).
62. *Id.* § 753-a(3)(e).
63. *Id.* § 753-a(4)(a)(i).
64. *Id.* § 753-a(4)(a)(ii-iii).
65. *Id.* § 753-a(4)(b).

fined in a secure or residential facility.[66]

The new Act initiates several major changes. First, fourteen and fifteen year old DFA offenders must be evaluated with regard to their amenability for restrictive placement. Juveniles who are found not to be suited to restrictive placement as well as all juveniles under the age of fourteen will receive under the new law dispositions identical to those possible under the old law except that they may not be committed to adult institutions. For juveniles requiring restrictive placement, the Act increases the initial period of confinement from eighteen months for any juvenile[67] to five years for class A felony act offenders and three years for class B felony act offenders.[68] Second, court jurisdiction over restrictively placed DFA offenders extends to a child's twenty-first birthday when previously, absent special conditions, it extended only until the eighteenth year.[69] As a result, a juvenile who is accused of committing a class A DFA offense the day before his[70] sixteenth birthday will be subject automatically to the court's jurisdiction until he reaches age twenty-one. Thus he is supervised until he attains an age well over the legal age of majority for purposes of voting, drinking, and driving.[71] Jurisdiction in this case may be terminated, in limited circumstances, after three years of confinement.[72]

C. New Procedures Initiated by the Act

Other provisions of the Act supplement the aforementioned substantive modifications. Their effect is to facilitate the transition from previous law as well as to insure procedural consistency. In all adjudications of delinquency, the order must specify the sections of the penal law under which the act committed would constitute a crime if done by an adult.[73] In addition, petitions alleging a DFA must be so marked.[74] Another provision enables the corporation counsel of New York City as well as the county and district attorneys of New York counties to arrange for the temporary transfer of assistant district attorneys to present juvenile DFA petitions.[75] This provision is intended to enable the court to deal more efficiently with the anticipated increase in the number of prosecutions expected to result from the preclusion of adjustments of DFA cases at Intake.[76] The Act also provides that the judge who presides at

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66. *Id.* § 753-a(3)(c)(ii), (4)(c)(ii).

67. *Id.* § 756(b) (McKinney 1975), *as amended by* N.Y. FAM. CT. ACT (McKinney Supp. 1976-1977).

68. *See* notes 52, 63 *supra*.

69. *Compare* note 61 *supra with* the practice under N.Y. FAM. CT. ACT § 756(c) (McKinney 1975) before the 1976 Amendment.

70. Although the author realizes that both females and males are subject equally to the requirements of the Act, for purposes of consistency and expediency the masculine pronoun will be used in its generic sense.

71. *Cf.*, N.Y. VEH. & TRAF. LAW § 502(2) (McKinney Supp. 1976-1977). (Applicant for full driver's license must be at least 18 years of age).

72. N.Y. FAM. CT. ACT § 753-a(3)(c)(iii) (McKinney Supp. 1976-1977).

73. *Id.* § 752.

74. *Id.* § 731(2).

75. *Id.* § 254(c).

76. This provision, however, can be viewed as defying part of the purpose of maintaining a separate and distinct juvenile system by assuring prosecution of an especially zealous nature by persons who are strangers to the system.

the initial fact-finding hearing will preside, wherever practicable, throughout the duration of the case.[77]

III
LEGAL CHALLENGES TO THE ACT

A. Jury Trials

1. McKeiver v. Pennsylvania[78]

The United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."[79] In *Baldwin v. New York*,[80] the Supreme Court limited this right to trials in which the potential punishment is greater than six months. The Court, in *McKeiver v. Pennsylvania*, refused to extend to juveniles the right to a jury trial in the adjudicative phase of a state court delinquency proceeding.[81] The Court made it clear that this refusal was compelled by the juvenile justice system's avowed goal of rehabilitation and the desire to maintain an informal proceeding.

The New York Act, in light of *McKeiver*, may be unconstitutional to the extent that compulsory nonjury trials, at least in DFA cases, are now based on goals of community protection rather than solely on goals of rehabilitation.

McKeiver was a consolidation of three cases. McKeiver was charged with a felony and received a probated sentence. The second juvenile was charged with misdemeanors and committed to a state reformatory for a term lasting potentially until the age of twenty-one. The third, charged with a misdemeanor, was given a suspended commitment to a state reformatory and placed on probation. All three juveniles were denied the benefit of a jury trial.[82] The Court's decision thus was intended to be construed broadly, not limited to specific factual situations nor to the particular disposition of a case.

