Juveniles in Kansas Have a Constitutional Right to a Jury Trial. Now What? Making Sense of *In re L.M.*[*]

I. INTRODUCTION

For many years, juveniles across the country have been accused of serious crimes and sentenced to years in jail without the right to a jury trial. Recently, however, that changed for juveniles in Kansas. It began with a sixteen-year-old being arrested on one count of aggravated sexual battery and one count of minor in possession of alcohol.[1] In district court, the juvenile—known only as L.M.—requested a jury trial, but the judge denied the request,[2] exercising the court's right under the Kansas Juvenile Justice Code (KJJC).[3] After a bench trial, L.M. was convicted on both counts and sentenced to eighteen months in a juvenile correctional facility.[4] However, L.M.'s sentence was stayed, he was placed on probation until the age of twenty, and he was required to register as a sex offender.[5] L.M. appealed the denial of a jury trial to the Kansas Supreme Court, which issued a landmark decision in June 2008. The court ruled that juveniles have a constitutional right to a jury trial, both under the Kansas Constitution and the U.S. Constitution, via the Sixth and Fourteenth Amendments.[6] The decision sent shockwaves through the Kansas juvenile justice system and left county officials, judges, attorneys, and legislators scrambling to determine the effect of the opinion.[7]

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1. *In re* L.M., 186 P.3d 164, 165 (Kan. 2008).
2. *Id.*
3. KAN. STAT. ANN. § 38-2357 (Supp. 2008).
4. *In re L.M.*, 186 P.3d at 165.
5. *Id.*
6. *Id.* at 170, 172.
7. *See* David Klepper & Diane Carroll, *Ruling Causes Seismic Shift in State's Court*, KAN.

The U.S. Constitution recognizes that a defendant's right to a jury is fundamental to a fair trial.[8] Historically, however, the right has not been secured for juveniles, even as it has come to be regarded as essential to due process in adult proceedings.[9] Recently though, juveniles around the country have gained traction in the battle to safeguard their right, and the *In re L.M.* decision is a significant step down that path. The Kansas Supreme Court in *In re L.M.*, however, gave little insight to lower courts on how a juvenile's right to a jury trial should operate.[10] This Note will analyze the court's opinion, critique several potential standards, and determine a logical solution that balances the nature and goals of the juvenile justice system with inherent policy concerns.

II. BACKGROUND

The right to a jury trial has a long and storied history in both English common law and the American legal tradition.[11] Interestingly, the right was extended to juveniles at common law, but that tradition did not find its way to the New World.[12] Instead, a new and entirely separate juvenile justice system was constructed at the end of the nineteenth century.[13] That system emerged out of the progressive reform movement of the time.[14] Beginning in the 1960s, the United States Supreme Court began to recognize the necessity of due process rights to this separate judicial system.[15] But progress has been neither fast nor thorough. Such incremental progress has put the right to a jury trial and the juvenile justice system on a collision course for the last quarter century. Now that they have collided, it must be determined whether the benefits of the separate system of juvenile justice and the exercise of the right to a jury trial can both be salvaged.

CITY STAR, June 21, 2008, at A4; David Klepper, *Major Changes Predicted in Juvenile Justice System*, KAN. CITY STAR, Sept. 28, 2008, at B1; Randall Hodgkinson, *Juveniles Have Right to a Jury Trial*, KAN. DEFENDERS, June 20, 2008, http://kansasdefenders.blogspot.com/2008/06/juveniles-have-right-to-jury-trial.html; Ron Sylvester, *Court Hustles to Prepare for Upcoming Juvenile Jury Trials*, WHAT THE JUDGE ATE FOR BREAKFAST: NEWS FROM INSIDE WICHITA'S COURTS, June 24, 2008, http://blogs.kansas.com/courts/2008/06/24/court-hustles-to-prepare-for-upcoming-juvenile-jury-trials.

8. U.S. CONST. amend. VI.

9. Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 143 (2008).

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

11. *See infra* Part II.A.

12. *In re* Javier A., 206 Cal. Rptr. 386, 396–409 (Cal. Ct. App. 1984).

13. *See infra* notes 35–36.

14. *See infra* notes 28–34.

15. *See infra* notes 48–60.

A. A Brief History of the Right to a Jury Trial

To understand the integral part that the jury trial plays in American criminal justice, one must first understand the origin and history of the right. Justice Hugo Black captured the right's importance when he stated succinctly that it "is . . . one of the fundamental aspects of criminal justice in the English-speaking world."[16] The majority in *Duncan v. Louisiana*—the seminal case on an adult's right to a jury trial—established that the right is "fundamental to the American scheme of justice."[17] However, as Justice Black intimated, the history of the right does not begin in the New World. The right played a fundamental part within English common law, long before the formation of the United States of America and the adoption of the Bill of Rights.[18] This history helps explain the right's status as crucial to maintaining a civilized society.[19] Indeed, scholars and judges argue that the history of the right dates back to the Magna Carta in 1215.[20] Under English common law, the rule was that "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours, indifferently chosen and superior to all suspicion."[21]

When British colonists arrived in the New World, they wasted little time incorporating the right to a jury trial in the new criminal justice system. On October 19, 1765, the Stamp Act Congress recognized the right to a jury trial for all British subjects.[22] The First Continental Congress and Declaration of Independence then followed suit.[23] In both instances, the colonists pointedly noted an affinity for trial by jury and reinforced an innate distrust of judges that relied on the British Crown for their salaries.[24] The right to a jury trial was formally adopted in American law when the U.S. Constitution was ratified.[25] In response to growing concerns that the right was not properly safeguarded, it was then

16. DeBacker v. Brainard, 396 U.S. 28, 34 (1969) (Black, J., dissenting).

17. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

18. *Id.* at 151–52.

19. *Id.*

20. *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (Cooley ed., 1899)); McKeiver v. Pennsylvania, 403 U.S. 528, 563 (1971) (plurality opinion) (Douglas, J., dissenting).

21. 4 BLACKSTONE, *supra* note 20, at 361.

22. *Duncan*, 391 U.S. at 151–52 (citing SOURCES OF OUR LIBERTIES 270 (R. Perry ed., 1959)).

23. *See id.*

24. *Id*. at 152.

25. U.S. CONST. art. III, § 2, cl. 2.

included in the Bill of Rights via the Sixth Amendment, which reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[26] Additionally, every original state, and every state thereafter, adopted the right to a jury trial within their respective constitutions.[27]

B. The Establishment and Evolution of a Separate Justice System for Juveniles

1. Shifting Paradigms and the Origins of a Separate System

In order to understand the role of the jury trial, or lack thereof, in the juvenile justice system, it is first important to understand the history, character, and operation of the system. The idea for a separate justice system arose out of the progressive movement toward the end of the nineteenth century.[28] In their efforts to reform juvenile justice, the progressives were responding to a variety of changes within society, including rapid industrialization and urbanization, as well as "changes in family structure, the function of the family in society, and a new cultural perception of childhood."[29] Children began to be seen as "vulnerable, innocent, passive, and dependent beings who needed extended preparation for life."[30] This was a radical departure from the general conception of children as little adults, which had been the foundation for juvenile justice for three centuries.[31] The changing beliefs in the nature of childhood and the family coincided with a similar changing belief as to the sources of juvenile criminal behavior.[32] Theorists began to argue that juvenile crime was caused by external factors, not by free-willed actors.[33] These changes in society and in criminal philosophy precipitated a diminishing belief in the moral responsibility of children

26. U.S. CONST. amend. VI.

27. *Duncan*, 391 U.S. at 153.

28. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 823 (1988).

29. *Id.* at 822.

30. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991).

31. *Id.*

32. Feld, *supra* note 28, at 824.

33. *See* Feld, *supra* note 30, at 694 ("Although classical criminal law attributed crime to free-willed actors, positivist criminology regarded crime as determined rather than chosen.").

and an effort to shift the focus of the juvenile justice system from punishment to rehabilitation and protection.[34]

In this vein, the first juvenile court was established in Illinois in 1899.[35] This new juvenile court adopted the doctrine of *parens patriae*.[36] With the doctrine, juvenile adjudications became guided by the "child's 'best interests,' background, and welfare."[37] As a result, the "sentences were indeterminate [and] nonproportional."[38] Furthermore, the new system provided the court with "considerable latitude" to adjudicate juveniles.[39] The system's focus was on achieving high-minded goals, such as protecting and rehabilitating the juvenile, and maintaining the family—not on consistency in sentencing and punishment.[40]

To achieve such goals, the juvenile justice courts took a number of precautions aimed at protecting juveniles. These steps included making "hearings . . . confidential, access to court records limited, and [finding] children . . . delinquent rather than guilty of committing a crime."[41] But not only did the look and feel of the system become more intimate, the adjudication process changed drastically. The "judges, assisted by social workers, [were] to investigate the problematic child's background, identify the sources of the misconduct at issue, and develop a treatment plan to meet the child's needs."[42] Judges began relying on psychologists and social workers, trying to gather as much information on the character and lifestyle of the child as possible.[43] Consequently, the actual offense committed became less significant.[44] The system as a whole was built to revolve around the best interest of the child.[45] But over time, it became clear the new system did not substantially lower recidivism rates.[46] That reality, coupled with a recognition that the difference between juvenile incarceration and adult incarceration was minimal, led the United States

34. *Id.*

35. Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 164 (2004).

36. *Id.* at 164–65.

37. Feld, *supra* note 30, at 695.

38. *Id.*

39. Ko, *supra* note 35, at 165.

40. Feld, *supra* note 28, at 824.

41. *Id.* at 825.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Ko, *supra* note 35, at 166 ("Juvenile institutions were no more rehabilitative than adult prisons.").

Supreme Court to begin extending constitutional due process protections to juvenile adjudications.[47]

2. The Extension of Due Process Rights to Juveniles

The Supreme Court's process of extending due process rights to juveniles began in the 1960s. The first case was *In re Gault*, in which the Supreme Court asserted that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[48] The Court adopted a narrow approach, limiting consideration to the adjudication process and not touching on intake or post-adjudication.[49] *Gault* began by examining the dubious historical relevance of the *parens patriae* doctrine.[50] The Court briefly discussed the dramatic difference between the new system and common law juvenile adjudications.[51] At common law, anyone over the age of seven was "subjected to arrest, trial, and in theory to punishment like adult offenders."[52] The Court then turned to the fiction created by the progressive reformers—that juveniles could only be entitled to custody, rather than liberty—which made the juvenile proceedings civil in nature and not subject to constitutional safeguards.[53] The Court found the separate juvenile system did not always reach the highest ideals: "The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[54] Furthermore, in *Kent v. United States*, the Court asserted that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[55]

The Court found the lack of due process had resulted in "unfairness to individuals and inadequate or inaccurate findings of fact and

47. *Id.*

48. *In re* Gault, 387 U.S. 1, 13 (1967).

49. *Id*.

50. *Id.* at 16.

51. *Id.*

52. *Id*.

53. *Id.* at 17 ("If [a child's] parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled.").

54. *Id.* at 18–19.

55. Kent v. United States, 383 U.S. 541, 556 (1966).

unfortunate prescriptions of remedy."[56] Furthermore, the rehabilitative focus of the juvenile court system had not substantially reduced recidivism rates,[57] which led the *Gault* Court to hold that juveniles were entitled to limited due process protections—including the right to notice of charges, appointment of counsel, confrontation of witnesses, and silence in the face of interrogation.[58] Then, in 1970, the Supreme Court ruled that the reasonable doubt standard also applied to juveniles, stating that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."[59] Additionally, the Court ruled in *Breed v. Jones* that juveniles should be protected against the threat of double jeopardy.[60]

The aforementioned cases laid the foundation upon which the Court considered *McKeiver v. Pennsylvania* in 1970–71.[61] The *McKeiver* Court declined to recognize a juvenile's constitutional right to a jury trial under the Sixth and Fourteenth Amendments.[62] *McKeiver* turned on the issue of whether juvenile adjudications are criminal prosecutions within the meaning of the Sixth Amendment.[63] Specifically, the Court looked at whether a jury is a necessary component to accurate fact finding in juvenile adjudications.[64] The plurality briefly discussed the downfalls of the juvenile justice system, noting that "[t]oo often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."[65]

However, even in acknowledging numerous faults in the system, the Court did not recognize a juvenile's constitutional right to a jury trial.[66] The Court cited several reasons for its decision, including: (1) a concern that the juvenile justice system would become completely adversarial; (2) that juries would not sufficiently enhance the court's fact finding function; and (3) a belief the juvenile justice system was still effective.[67] Though the Court made efficiency arguments, the primary focus of the opinion was on how recognizing the right to a jury trial would inalterably

56. *In re Gault*, 387 U.S. at 19–20.
57. *Id.* at 22.
58. *Id.* at 33, 41, 55, 57.
59. *In re* Winship, 397 U.S. 358, 365 (1970).
60. Breed v. Jones, 421 U.S. 519, 541 (1975).
61. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion).
62. *Id.* at 545.
63. *Id.* at 540–41.
64. *Id.* at 543.
65. *Id.* at 544.
66. *Id.* at 545.
67. *Id.* at 545–47.

change the nature of the juvenile adjudication process, effectively destroying its intimate and private nature.[68] In contrast, Justice Douglas, who wrote the dissent in *McKeiver*, focused on the potential term of incarceration.[69] Justice Douglas argued that it is inappropriate to incarcerate individuals for substantial periods without providing them with all of the due process rights guaranteed by the Constitution.[70]

After *McKeiver*, the Kansas Supreme Court considered a juvenile's right to a jury trial in *Findlay v. State*, holding that juveniles did not have the right under the Kansas Constitution.[71] The court adopted substantially the same reasoning as the United States Supreme Court, quoting *McKeiver* at length.[72] However, the Kansas Supreme Court did not rely solely on *McKeiver*; the court also examined the intent expressed in the Kansas Juvenile Offender Code (KJOC), the precursor to the KJJC:

> In no case shall any order, judgment or decree of the district court, in any proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state.[73]

The court noted that the statute did not impart criminal acts to juveniles, so juvenile adjudications were not equivalent to criminal prosecutions under section 5 of the Kansas Constitution Bill of Rights,[74] which guarantees jury trials for criminal prosecutions.[75] Because juveniles could not be subject to criminal prosecutions, they were not entitled to exercise the right to a jury trial under the Kansas Constitution.[76]

68. *Id.* at 545.