Although juvenile proceedings are technically civil in nature, the Court, recognizing their quasi-criminal impact, declined to ground its decision on the basis that the right to a jury trial is inapplicable to proceedings which are not "criminal prosecutions" within the meaning of the sixth amendment. The Court instead referred to the due process standard enunciated in *In re Gault*[83] and *In re Winship*.[84] These cases established fundamental fairness as the applicable due process standard in juvenile proceedings. In accordance with the more flexible approach taken in *Gault*, the Court defined the issue as whether or not the due process clause of the fourteenth amendment assures the right to trial by jury in the adjudicative phase of a juvenile proceeding. After noting the safeguards which have been extended in juvenile proceedings,[85] and the *Gault*

77. N.Y. FAM. CT. ACT § 742 (McKinney Supp. 1976-1977).
78. 403 U.S. 528 (1971).
79. U.S. CONST. amend. VI.
80. Baldwin v. New York, 399 U.S. 66 (1970).
81. 403 U.S. 528 (1971).
82. *Id.* at 534-38.
83. 387 U.S. 1 (1967).
84. 397 U.S. 358 (1970).
85. These include the rights to adequate notice of charges (387 U.S. at 33); the right to counsel (*id.* at 41); the constitutional privilege against self-incrimination (*id.* at 49-50, 55); the right to con-

Court's pointed failure to extend all procedural rights to juveniles, the *McKeiver* Court applied the standard of fundamental fairness to determine whether a right to trial by jury was constitutionally mandated. The Supreme Court,[86] adopting the reasoning of the Pennsylvania court below,[87] viewed the extension of procedural safeguards to juveniles since *Gault* as assurance that the due process guarantees afforded do adequately protect juveniles and assure them fundamentally fair trials.

The Court listed thirteen reasons to support its finding that there is no constitutional requirement for jury trials in juvenile proceedings. Among them, the Court cited the lack of Supreme Court precedent extending the right[88] and the general consensus of experts reported in the Task Force Report of the President's Commission of Law Enforcement and Administration of Justice[89] that jury trials need not be granted. The Court also noted that the majority of state legislatures have failed to recommend or require jury trials in juvenile proceedings.[90] Furthermore, the Court considered that implementation of a fully adversarial process in juvenile court complete with jury trials would put an end to the "idealistic prospect of an intimate, informal, protective proceeding"[91] and introduce delay, formality, and publicity into the system.[92] In addition, the majority found that a jury would not necessarily ensure accurate fact-finding in a juvenile proceeding.[93] The failings of the juvenile justice system were not attributed to the unfairness of the proceeding itself, but rather to limited post-adjudication resources and a general lack of knowledge of how to deal with the problems peculiar to juveniles.[94] A jury trial, the court reasoned, would not alleviate the problems of the system:

> [E]quat[ing] the juvenile proceeding—or at least the adjudicative phase of it—with the criminal trial . . . ignore[s] . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.
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> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[95]

Justice Harlan concurred with the majority on the ground that the sixth amendment does not apply to the states. His position, however, was that if it did apply, juveniles would be entitled to jury trials as long as the system fails

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front witnesses when a valid confession has not been obtained (*id.* at 57); as well as the standard of proof beyond a reasonable doubt. (397 U.S. at 358).

86. Only Justices Burger, Stewart, and White joined Justice Blackmun in the majority opinion.

87. *In re* Terry, 438 Pa. 339, 343, 265 A.2d 350, 352 (Pa. 1970) *aff'g In re* McKeiver, 215 Pa. Super. 760, 255 A.2d 921 (1969) and *In re* Terry, 215 Pa. Super. 762, 255 A.2d 922 (1969).

88. 403 U.S. at 545 (citations omitted).

89. REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME (1967). This was pre-*Gault*.

90. 403 U.S. at 548-49.

91. *Id.* at 545.

92. *Id.* at 550.

93. *Id.* at 547. The Court points out that juries are not required in equity, workmen's compensation, probate, or deportation cases. *Id.* at 543.

94. *Id.* at 544 (citation omitted).

95. *Id.* at 550-51.

to fulfill its original purpose of rehabilitation.[96] Justice White's concurring opinion was also grounded on the rehabilitative nature of the juvenile court:

> Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) . . . . Supervision or confinement is aimed at rehabilitation . . . . A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.[97]

Justice Brennan, concurring in part and dissenting in part, asserted that the program before the Court was constitutional, even though no jury was present, because the public was permitted to observe the proceedings.[98] The presence of the public or the press protected the accused from governmental oppression.[99] Justice Brennan, however, expressed a preference to accord juveniles the constitutional right to jury trials because it is the more effective means of protecting offenders in serious cases.

Justices Douglas, Black, and Marshall dissented, asserting that the distinction between criminal and juvenile justice is meaningless when lengthy confinement is possible. The sixth and fourteenth amendments, in their view, entitle juveniles to jury trials if, had they been tried as adults, they would have been granted this right.[100]

The *McKeiver* decision, although fragmented, has been construed as not extending to juveniles the right to trial by jury. The requirements of due process are satisfied without that right so long as the nature and aims of the juvenile proceeding are rehabilitative.[101]

The Act has undercut traditional assumptions at least insofar as it now balances a new purpose—community protection—against the best interests of the youth. In this way, the Act deprives the proceeding of its exclusively paternalistic focus while retaining only diluted procedural protections. Arguably, the Act's expansion of the purpose of juvenile justice to include protection of the community requires, in juvenile proceedings, the stronger protections afforded by jury trials.[102]