69. *Id.* at 560 (Douglas, J., dissenting).

70. *Id.*

71. Findlay v. State, 681 P.2d 20, 22 (Kan. 1984), *abrogated by In re* L.M., 186 P.3d 164 (Kan. 2008).

72. *Id.* at 21–22.

73. *Id.* at 22 (quoting KAN. STAT. ANN. § 38-1601 (repealed 2006)).

74. *See id.* (stating that the argument that "proceedings involving acts by juveniles that would constitute felonies if committed by adults are essentially criminal trials" is in "diametric conflict" with the KJOC).

75. KAN. CONST. Bill of Rights § 5.

76. *Findlay*, 681 P.2d at 22.

C. Operation and Character of the Kansas Juvenile Justice System

1. Intake and Assessment

It has been nearly twenty-five years since the *Findlay* decision, and though the Kansas juvenile justice system has changed dramatically, it has retained several notable features. First, juveniles encounter a comprehensive intake process, which is a more personalized evaluation than the standard booking process used for adults.[77] Once a juvenile is arrested and a complaint is filed, that juvenile is turned over to a Juvenile Intake and Assessment Center (JIAC), which administers the Juvenile Intake and Assessment Questionnaire (JIAQ), does other assessment screening, and engages in the referral and placement of children.[78]

The interview process works to both evaluate the juvenile and involve the parent or legal guardian. The phases proceed as follows: (1) an interview is conducted using the JIAQ and an additional problem-oriented screening instrument, which is voluntary for the juvenile; (2) the juvenile's parent, legal guardian, or other adult is contacted; (3) an attempt is made to review the results of the interview with the appropriate adult—but if not making this attempt is in the best interest of the child, the review is not required.[79] Once the interview is completed, the worker makes one of the following referrals:

> (A) Release the child to the custody of the . . . legal guardian or another appropriate adult if the . . . worker believes that it would be in the best interest of the child and it would not be harmful to the child to do so.
>
> (B) Conditionally release the child . . . if the intake assessment worker believes that if the conditions are met, it would be in the child's best interest to release the child . . . and the intake and assessment worker has reason to believe that it might be harmful to the child to release the child . . . without imposing the conditions. The conditions may include, but are not limited to:
>
> - Participation of the child in counseling
> - Participation of members of the child's family in counseling

77. National Center for Juvenile Justice, State Juvenile Justice Profiles: Kansas, http://www.ncjj.org/stateprofiles/profiles/KS06.asp (last visited Apr. 21, 2009).

78. KANSAS JUVENILE JUSTICE AUTHORITY, STANDARDS AND RULES 15 (2002), *available at* http://www.kansas.gov/jja/documents/JIAS_StandardsandRules_1.pdf.

79. *Id.* at 16–18.

- Participation by the child, members of the child's family and other relevant person[s] in mediation
- Referral of the child and the child's family to the Secretary of Social and Rehabilitation Services for services and the agreement of the child and family to accept and participate in the services offered
- Referral of the child and the child's family to available community resources or services and the agreement of the child and family to accept and participate in the services offered
- Requiring the child and members of the child's family to enter into a behavioral cont[r]act which may provide for regular school attendance among other requirements
- Any special conditions necessary to protect the child from future abuse or neglect

(C) Deliver the child to a shelter facility or a licensed attendant care center along with the law enforcement officer[']s written application. The . . . facility shall then have custody as if the child had been directly delivered to the facility by the law enforcement officer . . . .

(D) Refer the child to the county or district attorney for appropriate proceedings to be filed or refer the child and family to the Secretary of Social and Rehabilitation Services for investigations in regard to the allegations.

(E) Make recommendations to the county or district attorney concerning immediate intervention programs, which may be beneficial to the juvenile.[80]

This Note is primarily concerned with referrals under (D), which unlike other options, would likely result in court proceedings. However, the other referral choices elucidate the number of children brought into the system that would fall outside the adult criminal justice system. It is apparent that some of the juveniles are merely troubled or confused, not necessarily a danger to society.[81] Of course, there remains a large portion of juveniles who are suspected of felonies or misdemeanors: 64.1% are suspected of misdemeanors,[82] and 19.3% are suspected of various felonies.[83] Therefore, the juvenile justice system is not easily

80. *Id.* at 19–20.

81. For instance, in fiscal year 2005, 16.6% of the juveniles arrested were suspected of running away, truancy, being victims of abuse or neglect, or other non-felony, non-misdemeanor issues. *See* KANSAS JUVENILE JUSTICE AUTHORITY, KANSAS JUVENILE INTAKE AND ASSESSMENT STATISTICS: ALLEGED JUVENILE OFFENDERS app. D (2006), *available at* http://www.kansas.gov/jja/documents/Data_juvenileintakeanDassessmt.pdf.

82. *See id.*

83. *See id.*

pigeonholed; rather, it is quite broad and encompasses a number of juveniles suspected of a variety of crimes.

Even if juveniles are believed to have committed a misdemeanor or felony, there are four options available for JAIC workers that do not involve filing charges and proceeding with a juvenile adjudication.[84] The availability of these additional options typifies the still inherent difference between the adult criminal system and the juvenile system. For instance, options (A) and (B)—release and conditional release of the child to a legal guardian—explicitly state such referrals should be undertaken only if in the child's best interest.[85] Furthermore, option (C) refers to custody of the child and (E) recommends immediate intervention if beneficial to the child.[86] References to the child's best interest and to custody indicate that the state still tries to play the beneficent parental role, particularly when the county or district attorney does not plan to file charges. Though some argue that the essential nature of the juvenile justice system has changed,[87] one can see—simply by looking at the array of options and the ability to fashion individual solutions—that assertion focuses too narrowly on the adjudicatory aspects of the system.

2. Adjudication and Sentencing

If the referral worker chooses option (D), then formal charges are filed by the county or district attorney, and a trial is held.[88] During the trial, juveniles have certain rights, including notice of charges, appointment of counsel, confrontation of witnesses, and the reasonable doubt standard.[89] Specifically, K.S.A. 38-2306 gives juveniles the right to an attorney at all proceedings, whether or not the juvenile can afford one.[90] Additionally, the court may appoint a volunteer court-appointed special advocate (CASA), whose purpose is to advocate solely for the best interests of the child.[91] Another recent change to the system is a presumption that the hearings—detention, first appearance, adjudicatory, and sentencing—are open to the public unless the judge determines otherwise, either because of the interests of the victim or the interests of

84. *See supra* text accompanying note 80.
85. *See supra* text accompanying note 80.
86. *See supra* text accompanying note 80.
87. *See infra* Part II.D.
88. *See supra* text accompanying note 80.
89. *See supra* notes 60–61; KAN. STAT. ANN. § 38-2306 (Supp. 2008); § 38-2355.
90. *See* § 38-2306.
91. *Id.* § 38-2307.

a defendant under sixteen years of age.[92] At trial, the question of whether a jury would be seated, prior to *L.M.*, was a matter of judicial discretion.[93] Juveniles could request a jury trial in any felony case; however, discretion to grant the request was completely within the province of the juvenile court judge.[94] Also, the KJJC still operates from the rules of civil procedure, seemingly separating juvenile court from criminal court.[95]