2. *Implications for Jury Trials Under* McKeiver

a. The Conflict Between the Youth's Best Interests and Community Protection—When the best interests of the child also promote community protec-

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96. *Id.* at 557.
97. *Id.* at 551-52.
98. In New York, for example, the general public may be excluded from juvenile proceedings. N.Y. FAM. CT. ACT § 741(b) (McKinney 1975).
99. 403 U.S. at 554-56.
100. *Id.* at 559.
101. Note, *Jury Trials in Juvenile Proceedings*, 85 HARV. L. REV. 113, 114-15 (1971-72).
102. The principal drafters of the Act maintain that despite the change in purpose of the Act, the legislature did not intend to require trial by jury in delinquency cases. Gottfried & Barsky, *Practice Commentaries*, N.Y. FAM. CT. ACT § 753-a (McKinney Supp. 1976-1977).

tion, the two purposes of the Act coincide, and the need for a jury trial is minimized. In that case, the purposes for the removal of the youth from society are still rehabilitative. When removal for purposes of community protection is not in the best educational, emotional, psychological, or even physical interests of a child, the conflict between the competing goals of the Act is brought into focus. For example, an undersized youth, having a record of victimless crimes, and committed as a DFA offender for arson might be emotionally ostracized and physically harmed by his institutional peers. Both his educational and emotional development might be retarded in a prolonged stay at a juvenile facility, yet he could be restrictively placed for purposes of community protection.

When this conflict exists, the Act fails to meet the due process obligations as construed in *McKeiver*. The rationale of the opinions of all of the Justices in *McKeiver* would seem to require a jury trial in this case. The dissenters, Justices Douglas, Marshall, and Black advocated jury trials under the sixth amendment as applied in *Baldwin*[103] in all juvenile proceedings. Justice Brennan also advocated either jury trials or public proceedings in all serious cases. Justice White would require jury trials so long as juvenile commitments are based on non-rehabilitative considerations. Disregarding Justice Harlan's unusual position with regard to the sixth amendment, he similarly advocated a jury trial so long as juvenile delinquency commitments are not in fact rehabilitative. Finally, even the majority Justices would require a jury trial under the New York Act because it permits commitment of juveniles for purposes of community protection and no longer solely for purposes of rehabilitation. The majority would view the Act's solicitude for community protection as tipping the precarious balance previously maintained between the interests of the child and those of society. The balance is shifted, not by the introduction of harsher penalties, but because commitment, whatever its length, is not imposed solely for rehabilitative purposes,[104] and in fact may be adverse to the youth's best interests. Perhaps, at least in New York, Blackmun's day of "ultimate disillusionment"[105] has arrived.

The partial failure of the rehabilitative ideal, recognized both by the Justices in *McKeiver*[106] and the drafters of the Act,[107] will result in the commitment of some juveniles, for extended periods of time, for purposes other than rehabilitation. This result suggests that juvenile DFA offenders will be denied the right to trial by jury in a proceeding almost identical in its purposes and effects to a criminal trial.

b. Nature of Penalty—A Kings County Family Court judge recently rejected a class A DFA offender's claim to a jury trial.[108] The challenge asserted that a jury trial was required because of the Act's provisions for a mandatory minimum commitment of extended duration.[109] The youth's counsel contended that commitment under this provision, without a jury trial, violated the rule

103. Baldwin v. New York, 399 U.S. 66 (1970).
104. N.Y. FAM. CT. ACT § 711 (McKinney Supp. 1976-1977).
105. 403 U.S. at 551.
106. 403 U.S. at 543-44.
107. Gottfried & Barsky, *Supplementary Practice Commentaries* art. 7 (McKinney Supp. 1976-1977).
108. Matter of Det. William M. (Harold B.), reported in N.Y.L.J., Apr. 29, 1977, at 14, col. 5.
109. *See* text accompanying notes 52, 63 *supra*.

enunciated in *Baldwin v. New York*[110] which requires the state to afford an opportunity for trial by jury whenever possible deprivations of liberty exceed six months. The challenge was rejected because under *McKeiver*, the length or severity of the penalty is irrelevant to the constitutional requirements of due process. Judge Gartenstein also expressed his belief that "the juvenile system is the result of a noble social experiment which we seem intent on abandoning."[111] This decision, however, is not determinative of juveniles' rights to a jury trial under the New York law[112] since the *McKeiver* decision did not turn on the duration or conditions of commitment, but rather on its purpose.