Once the juvenile is adjudged to be a juvenile offender, the court moves into the sentencing phase of the proceedings. There are two statutes in Kansas that govern the sentencing of juveniles. The first is the sentencing matrix, K.S.A. 38-2369, which lays out ranges for terms of incarceration based upon the offense committed and, in some cases, the criminal history of the juvenile offender.[96] Because the matrix only covers periods of incarceration in juvenile detention facilities and after-term conditions, such as probation, all of the punishments in the sentencing matrix appear punitive in nature.[97] In contrast—and in the same vein as the progressive reformers of the late nineteenth and early twentieth centuries—the KJJC provides great flexibility for juvenile judges in sentencing through sentencing alternatives, which may be invoked through K.S.A. 38-2367.[98] The sentencing alternatives include: (1) probation; (2) participation in community based programs; (3) placement in custody of parents or other legal guardian; (4) counseling, mediation, or other drug evaluation; (5) suspension of driver's license; (6) community service; (7) restitution; (8) fines; (9) house arrest; and (10) placement in a sanctions house for up to twenty-eight days.[99] As for the actual distribution of juvenile offenders, the courts do not heavily concentrate on a single disposition. As of January 2009, the average distribution of juveniles in the custody of the Kansas Juvenile Justice Authority was 26% in the home or with a relative, 21% in a juvenile correctional facility, 23% in a youth residential center, and the rest split between other facilities—foster homes, psychiatric residential treatment facilities, and other locations.[100] Given those numbers, it seems apparent

92. *Id.* § 38-2353.
93. *See In re* L.M., 186 P.3d 164, 165–66 (Kan. 2008).
94. § 38-2357.
95. *Id.* § 38-2354.
96. *Id.* § 38-2369.
97. *See id.*
98. § 38-2361; § 38-2367 (allowing the judge to modify a sentence).
99. § 38-2361.
100. KANSAS JUVENILE JUSTICE AUTHORITY, STATEWIDE MONTH END POPULATION: PLACEMENTS FOR YOUTH IN THE CUSTODY OF JJA ON THE LAST DAY OF EACH MONTH 1 (2009),

that the juvenile justice system in Kansas is not solely focused on taking punitive action against juvenile offenders—at least in the form of incarceration in juvenile correctional facilities.

D. In re L.M.

The Kansas Supreme Court recently overturned *Findlay v. State*[101] with its decision in *In re L.M.*[102] L.M. appealed the denial of a jury trial to the Kansas Supreme Court, which applied *McKeiver* and decided the case under the Kansas Constitution and the Sixth and Fourteenth Amendments.[103] The majority based the decision on one key rationale—that after 1984, the dramatic changes to the juvenile justice system made juvenile adjudications adversarial in nature and, thus, more equivalent to criminal prosecutions.[104] In justifying the primary rationale, the majority made three arguments. First, the language used in the KJJC, which the Kansas Legislature changed after 1984, asserts a fundamentally different—more punitive—goal for the juvenile justice system.[105] Second, the punishment scheme used for juvenile offenders changed dramatically, particularly because a sentencing matrix was adopted, and the kinds of punishment options available to juveniles and adults became strikingly similar.[106] The third and final argument was that many of the protective measures originally adopted to protect juveniles had been stripped away and the *parens patriae* nature of the system had disintegrated.[107] Because the revised KJJC refers to its proceedings as prosecutions, and as being based on violations of the laws of Kansas, the majority in *L.M.* concluded that juvenile defendants are entitled to jury trials under the Kansas Constitution.[108] The concurrence agreed with the majority in the result, but focused only on the right under the Kansas Constitution, not the Sixth and Fourteenth Amendments.[109] The dissent attacked each of the reasons asserted by the majority—language, punishment, and absence of protective measures.[110]

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available at http://www.kansas.gov/jja/documents/Data_FY09CourtOrderedCustody.pdf.

101. 681 P.2d 20 (Kan. 1984), *abrogated by In re* L.M., 186 P. 3d 164 (Kan. 2008).
102. 186 P.3d at 172.
103. *Id.* at 170–72.
104. *Id.* at 168.
105. *See id.*
106. *Id.* at 169.
107. *Id.* at 170.
108. *Id.* at 172.
109. *Id.* at 172–73 (Luckert, J., concurring).
110. *Id.* at 175–80 (McFarland, C.J., dissenting).

In the end, though, the majority recognized a newly-minted right for juveniles in Kansas. Unfortunately, the court gave minimal guidance on how the right should operate in future cases. Instead, the court stated only that "[t]he right to a jury trial in juvenile offender proceedings is a new rule of procedure . . . ."[111] So, in effect, the Kansas Supreme Court put off the question for another time. However, the Kansas Supreme Court took one explicit step and invalidated both K.S.A. 38-2344(d) (which made bench trials the default rule) and K.S.A. 38-2357 (which gave courts the option to grant jury trials).[112]

III. ANALYSIS

The Kansas Supreme Court decided *In re L.M.* on the premise that the Kansas juvenile justice system fundamentally changed after 1984.[113] To a large degree, that is true. There have been substantial changes in the language of the KJJC, in the approach to sentencing, and in the privacy restrictions that originally protected juveniles.[114] Those changes, however, belie an important truth: the Kansas juvenile justice system remains substantially different than the adult criminal system, as it retains much of the *parens patriae* nature upon which it was originally constructed.[115] That reality, along with policy considerations, including decreased efficiency and added cost, must be considered when determining how the right to a jury trial should operate. This Note will explore all of these competing concerns in an attempt to provide a cogent and effective solution that will preserve constitutional rights in a manner that does not destroy the unique nature of the juvenile justice system.

A. Analysis of In re L.M. *and Changes in the Language of the KJJC*

Before examining how a juvenile's right to a jury trial should operate, it is important to determine the precise holding of the Kansas Supreme Court in *L.M.* As stated above, the majority analyzes changes within the KJJC through statutory language. These statutory changes indicate that the Legislature pushed the juvenile justice system into serving a punitive function. Perhaps this is partly because national

111. *Id.* at 172 (majority opinion).
112. *Id.* at 170.
113. *See id.* at 168.
114. *See infra* Part III.A.
115. *See supra* Part II.C.

statistics indicate that repeat offenders are not being rehabilitated but instead are accounting for a large percentage of juvenile crime.[116]

In acknowledging the shift by the Legislature and the changing nature of the juvenile system, the majority utilizes two distinct rationales in recognizing the right to a jury trial. First, the majority argued that the juvenile justice system changed, losing its *parens patriae* character and becoming more like the adult criminal system, which points toward the U.S. constitutional standard. Second, the majority critiqued the changing terminology of juvenile court adjudications, which points toward the Kansas constitutional standard. The question is whether any of the Kansas Supreme Court's reasoning elucidates a preference for one standard over the other, or whether a third standard should be adopted.

1. Analysis Under the U.S. Constitution

The majority in *L.M.* turns first to a juvenile's right to a jury trial under the U.S. Constitution and analyzes both the changed nature of the juvenile justice system and the decline of the *parens patriae* doctrine. The first statutory revision examined—and arguably the most influential—is the stated intent of the KJJC, which reads: "[t]he primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community."[117] This is in stark contrast to the previously stated intent of the KJOC:

> [E]ach child within [the code's] provisions shall receive the care, custody, guidance, control and discipline, preferably in the child's own home, as will best serve the child's welfare and the best interests of the state. All proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state.[118]

The revision in the language shifts the focus of the code from serving the child's own welfare to promoting public safety and holding juveniles accountable. Additionally, the revision noticeably leaves out the last sentence of the previous statute, which refers to the parental power of the

116. *See* Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 846 (1994) (noting that juveniles with five or more police contacts account for two-thirds of all offenses).