It appears that *United States ex rel. Murray v. Owens*[113] supports denial of the right to jury trials for juveniles. In that case, the Second Circuit upheld a New York statute which permitted the commitment of fifteen year old youths to adult correctional facilities for three years upon an adjudication of delinquency by a judge rather than a jury.[114] The court, in reaching its decision, looked to the *McKeiver* opinion for guidance. The court gave two grounds for its decision. First, this New York commitment practice was probably known to the Supreme Court at the time of *McKeiver*.[115] Second, the *McKeiver* determination that a jury trial would not effectively improve the fact-finding process was unaffected by the location or type of facility to which a juvenile was committed. In conclusion, the court stated that "[a]n informal proceeding informed by sympathy and concern was itself considered [by the Court in *McKeiver*] sufficiently desirable and still attainable to outweigh the argument in favor of jury trials."[116]

The Act, however, is vulnerable not because of the setting or disposition of juvenile commitments but rather because it alters the *quid pro quo* for commitment from rehabilitation to community protection. The motivations of sympathy and concern for the juvenile now compete with motivations of concern for the protection of society. When this latter concern serves as the basis for a commitment order, it is a violation of due process to deny the right to a jury trial.

c. Similarity of Juvenile and Criminal Proceedings—Juvenile proceedings under the Act have been held by the Supreme Court in *In re Gault*[117] to resemble criminal prosecutions within the meaning of the sixth amendment. In extending the right to counsel in juvenile proceedings, the Court concluded that: "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[118] In another case which extended due

110. 399 U.S. 66 (1970).
111. N.Y.L.J., Apr. 29, 1977, at 14, col. 6.
112. Although the issue will eventually be appealed, this is not likely to be the case upon which an appeal would be taken. Conversation with Rhoda Cohen, Brooklyn, N.Y. Legal Aid attorney, in New York City (May, 1977).
113. 465 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 1117 (1972).
114. Act of Apr. 28, 1960, ch. 882, § 2, 4, 1960 N.Y. LAWS (repealed 1976).
115. 465 F.2d at 291-92.
116. *Id.* at 294.
117. 387 U.S. 1 (1967).
118. *Id.* at 36.

process protections to juvenile proceedings, the Supreme Court "made it clear . . . that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."[119]

The only major distinction between juvenile and criminal proceedings exists in the area of sentencing. Juvenile dispositions are predicated on the nature of the offender, while criminal sentences continue to be tied to the nature or gravity of the offense.[120] Under the Act, this distinction is no longer applicable, at least with respect to DFA offenders. The commitment imposed on DFA offenders is based on the severity of the offense coupled with the youth's amenability to restrictive placement. Thus dispositions are no longer predicated solely upon considerations of the need or potential for individualized treatment. Although one of the four restrictive placement criteria does require that the needs and best interests of the child be examined,[121] it is no longer the sole criteria for disposition. Since this distinction between criminal and juvenile proceedings has been obliterated by the Act (at least in DFA cases), any justification for an informal version of due process ceases to exist. The result should be, under this analysis, a right to trial by jury in DFA cases.

d. Conclusion—The jury trial issue reappears in New York despite the *McKeiver* decision because of the novel nature of the 1976 amendments. The problem will only cease to exist if the courts interpret the Act's dual purposes as being entirely consistent with each other. To do so would require an assumption that the mandatory minimum commitments were based on a legislative judgment that serious offenders could not be rehabilitated in a shorter period. There is no support in modern sociology or penology for this assumption. No one knows what relationship exists between the seriousness of the offense or duration of commitment and the prospects for rehabilitation.[122] Thus, the interpretation is subject to attack as resting on an arbitrary and invidious abuse of legislative discretion.

B. Right to Treatment

In prosecutions under the Act, a court may determine that the Act is not sufficiently penal in nature to justify granting trial by jury and other procedural rights to juveniles. This suggests that the aim of commitment is rehabilitation. At the very least, treatment in fact should be afforded to those who are substantially deprived of their liberty.[123]

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119. *In re* Winship, 397 U.S. 358, 365-66 (1970).

120. The rights extended to juveniles in *Gault* and its predecessors have served to eliminate most of the other major procedural differences.

121. N.Y. FAM. CT. ACT § 753-a(2)(a) (McKinney Supp. 1976-1977).

122. [T]here is no data available on which to determine how much more security the public obtains as a result of secure incarceration of a violent juvenile beyond the period of incarceration. Examination of 100 correctional outcome studies showed that the evidence of effectiveness of correction treatment is inconsistent, contradictory, and of questionable reliability (citation omitted). GOVERNOR'S REPORT, *supra* note 3, at 51.

123. If juveniles do receive jury trials, the right to treatment may be unavailable. Juveniles would be receiving the full panoply of due process rights and would have no more claim to a right to treatment than do adult offenders. Nevertheless, the continued validity of the rehabilitative ideal pervades the juvenile system thus preserving the right. The issue "whether persons committed on grounds of dangerousness might enjoy a 'right to treatment' " has never been adjudicated.

When the rationale for commitment is that the offender is promised treatment for his condition, not punishment for his offense, treatment must be forthcoming. This notion has been termed the "right to treatment."[124] If treatment is withheld, the major justification for commitment disappears and the continued deprivation of liberty becomes purely punitive. Such a commitment violates due process of law.