117. KAN. STAT. ANN. § 38-2301 (Supp. 2008).

118. Act of May 13, 1982, ch. 182, § 38-1501, 1982 Kan. Sess. Laws 765 (repealed 2006) ("enacting the Kansas Code for Care of Children and the Kansas Juvenile Offenders Code").

state. Furthermore, the revision of the KJJC changed other terminology in a manner that points toward a more punitive system. Specifically, "dispositional proceedings"[119] have become "sentencing proceedings";[120] a "[s]tate youth center"[121] is now a "[j]uvenile correctional institution";[122] and finally, commitment to a juvenile correctional facility is now a "term of incarceration."[123]

Though the *L.M.* majority made strong arguments that the juvenile justice system had fundamentally changed, the basis may only be a matter of selective interpretation. For instance, as the dissent points out, the KJOC, in 1982, was aimed at serving the best interests of the state, and in contrast, rehabilitation remains a current goal of the KJJC.[124] So perhaps it depends on which part of each statute the court makes its focus. Furthermore, the dissent draws a stark contrast between the new language of the KJJC and the intent of the Kansas Criminal Code, which unequivocally indicates the primary goal of the adult criminal system is not rehabilitation, but punishment and the protection of society.[125]

The majority in *L.M.* then notes that the punishment options available to juvenile court judges are similar to the options available to those judges in adult criminal proceedings. For instance, "[b]oth adults and juveniles may be sentenced to probation; a community-based program; house arrest; a short-term behavior-modification program like a sanctions house or conservation camp; placement in an out-of-home facility; or incarceration in a correctional facility."[126] Additionally, counseling, drug and alcohol evaluations, mediation, educational programs, charitable or community service, restitution, and fines are all punishments that are available against both adult and juvenile offenders.[127] Thus, the majority in *L.M.* draws the conclusion that because the punishment options available in both adult and juvenile proceedings are similar, then necessarily the sentencing of juveniles "has become much more congruent with the adult model."[128]

However, the majority opinion does not account for how these similarities operate in practice. For instance, the court fails to establish

119. § 38-1605(b) (repealed 2006), 1982 Kan. Sess. Laws 800.
120. § 38-2305(b) (Supp. 2008).
121. § 38-1602(g) (repealed 2006), 1982 Kan. Sess. Laws 799.
122. § 21-4502(e) (2007).
123. § 38-2374 (Supp. 2008).
124. *In re* L.M., 186 P.3d 164, 176 (Kan. 2008) (McFarland, C.J., dissenting).
125. *Id.* at 176–77.
126. *Id.* at 169.
127. *Id.*
128. *Id.*

that the KJJC's increased similarity with the adult criminal code actually results in more punitive sentences across the board, rather than merely a broader array of options at the juvenile court's disposal. In that vein, the dissent points out that even though sentencing options are similar and there is a juvenile sentencing matrix, juvenile sentences on the whole are markedly different than those sentences that adults receive for the same crimes.[129] Additionally, the matrix is explicitly advisory; indeed, "[c]ommitment to a juvenile correctional facility for a term under the matrix is only *one* of a number of sentencing alternatives available to a juvenile judge."[130] Furthermore, if the judge does hold to the matrix, he or she has the power to modify the sentence after its imposition.[131] The dissent notes other unique options that remain with the juvenile system, including the ability to impose a juvenile sentence and stay a concurrent adult sentence, "evidenc[ing] a last-ditch effort to extend the favorable protections of juvenile court and the benefits of its less severe sentences to juvenile offenders."[132] Additionally, the court can help the juvenile get more involved with family and community, or deal with the juvenile through noncustodial placement, rehabilitation, or intermediate intervention programs.[133]

The majority and dissent both have logical and interesting arguments about how the juvenile justice system has changed and currently operates. The majority essentially concludes its first analysis by arguing that because the *parens patriae* nature of the juvenile justice system has eroded, it is now substantially similar to the adult criminal system, which is at least a tacit rejection of the *McKeiver* rationale—that the juvenile system focused more on rehabilitation than punishment.[134] That conclusion led the Kansas Supreme Court to hold that Kansas juveniles "have a U.S. constitutional right to a jury trial under the Sixth and Fourteenth Amendments."[135] Therefore, it would appear that one threshold acceptable to the Kansas Supreme Court might be the U.S. constitutional standard. However, the court indicates another threshold might be equally acceptable.

129. *Id.* at 177 (McFarland, C.J., dissenting).
130. *Id.* at 178.
131. *Id.*
132. *Id.* at 178–79.
133. *Id.* at 179–81.
134. *Id.* at 170 (majority opinion).
135. *Id.*

2. Analysis Under the Kansas Constitution

The second basis upon which the Kansas Supreme Court recognized a juvenile's right to a jury trial is the Kansas Constitution.[136] The focus is on section 10 of the Kansas Constitution's Bill of Rights, which provides the right to a jury trial in "all prosecutions."[137] The verbiage "prosecution" is important because the term "juvenile adjudication" in the KJJC was changed by the Legislature to prosecutions for violations of Kansas criminal laws—or the equivalent of criminal prosecutions.[138] Thus, the Kansas Supreme Court recognizes the right to a jury trial under the Kansas Constitution, in addition to the U.S. Constitution, and hints that the Kansas constitutional standard may also serve as an acceptable rule.[139]

The question is, which threshold should control in juvenile adjudications? Unfortunately, the *L.M.* majority failed to indicate a preference and effectively denied the opportunity to fashion a solution.[140] This lack of judicial action has left the question unresolved. This Note will lay out and critique the aforementioned standards and other potential thresholds, taking into account the analysis of the court, the operation of the juvenile justice system, the interest of juveniles, and other policy concerns to determine an appropriate solution.

B. Policy Concerns Inherent in the Operation of the Right to a Jury Trial

Before critiquing individual standards, it is important to take a big-picture look at the policy concerns inherent with granting jury trials to juveniles. While there are certainly benefits to jury trials, such as a strong argument for increased accuracy of the fact finder[141] and protection from potential government oppression or judicial bias, there are also very real concerns. In particular, jury trials will tend to decrease efficiency, destroy the little privacy that juvenile defendants have

136. *Id.* at 171.

137. *Id.*; KAN. CONST. Bill of Rights § 10.

138. *See In re L.M.*, 186 P.3d at 172; *see also* KAN. STAT. ANN. § 38-2303(c), (d) (Supp. 2008); § 38-2304(e)(2); § 38-2346(a), (b)(1); § 38-2350.