The right to treatment argument becomes even more forceful under the Act because juveniles will be facing longer minimum periods of confinement, with the maximum term remaining discretionary. The Supreme Court has held that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[125] If all procedural rights to which adults are presently entitled are not extended to juveniles under the Act, then the only constitutionally valid foundation for such commitment must be rehabilitation, thus giving rise to a constitutionally based[126] claim for treatment in fact. This argument has met some success in the courts.[127]

C. Four Constitutional Attacks on "Mandatory" Commitments

The most immediate analogy that can be made to the mandatory commitment provisions of the Act[128] is with the mandatory sentencing provisions of the drug laws.[129] There have been four types of challenges asserted against such provisions: denial of equal protection,[130] legislative infringement into the judicial function,[131] denial of due process,[132] and cruel and unusual punishment in violation of the eighth amendment.[133] Each of these has been categorically rejected by most courts. In general, these arguments are even less appropriate to testing the constitutionality of the Act. Under the Act, the imposition of "mandatory commitments" depends upon a determination of need for restrictive placement whereas under the drug laws, a conviction results in automatic application of the nondiscretionary sentence. Minimum commitment provisions under the Act are mandatory only in the sense that minimum commitments must be imposed on serious offenders once they have been found to be in need

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O'Connor v. Donaldson, 422 U.S. 563, 571 n.6 (1975). *O'Connor* was a civil suit alleging a deprivation of the right to liberty for involuntary confinement in a mental institution. For a discussion of the case *see* Comment, O'Connor v. Donaldson: *Due Process Rights of Mental Patients in State Hospitals*, 6 N.Y.U. REV. L. & SOCIAL CHANGE 65 (1976).

124. For a history of the development of this argument see Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process*, 57 GEO. L.J. 848, 862-76 (1969); for a discussion of trial tactics based on this theory *see* Wald & Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs*, 12 AM. CRIM. L. REV. 125 (1974).

125. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

126. Kittrie, *supra* note 124, at 863.

127. Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

128. N.Y. FAM. CT. ACT § 753-a(3, 4) (McKinney Supp. 1976-1977).

129. Act of May 8, 1973, ch. 276-78, 1973 N.Y. LAWS (current version at N.Y. PENAL LAW art. 220 (McKinney Supp. 1976-1977)).

130. *See generally* cases cited note 134 *infra*.

131. *See generally* cases cited note 147 *infra*.

132. *See generally* cases cited note 148 *infra*.

133. *See generally* People v. Gardner, 78 Misc. 2d 744, 748-50, 359 N.Y.S.2d 196, 200-02 (Sup. Ct. 1974).

of restrictive placement. A determination that the juvenile is indeed a DFA offender will not alone suffice.

1. Equal Protection

A possible challenge based on the equal protection clause of the fourteenth amendment is that juvenile offenders are improperly denied the opportunity to plea bargain. This argument has not proven persuasive in the analogous drug-related cases. Several state and lower federal courts have found no denial of equal protection when the opportunity to plead to a lesser included offense has been withheld from drug law defendants while other defendants have enjoyed that benefit. The courts have found there is no constitutional right to "cop a plea."[134] Thus there can be no successful equal protection challenge based upon diminished opportunity to plea bargain for more favorable treatment than that provided by the Act.

Furthermore, pleading to a lesser included offense is nowhere prohibited by the provisions of the Act although it is true that pre-trial adjustments of petitions marked DFA will be sharply curtailed.[135] Cases in which the state has weak evidence, or would prefer to gain valuable testimony for the prosecution of a codefendant, may prompt the prosecution to bargain a plea down to an offense which carries no potential for a § 753-a commitment.

A second equal protection challenge more appropriate to the Act is that it improperly distinguishes between juveniles of different ages who have committed the same offense. In DFA cases, as in criminal proceedings, the duration of commitment is primarily affected by the gravity of the offense committed.[136] Yet, under the Act fourteen and fifteen year olds are treated differently than thirteen year olds who commit the same offense.[137]

In *United States ex rel. Sero v. Preiser*,[138] the court held that the imposition of sentences on adults aged sixteen to twenty-one[139] that were longer than those imposed on adults over twenty-one, violated equal protection guarantees when the younger convicts were to be incarcerated in penal rather than rehabilitative institutions. Although under the Act DFA offenders in need of restrictive placement will continue to be sent to rehabilitative institutions, there may be no rehabilitative justification for the imposition of the longer sentence. If sentencing is determined without regard to rehabilitation, *Sero* suggests that the differential disposition denies equal protection to fourteen and fifteen year olds.

With regard to age classifications in general, the Supreme Court has held that a scheme requiring the mandatory retirement of policemen at age fifty was a permissible classification.[140] A strict scrutiny standard was rejected because the aged were not a clearly identifiable and historically disadvantaged group in

134. *See generally id.* at 754, 359 N.Y.S.2d at 205; Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

135. N.Y. FAM. CT. ACT § 734(a)(i) (McKinney Supp. 1976-1977).

136. *See* text accompanying notes 119-121 *supra*.

137. N.Y. FAM. CT. ACT § 712(h) (McKinney Supp. 1976-1977).

138. 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

139. Offenders between the ages of 16 and 21 were termed "youthful offenders." Act of July 20, 1965, ch. 1030, § 75.00, 1965 N.Y. LAWS (repealed 1974).

140. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

need of protection of their rights. This is also true for juveniles aged fourteen and fifteen. Faced with an equal protection claim under the Act based on age classification, the Court would probably apply a minimal scrutiny test, finding that the length of commitment bears a rational relationship to rehabilitation and community protection.

The criteria for determining amenability to restrictive placement[141] are also vulnerable to attack on equal protection grounds. These criteria (*i.e.* needs and best interests, record and background, nature and circumstances of the offense, and need for community protection), as applied, are so subjective as to render restrictive placements arbitrary, and thus violative of equal protection.[142] Juvenile DFA offenders with similar records may be treated differently by different judges applying these criteria. Even if the criteria could be objectively applied, it is possible to argue that they are not rationally related to the legislative purposes of rehabilitation and community protection. For example, there is no demonstrated relationship between a person's background or criminal history and his propensity to commit crime[143] or his amenability to rehabilitation.[144]

Finally, an argument can be made that the categorization of enumerated offenses as DFA offenses to the exclusion of others subjects an arbitrary class of juveniles to harsher penalties. The DFA enumeration omits many acts deemed serious by the criminal law, including second degree assault or robbery, possession of narcotics, and possession of weapons.[145] It is unlikely, however, that an equal protection challenge of this type would succeed in view of the wide discretion afforded state legislatures in determining the nature and scope of criminal offenses and penalties.[146]

2. *Legislative Infringement Into the Judicial Function and Denial of Due Process*

Judges have been allowed to determine, subject only to minimal legislative limitations, the actual duration of sentences. The mandatory minimum commitment provisions incorporated by the Act effectively preempt judicial discretion in this area. Thus it might be argued that the legislature has improperly encroached upon the function of the courts. There is, however, no constitutional requirement that courts be given discretion in sentencing:[147] mandatory sentencing of the type required under the Act is properly within the powers of the state legislature.

The due process argument arising in the drug cases is that mandatory sen-

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141. N.Y. FAM. CT. ACT § 753-a(2)(a-d) (McKinney Supp. 1976-1977).

142. *Cf.* Furman v. Georgia, 408 U.S. 238, 249 (Douglas, J., concurring), 291-95, 305 (Brennan, J., concurring) (suggesting that the arbitrary application of the death penalty rendered it cruel and unusual in violation of the eighth and fourteenth amendments).

143. GOVERNOR'S REPORT, *supra* note 3, at 63-66 and notes contained therein; Wayburn v. Schupf, 39 N.Y.2d 682, 691-92, 385 N.Y.S.2d 518, 523, 350 N.E.2d 906, 911 (Fuchsberg, J., concurring) (1976).

144. Shepherd, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U.L.J. 12, 29-35 (1977).

145. *Cf.* N.Y. PENAL LAW § 60.05 (McKinney 1975 & Supp. 1976-1977) (cross reference omitted).

146. People v. Broadie, 45 App. Div.2d 649, 652-54, 360 N.Y.S.2d 906, 910-12 (2d Dept. 1974), *aff'd*, 37 N.Y.2d 116, 371 N.Y.S.2d 471 (Ct. App. 1975).

147. *Id.* at 650, 360 N.Y.S.2d at 908.

tencing imposes imprisonment without affording the defendant a hearing to determine the possibility of less severe rehabilitative measures. Yet, a deprivation of sentencing alternatives is not a deprivation of liberty without due process.[148] Since under the Act there is some flexibility in sentencing, inasmuch as the judge retains discretion in determining whether or not restrictive placement is required, attacks of this nature are even less assured of success than in the drug cases.[149]

3. Cruel and Unusual Punishment

Mandatory sentencing has also been criticized as violating the eighth amendment ban against cruel and unusual punishment.[150] A three or five year commitment imposed on a juvenile may be unduly harsh in light of his age and experience.

The eighth amendment applies to confinement for purposes of punishment. Thus the Act may be vulnerable to an eighth amendment attack only if the conditions in the secure or residential facilities to which DFA offenders are sent are such that rehabilitation cannot occur. This argument is based on the theory that when the rehabilitative *quid pro quo* is rejected, the commitment becomes purely punitive and hence may be perceived as cruel and unusual.

Adult convictions for the same crimes enumerated in the Act as DFA offenses result in much harsher sentences even in view of the age differential, making it unlikely that juvenile commitments will be held to be cruel and unusual punishment. Under the criminal law, first time adult offenders who are convicted of first degree robbery,[151] manslaughter,[152] sodomy,[153] or rape[154] are subject to a maximum twenty-five year sentence;[155] first time adult offenders convicted of kidnapping[156] or of murder in the first degree[157] (excepting a limited class of offenders who may receive the death penalty) may receive a sentence of life imprisonment.[158] Adult first offenders convicted of assault with a deadly weapon in the first degree[159] may receive a sentence of up to fifteen years imprisonment.[160] Some will undoubtedly believe that even under the provisions of the new Act, juveniles are "getting away with murder."