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

140. *See id.*

141. *See* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 564–65 (1998) (noting five cases within a year where a juvenile was convicted by a judge on scant evidence and was overturned on appeal for insufficiency of the evidence).

retained, and increase costs inherent in building new courtrooms, hiring new judges, and paying juries. Many of these policy concerns stem from the likelihood that many juveniles will elect a trial by jury, particularly given that juries have generally been thought to acquit criminal defendants more often than judges.[142]

The first and most glaring policy consideration that must be acknowledged is the decreased efficiency that jury trials, particularly a substantial number of jury trials, will bring to the juvenile justice system. In adjudicating juveniles, there is a concern for a quick resolution beyond merely the juvenile's obvious interest. In particular, parents have a vested interest because their parental rights hang in the balance.[143] Additionally, the state desires a quick resolution to ensure that rehabilitation is effective. Unfortunately, jury trials will take longer.[144] On average, a felony jury trial takes between two and four days,[145] with the time required to pick a jury accounting for twenty to thirty-five percent.[146] In contrast, a bench trial takes about one day.[147] Furthermore, jury trials require more preparation time, which will result in higher costs for the prosecution, court-appointed attorneys, and juveniles and their families.[148] Moreover, courts will be forced to endure added time for voir dire and jury deliberations. These concerns are very real. Courts in Shawnee County received dozens of requests for jury trials in the first three months after the *L.M.* ruling,[149] and courts in Sedgwick County plan to accommodate up to 100 new juvenile trials a year.[150] Such volume and potential for decreased efficiency is a strong argument to seriously consider the number of trials that would be expected at each potential threshold.

A large number of jury trials will also substantially increase the costs of the juvenile court system, including construction costs, judicial salaries, juror stipends, and more hours for court-appointed attorneys.

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142. *Id.* at 562–63.

143. *See* § 38-2334 (highlighting instances when removal of juvenile from parental custody is appropriate); § 38-2365 (discussing when certain juvenile offenders may be removed from the home and placed in the custody of the state).

144. Klepper, *supra* note 7.

145. Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 60 (1999).

146. *Id.*

147. Cristina Janney, *Juvenile Trials Could Burden System: Untested Policy Leaves Questions for Local Legal Systems*, NEWTON KANSAN, Jan. 17, 2009, *available at* http://www.thekansan.com/news/x2009616986/Juvenile-trials-could-burden-system.

148. *Id.*

149. Klepper, *supra* note 7.

150. Sylvester, *supra* note 7.

Indeed, juries entail a number of costs that are not associated with bench trials, including:

> [T]he expense of preparing and updating juror lists and pattern jury instructions, juror fees (up to fifty dollars per day in some jurisdictions, but in many states, much less), jury administrators' salaries, jury summoning and qualification mailings, proceedings to enforce jury summonses, jury education programs, juror meals, and, for some cases, the cost of sequestering the jury during deliberations.[151]

In terms of construction, as of September 27, 2008, only one juvenile courtroom in Johnson County, Kansas, was equipped to have a jury trial.[152] Sedgwick County has a similar problem; the juvenile court judges have recognized that the new juvenile court facilities do not yet have facilities for juries, thus requiring further construction.[153] As indicated previously, there will be an enormous efficiency concern with increased jury trials, and one way to alleviate that concern is to hire more juvenile court judges. However, that solution really just reallocates the concern to a tangible financial cost, rather than the opportunity cost of inefficient juvenile courts. Thus, efficiency and cost are the two primary policy concerns that drive an argument for a narrow interpretation of *L.M.* and the adoption of a threshold that errs on the side of fewer trials.

C. *Establishing a Standard in Light of In re* L.M. *and Inherent Policy Considerations*

The majority in *L.M.* tacitly acknowledges that two jury trial standards would be favorable, those under the U.S. and Kansas Constitutions. The not-so-obvious standards that may be viable are the standard that would be recognized by an extremely narrow interpretation of the majority opinion, and the previous standard established by the Kansas Legislature for a juvenile jury trial with court permission. This Note will critique how well the majority's rationale supports adoption of each standard, and will consider the impact each standard will have on the operation of the juvenile justice system and relevant policy considerations mentioned above.

151. King, *supra* note 145, at 60.
152. Klepper, *supra* note 7.
153. Sylvester, *supra* note 7.

1. Jury Trial Standard Under the U.S. Constitution

Over the years, the United States Supreme Court has sketched out how the U.S. constitutional right to a jury trial—both under the Sixth and Fourteenth Amendments—operates in a criminal case. The seminal decision was *Duncan v. Louisiana*, which held that the Sixth Amendment right to a jury trial applied to the states through the Fourteenth Amendment.[154] Recognizing the efficiency concerns inherent in granting all defendants the right to a jury trial, including those accused of petty offenses,[155] the majority in *Duncan* held that a jury trial is a fundamental right when the defendant is accused of a serious crime.[156] The *Duncan* Court decided that the question of whether a jury trial is a fundamental right should be decided at the outset of the litigation, based on the potential sentence.[157] The Court concluded the analysis by recognizing that petty offenses are generally those that carry a prison term of up to six months.[158] Furthermore, the Court recognized that more than six months in jail was the threshold upon which the right to a jury trial attached in the eighteenth-century court system.[159] The Court declined, however, to draw a hard-and-fast line. Instead, it merely asserted that the potential for imprisonment for up to two years alone was enough to make the right to a jury trial fundamental.[160]

In later cases, however, the Supreme Court refined its approach, indicating in *Baldwin v. New York* that even though many factors are considered, "the most relevant . . . criteri[on] . . . [is] the severity of the maximum authorized penalty."[161] For the Court, the potential term of incarceration indicated a judgment made by the Legislature about the seriousness of the crime.[162] Recognizing this consideration, the *Baldwin* Court held that the potential for any prison term longer than six months entitled the defendant to a jury trial.[163] The Court has recognized, however, that crimes carrying a potential prison term of less than six months may yet be serious offenses for purposes of the right to a jury

154. Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).
155. *Id.* at 158.
156. *Id.* at 157–58.
157. *Id.* at 159.
158. *Id.* at 161.
159. *Id.*
160. *Id.* at 161–62.
161. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion).
162. Frank v. United States, 395 U.S. 147, 149 (1969).
163. *Baldwin*, 399 U.S. at 69.

trial, depending on whether other more-serious penalties attach.[164] The burden, however, is on the defendant, because the Court "presume[s] for purposes of the Sixth Amendment that society views such an offense as 'petty.'"[165]

Given that the jury trial standard under the U.S. Constitution is based on the potential for the defendant to spend more than six months in jail, the issue then becomes what that standard would mean for juveniles in Kansas. The KJJC sentencing matrix divides offenses into four separate categories: (1) violent offenders; (2) serious offenders; (3) chronic offenders; and (4) conditional release violators.[166] Each of those four categories has sub-categories that further break up the division of violations and sentences.[167] The most relevant consideration is the lower-level offenders because they are not clearly subjected to punitive punishments. The two lowest levels are conditional release violators and juveniles adjudicated under chronic offender III status; those individuals face a possible six-month incarceration in a juvenile correctional facility.[168] With conditional release violators, it is possible for the judge to fashion a punishment alternative to incarceration,[169] but that is discretionary. The key is that the juvenile defendant is threatened with the possibility of six months in jail—the cut-off for the right to a jury trial for adults under the U.S. Constitution.

Thus, according to the U.S. constitutional standard, every juvenile defendant who faces the potential to be adjudicated as a juvenile offender, with the exception of chronic offenders III and conditional release violators, would benefit from the right to a jury trial. It is apparent, then, that the U.S. constitutional standard is relatively broad, which indicates that there may be cost and efficiency concerns with adopting this standard. Additionally, there are other concerns that make the adoption of this threshold problematic. Specifically, the Kansas Supreme Court, in ruling that the denial of the right to a jury trial is unconstitutional under the Sixth and Fourteenth Amendments, may contradict *McKeiver*. At the very least, it raises serious questions. Granted, there is an argument that the system has changed so substantially that *McKeiver*'s rationale is no longer applicable. But even in light of that argument, it would seem illogical to adopt such a

164. *Duncan*, 391 U.S. at 161.
165. Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989).
166. KAN. STAT. ANN. § 38-2369 (Supp. 2008).
167. *See id.*
168. *Id.*
169. *Id.*

threshold when it is far from clear whether or not that aspect of the opinion is valid. Thus, it is appropriate to examine whether the Kansas constitutional standard offers a better alternative.

2. Jury Trial Standard Under the Kansas Constitution

The right to a jury trial under the Kansas Constitution is significantly different than the U.S. constitutional standard. The Kansas Constitution grants the right to a jury trial under sections 5 and 10 of the Kansas Constitution's Bill of Rights. Section 10 reads: "In all prosecutions, the accused shall be allowed . . . a speedy public trial by an impartial jury . . . ."[170] The Kansas Supreme Court expounded on what actually qualifies as a prosecution. Although a jury trial was denied for a bastardy proceeding—where the court indicated that "all prosecutions" referred only to those prosecutions for violations of Kansas law[171]—the right to a jury trial was recognized in a nuisance proceeding.[172] The court, in *In re Rolfs*, declared that "no party can be subjected to a prosecution for an act of a criminal nature . . . without in some way and before some tribunal being secured an opportunity of having the truth of that charge inquired into by an impartial jury."[173]

The Kansas Legislature has responded to these legal standards by outlining the general parameters of when and how the right to a jury trial may be invoked. Because the right attaches in any criminal prosecution, it applies to both felonies and misdemeanors.[174] However, the right operates differently in each circumstance. When accused of a felony, a defendant is entitled to a jury of twelve members, unless of course, the parties agree to a waiver.[175] In contrast, misdemeanors are presumptively tried to the court, unless the defendant requests a jury trial in writing seven days from the first notice of trial, and juries are only composed of six people.[176] Thus, unlike under the U.S. Constitution, under Kansas law, defendants still get the right to a jury trial for petty offenses.[177] However, there are some exceptions: trials in municipal court, and trials for tobacco or traffic infractions are to the court.[178]

170. KAN. CONST. Bill of Rights § 10.
171. State *ex rel.* Mayer v. Pinkerton, 340 P.2d 393, 394–95 (Kan. 1959).
172. *In re* Rolfs, 1 P. 523, 526–27 (Kan. 1883).
173. *Id.* at 526.
174. *See* § 22-3403 (2007); § 22-3404.
175. § 22-3403.
176. *Id.* § 22-3404.
177. *Id.*
178. *Id.*

Given this standard, the analysis turns to whether the right under the Kansas Constitution is a feasible threshold, particularly given that it is much broader than the federal right. The Kansas right would mean certain misdemeanors and low-grade felonies, which are not covered in the sentencing matrix, would require jury trials.[179] The matrix only applies to misdemeanors when committed by repeat offenders qualifying for chronic offender III status.[180] However, juveniles are frequently adjudicated as juvenile offenders for misdemeanor crimes; there were 9329 in 2005.[181] At the very least, all of those juveniles, along with the additional 2802 juveniles arrested for felonies in 2005, would be entitled to a jury trial.[182] These numbers say nothing of the additional juveniles—some 2418 in 2005—suspected of running away, truancy, or being victims of abuse or neglect—situations that are not covered in the adult criminal justice system.[183] Under a strict interpretation of Kansas Supreme Court precedent, this latter category, particularly those juveniles suspected of running away and being truant, should be guaranteed the right to a jury trial; however, such a result is illogical.[184] Those offenses are only illegal for juveniles, so it is likely that the Kansas Legislature never considered the possibility that juveniles would receive jury trials for those cases. Therefore, for the sake of finding an agreeable compromise, this Note will equate those offenses with tobacco and traffic infractions and not consider their inclusion in the operation of a juvenile's right to a jury trial.

Even with that compromise, juveniles would be granted a very broad right with the potential for 10,000 additional jury trials in Kansas Courts. Even if 90% are plea bargained, as is the approximate national average,[185] that leaves 1000 potential jury trials. Such a realization brings the policy concerns mentioned earlier into acute focus, and it reinforces the fact that a narrow interpretation of *L.M.* is necessary, if for no other reason than to refrain from draining state resources and clogging the juvenile justice system. Thus, it is quite frankly unworkable and impracticable, to say nothing of the further deterioration it would cause to the intimate nature of the juvenile justice system, to adopt the standard

179. *See* § 38-2369 (Supp. 2008).
180. *Id.*
181. KANSAS JUVENILE JUSTICE AUTHORITY, *supra* note 81.
182. *Id.*
183. *Id.*
184. *See supra* notes 170–74 and accompanying text.
185. Dirk Olin, *Plea Bargain*, N.Y. TIMES MAGAZINE, Sept. 29, 2002, at 29.

under the Kansas Constitution. There are, however, other options available.

In recognition of the fact that the Kansas Supreme Court was not explicit about what counts as a criminal prosecution, it is plausible that *L.M.* could be interpreted very narrowly. Such an interpretation would necessitate looking solely at the function of the opinion for the specific case considered by the Kansas Supreme Court. This function effectively rules that a juvenile offender who is adjudicated as a serious offender I, carrying the potential for a thirty-six-month term of incarceration,[186] and who has to register as a sex offender, deserves the right to a jury trial.[187] Whether that is the standard or not, at the very least, that threshold is the starting point for establishing when the right to a jury trial operates.

3. Other Potential Standards

The question, though, is whether that should be the sole standard. This Note argues that it should not. First of all, it is a narrow interpretation drawn from a broad opinion. After all, the Kansas Supreme Court is asserting that jury trials are required for all KJJC adjudications that can be considered criminal prosecutions and subject juveniles to punitive sentences, similar to what an adult would face.[188] With this holding, it would seem that the court intended for the opinion to cover a wide swath of juvenile adjudications and potential punitive sentences. A very narrow interpretation would leave off the following categories under the Kansas Juvenile Sentencing Matrix: (1) serious offender II—subject to nine-to-eighteen-month terms of incarceration; (2) chronic offender I and II—subject to six-to-eighteen-month terms of incarceration; and (3) chronic offender III and conditional release violators—subject to three-to-six-month terms of incarceration.[189] Thus, a juvenile could commit a felony and be sentenced to a year and a half in a juvenile correctional facility without a jury trial. Surely such a punishment would be termed punitive by the court and such an adjudication would be considered a prosecution.

The last logical threshold, then, is the statutory language set by the Kansas Legislature prior to the *In re L.M.* decision, which the Kansas

186. KAN. STAT. ANN. § 38-2369 (Supp. 2008).
187. *In re* L.M., 186 P.3d 164, 172 (Kan. 2008).
188. *See supra* notes 136–39 and accompanying text.
189. § 38-2369.