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148. *See* Black v. State, 509 P.2d 941 (Crim. App. Okla. 1973).

149. *See also* Information Packet on Juvenile Justice Standards Project, (Dec. 22, 1975) (publication of limited circulation sponsored by the Institute of Judicial Administration and the American Bar Association available at 80 5th Avenue, Room 1501, N.Y., N.Y., 10011, 212-255-1015 (29 volume publication forthcoming in 1978)). These standards advocate that the standard for sentencing be the least restrictive alternative for intervention into the lives of juveniles and their families. *Id.* at 9-14, 64-67. For an analysis of the Standards *see* Ketcham, *National Standards for Juvenile Justice*, 63 VA. L. REV. 201 (1977).

150. This amendment was made applicable to the states in *Robinson v. California*, 370 U.S. 660, 666 (1962).

151. N.Y. PENAL LAW § 160.15 (McKinney 1975).

152. *Id.* § 125.20.

153. *Id.* § 130.50.

154. *Id.* § 130.35.

155. *Id.* § 70.00(2)(b).

156. *Id.* § 135.25.

157. *Id.* § 125.27.

158. *Id.* § 70.00(2)(a).

159. *Id.* § 120.10.

160. *Id.* § 70.00(2)(c).

IV
THE IMPACT OF THE NEW ACT

What effect the Act will have on the future of juvenile justice will depend upon whether or not the Act resolves the problems of the prior system and upon whether or not its approach to such a resolution is the correct one.

A. The Failings of Juvenile Justice

The Governor's Panel on Juvenile Violence,[161] charged with defining the nature and extent of the problem of juvenile violence, reported that:

> While there has been an increase in juvenile violence since 1970, it has not been as dramatic as the media has made it seem. . . .
>
> There is a noticeable funneling (or sieve) aspect to the juvenile justice system. Specifically, (a) the vast majority of children contacted by police are given . . . no further processing; (b) [53.5 percent] . . . of juveniles charged with violent crimes . . . are diverted at court intake . . . ; (c) once in court, a large number of cases are withdrawn or dismissed . . . .[162]

In addition, it was reported that it was impossible to determine from available information at what stage of the system the arrested juveniles were being diverted, and how many of those finally adjudicated delinquent were guilty of the initial act charged.[163] For example, it was not possible to determine how many juveniles who appeared in court were placed in the equivalent of a secure or residential facility under the previous law, although it is known that approximately one in five children who did go to court had some restriction placed on their liberty.[164] It was also impossible to determine on what charge the finding of delinquency was made.[165] Such uncertainty results when, for example, a child charged with murder is recorded as having received probationary treatment when actually the disposition was predicated on a lesser offense after the murder charge was not proved. As a result of these deficiencies a meaningful appraisal of the effectiveness of New York's system of juvenile justice may be impossible.

In view of the absence of reliable data, it is impossible to substantiate any claims that leniency in the treatment of juvenile offenders has contributed to the system's weaknesses.[166] Although it is true that fewer than ten percent of the juvenile arrests for robbery resulted in probation, placement, or commitment, and approximately fifty-five percent of the robbery petitions were never adjudicated on the merits due to pre-trial adjustment,[167] many of the adjustments made were justifiable on grounds other than leniency.[168] In addition, it is

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161. GOVERNOR'S REPORT, *supra* note 3.

162. *Id.* at 20-21.

163. JUVENILE VIOLENCE REPORT, *supra* note 3, at 3.

164. *Id.* at 40. This includes commitment, placement, residential care, and probation. *See also id.* at 30, 31, 47.

165. *Id.* at 11.

166. Goldstein, *Juvenile Justice System in Throes of Change*, N.Y. Times, Oct. 30, 1976, § 2, at 48, col. 4.

167. JUVENILE VIOLENCE REPORT, *supra* note 3, at 43-45.

168. *Id.* at 30, 32. For example, adjustment may be appropriate when the complaining party refuses to proceed with the action. *Id.* at 30.

unreasonable to charge the system with leniency without first comparing the number of satisfactory dispositions of juvenile cases with their counterparts in the criminal system or without uncovering the reasons for the low rate of commitment, placement, and probation.[169] Nevertheless, there has been general agreement that the juvenile justice system, accused of being a "non-system,"[170] has failed to deliver both treatment and services to youths and has failed to resolve satisfactorily the problem of juvenile violence.[171]

Arguably, the system has failed because of the inefficiency or ineffectiveness of the legal process itself. Clearly, some of the errors have resulted from a lack of post-adjudication resources,[172] lack of knowledge about rehabilitation and juvenile crime, and a general indifference toward the future of today's youth.

B. The Effect of the Act

The requirement that there be accurate recording at every stage of the juvenile process will alleviate one of the system's greatest problems. The Act requires specific findings for the factual basis of[173] and the reasons for[174] the court's disposition. This will virtually assure that future evaluation of the system will be more meaningful than past attempts have been. The Act also attempts to respond to accusations of leniency by tightening controls over adjustment in DFA cases.[175] Whether or not this provision will significantly contribute to a reduction in the number of adjustments is uncertain as the number of juveniles charged with DFA offenses will be small compared to the total delinquent population. In addition, it is unclear whether or not the large number of prior juvenile petitions, which would be DFA petitions if brought today, were actually adjusted improvidently.