Supreme Court ruled as unconstitutional because the language was permissive.[190] The statute reads:

> In all cases involving offenses committed by a juvenile which, if done by an adult, would make the person liable to be arrested and prosecuted for the commission of a felony, the judge may upon motion, order that the juvenile be afforded a trial by jury. Upon the juvenile being adjudged to be a juvenile offender, the court shall proceed with sentencing.[191]

Thus, it is plausible to conclude that the appropriate action to take following *L.M.* is to merely change the language of the statute from "may" to "shall," and establish the threshold at the adjudication of a felony. This would provide a clear and easy-to-administer rule. The problem, though, lies in the recognition that there are felonies where incarceration is not a potential punishment upon the first offense, particularly severity level III and IV felony drug adjudications.[192] Additionally, there are times when defendants accused of misdemeanors face the potential for six months of incarceration—although the defendants must have prior adjudications.[193] Therefore, such a threshold is an illogical solution. A focus on verbiage (i.e., felony versus misdemeanor) ignores the obvious fact that via the Kansas Supreme Court's opinion, as well as common sense, it is clear that potential punishment, whether punitive or rehabilitative, should be the focus. Therefore, though changing the language in the statute—and thus requiring jury trials in all felony cases—is one plausible solution, it is less than ideal.

4. Identifying the Ideal Standard for Juvenile Jury Trials in Kansas

The question then becomes, if each of the four previously examined thresholds are flawed, then what standard should be adopted? Logic dictates several requirements: (1) it must be clear and easy to apply so juvenile courts are not trying to interpret a convoluted standard; (2) it must be consistent with the reasoning of the *L.M.* court, so it must protect juveniles who are clearly subject to criminal prosecutions and punitive punishments; (3) any standard should protect the ability of juvenile

190. *In re L.M.*, 186 P.3d at 170.

191. § 38-2357, *invalidated by In re L.M.*, 186 P.3d at 170.

192. *See id.* § 38-2369 (sentencing matrix requires prior offenses for incarceration to be a potential punishment for severity level III and IV drug felonies).

193. *See id.*

courts to operate in a more intimate setting when the function of the adjudication is rehabilitation and not punishment; and (4) the right should not be overly broad to ensure cost and efficiency do not become overriding concerns. These considerations lead to one clear reading of the *L.M.* opinion: the right to a jury trial should be guaranteed to juveniles that are subject to potential terms of incarceration of more than six months (i.e., the U.S. constitutional standard).

A threshold of more than six months in jail would be easy to interpret, and in that way, helpful to lower courts. Such a rule would include violent offenders I and II, serious offenders I and II, and chronic offenders I and II.[194] Juveniles charged with offenses not in the six categories mentioned above would not have the right to a jury trial. Some may argue that a six month minimum is an arbitrary division. However, because the United States Supreme Court established that same arbitrary division to govern an adult's right to a jury trial, that argument is unpersuasive.

Additionally, such a threshold invokes the right to a jury trial only when there is the potential for a punitive sentence. A strong argument can be made that *L.M.* guarantees a right to a jury trial when the goal is punishment and not rehabilitation. Some might argue the rehabilitative nature of the system is continually overcome by a focus on punishing juveniles in all adjudications, but that argument focuses narrowly on verbiage and misses how the juvenile justice system operates in practice. In reality, juveniles subject to sentences of six months, or other less onerous dispositions, can be said to benefit from the *parens patriae* nature of the juvenile justice system, and that opportunity should be preserved. Furthermore, there is a clear inference—made from the relatively short sentences—that those juveniles can more easily be rehabilitated. Furthermore, as mentioned previously, it is generally accepted that crimes with the potential for a maximum six-month sentence are presumed petty in nature. Adopting this threshold, the right would trigger when a juvenile is subject to between six and eighteen-month terms of incarceration, which is clearly punitive.

The third reason to adopt the U.S. constitutional standard is to preserve the intimate nature of the juvenile justice system, where rehabilitation is still the goal. As mentioned previously, the juvenile justice system retains much of the intimate nature that it was constructed upon. While the *L.M.* opinion could be read to support the adoption of a broad standard, like the Kansas constitutional standard, such a reading

194. *See id.*

would grant too broad of a right to a jury trial and destroy intimate adjudications in one sweeping brushstroke. Such a result would ignore the nuance of *L.M.*—that while the court is clear that juveniles subject to punitive sentences must be protected by juries, the court is silent on those juveniles that benefit from the remnants of the *parens patriae* doctrine.

For that reason, this Note argues that the Kansas Supreme Court meant the new right to operate during situations where the goal of the juvenile system is clearly punitive, but not operate during other situations where the goal of the system remains rehabilitation and protecting the best interests of the child. Such an analysis of the *L.M.* opinion indicates that the in-excess-of-six-months requirement is rooted in an abundance of logic. Such a standard will essentially bifurcate the juvenile justice system, ensuring certain juveniles—those threatened with harsh punitive sentences—will be free to exercise their right to a jury trial, while those accused of smaller crimes and subject to lighter sentences are still guaranteed the intimate adjudication that has been the hallmark of the juvenile justice system. Such a result would strike a careful balance rooted in the rationale of the *L.M.* majority, while nodding to the dissent's concerns and negotiating the tenuous relationship between *In re L.M.* and *McKeiver v. Pennsylvania*.

The final two considerations are cost and efficiency, which must both be weighed to ensure the number of jury trials does not overwhelm the juvenile justice system. Setting the threshold at chronic offenders I and II, which have the potential for six-to-eighteen-month sentences, will ensure there is not an overwhelming number of jury trials; all of the misdemeanors would be weeded out, and many of the lower-level felonies would not qualify, which would leave only chronic offenders accused of lower-level felonies and those offenders accused of more serious felonies. Assuming that a large portion—90% or so—of the offenders plea bargain, the number of jury trials statewide would be around 200–300.[195] While costs will increase and efficiency in adjudications will decrease, it will not be to the extent that it cripples the juvenile justice system. Thus, the in-excess-of-six-month requirement is a logical standard from a policy standpoint. Therefore, given that the federal standard is clear-cut, focuses on punitive sentences, protects the juvenile justice system, and is not burdensome from a cost and efficiency standard, this Note urges its adoption.

195. In 2005, there were 1053 juveniles alleged to have committed person felonies and 1749 alleged to have committed property felonies. KANSAS JUVENILE JUSTICE AUTHORITY, *supra* note 81. The majority of these juveniles would likely fall within the new standard.

IV. CONCLUSION

Kansas juvenile courts need guidance on how to apply the *L.M.* decision. The counties are in the process of estimating how many jury trials they need to accommodate, and juveniles, their attorneys, and their families are desperate to understand how the right will apply. For these reasons, either the Kansas Supreme Court or the Kansas Legislature needs to act. However, when they do, they must ensure that the century of effort spent building the separate juvenile court, including the recently-made changes and the important nuance of balancing punishment with rehabilitation and protection, is not wasted. This is possible because there are many ways to read *In re L.M.* It can be read as the capstone in the demise of the Kansas Juvenile Justice System, or as another step on the path toward that end. Or, in the alternative, it can be read simply as a recognition that even with a separate juvenile justice system, different goals and policy considerations and all, there remains a certain fundamental nature to the exercise of the right to a jury trial, built on eight centuries of English common law and two and a half centuries of American legal tradition. This Note argues for the latter interpretation of the Kansas Supreme Court's decision and urges a resolution—namely the federal constitutional right—that does not destroy the juvenile justice system in the process of granting juveniles their newly-minted constitutional right.