Despite the inability to identify the cause of the problems of the juvenile system, the New York Legislature responded to the accusation of its ineffectiveness by passing the Act. One major assumption made was that the system had not properly dealt with the more violent juvenile offender. The majority of juveniles who will be affected by the Act will be those arrested for assault and robbery. These two crimes accounted for over eighty-six percent of the total arrests in the five New York counties in a one year period.[176] The provisions of § 753-a, however, will affect only those arrested for first degree violations.

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169. *Id.* at 33.

170. GOVERNOR'S REPORT, *supra* note 3, at 88.

171. *See* 403 U.S. at 547.

172. GOVERNOR'S REPORT, *supra* note 3, at 79-80.

> [T]he Task Force . . . found that release from the training school system is far too often dictated by the population capacity of the institutions rather than on an objective evaluation of the readiness of the juvenile to return to the community. This has been somewhat ameliorated, however, through the 'sensitive case' procedures instituted by Division for Youth this past year.

Id. at 80.

173. N.Y. FAM. CT. ACT § 752 (McKinney Supp. 1976-1977).

174. *Id.* § 752.

175. *Id.* § 734(a)(ii).

176. JUVENILE VIOLENCE REPORT, *supra* note 3, at 14, 17. This figure is based on a sampling of about 49% of the total 7-15 year old population.

Since only 1.3 percent of all arrests were for manslaughter and murder (a total of seventy-six individuals implicated in fifty-four incidents)[177] the effect of the Act will not noticeably affect the total delinquent population.

The Act, therefore, is not intended to make the juvenile justice system generally more effective but rather to isolate one small segment of the delinquent population, *i.e.*, violent offenders, and deal with them more scrupulously. Not only do the restrictive placement provisions promote this end, but the requirement that judges state their findings of fact and reasons for disposition in the record commands the judiciary to treat the problem of juvenile violence with greater concern.

The Institute of Judicial Administration, in cooperation with the American Bar Association, has devised standards for the administration of juvenile justice.[178] The Standards recommend for juveniles: (1) sanctions proportionate to the severity of the offenses;[179] (2) determinate sentences representing the least restrictive alternative for intervention into the lives of juveniles and their families;[180] (3) a presumption against confinement in secure facilities;[181] (4) a three year maximum disposition;[182] (5) jury trials at the option of the juvenile;[183] (6) retention of juvenile court jurisdiction over persons less than eighteen years of age;[184] (7) provision for waiver of jurisdiction to adult court in cases of persons over sixteen when the juvenile is not a proper juvenile court subject due to the seriousness of the offense, the inefficiency of juvenile court dispositions, the prior record of the juvenile, and the greater appropriateness of criminal correctional facilities and programs.[185]

The Standards reject the best interests test so heavily relied on in New York and favor a more determinate system of juvenile justice based on objective considerations.[186] They boldly recognize that coercive sanctions are punishment and that the nature and duration of the sanction should be measured by the seriousness of the offense.[187] This standard, however, is qualified by the mandate that the court employ the least restrictive category and duration of disposition consistent with the seriousness of the offense and the degree of culpability of the individual as indicated by the circumstances of the case, the age, and prior record of the juvenile. The Standards also disallow the imposition of any sanction when the resources necessary to effectuate it are unavailable.[188] The more formal penal approach to juvenile justice is also reflected by their recommendations for procedural reform in the system. Under the proposed procedure, juveniles have the option of being tried by a jury of as few as six persons who will be required to reach a unanimous verdict.[189]

177. *Id.* at 22, 27.
178. Information Packet on Juvenile Justice Standards Project, *supra* note 149.
179. *Id.* at 5, 8, 9.
180. *Id.* at 5, 8, 11, 64.
181. *Id.* at 65.
182. *Id.* at 59.
183. *Id.* at 19, 39.
184. *Id.* at 20, 59.
185. *Id.* at 6, 19-20, 59-60.
186. *Id.* at 5, 25.
187. *Id.* at 5, 8, 25, 65.
188. *Id.* at 10, 65-66.
189. *Id.* at 39.

Whether or not this alternative is a more appropriate one for dealing with the problem of juvenile crime is a question which remains unanswered. It does, however, force inquiry into the propriety of the Act's resolution and perhaps stimulates the pursuit of other options.

V
CONCLUSION

Rigorous treatment of violent juvenile offenders is certainly not an impermissable end in itself. The Juvenile Justice Reform Act of 1976, however, emphasizes considerations of community protection as well. The penal nature of placements determined with reference to community protection are in conflict with the juvenile's best interests. The task of reconciliation has been left to the courts. The manner in which these competing concerns are balanced will determine whether or not juveniles are granted the full range of procedural and substantive rights. Resolution of this conflict will surely affect the future philosophy of juvenile justice in this country.

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