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The Constitutional Tension between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts

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THE CONSTITUTIONAL TENSION BETWEEN *APPRENDI* AND *McKEIVER*: SENTENCE ENHANCEMENTS BASED ON DELINQUENCY CONVICTIONS AND THE QUALITY OF JUSTICE IN JUVENILE COURTS

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In Apprendi v. New Jersey, *the Supreme Court ruled that any fact that increases the penalty for a crime "other than the fact of a prior conviction" must be submitted to a jury and proved beyond a reasonable doubt.* Apprendi *exempted the fact of a prior conviction from its holding because criminal defendants enjoyed a constitutional right to a jury trial at the time the state obtained that conviction which assured the accuracy and reliability of the prior record. By contrast, a plurality of the Supreme Court in* McKeiver v. Pennsylvania *denied juvenile delinquents a constitutional right to a jury trial and the vast majority of states do not provide juveniles with either a state constitutional or statutory right to a jury trial. The absence of a jury right detracts from the factual accuracy of delinquency convictions, adversely affects the quality of justice and delivery of legal services in juvenile courts, and raises significant questions about the propriety of using delinquency adjudications to enhance adult criminal sentences under the* Apprendi *exception for prior convictions. Since* Apprendi, *federal circuit and state appellate courts are divided on the use of delinquency convictions to enhance criminal sentences. While it is important to use delinquency convictions to enhance criminal sentences, justice and fairness require that courts only use convictions that satisfy* Apprendi's *procedural requirements.* McKeiver *long has been ripe for overruling on its own merits, and* Apprendi *provides additional impetus for the Supreme Court and states to grant juveniles a constitutional or statutory right to a jury trial so that criminal*

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courts properly may use delinquency adjudications as a legitimate "fact of a prior conviction."

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In *Apprendi v. New Jersey*,[1] the Supreme Court ruled that *"[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt."[2] The Court reasoned that Due Process required a jury to find the facts upon which a court based an enhanced sentence as an "element" of the offense at trial, rather than to allow a judge to find those facts by a preponderance of the evidence as a "sentencing factor" at a sentencing hearing. The Court exempted the *"fact of a prior conviction"* from its holding because defendants enjoyed criminal procedural safeguards, including the right to a jury trial and proof beyond a reasonable doubt, which assured the accuracy and reliability of the prior record.[3]

1. 530 U.S. 466 (2000).
2. *Id.* at 490 (emphasis added).
3. *Id; see also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (stating that Congress treated recidivism as a sentencing factor rather than an

Although *Apprendi* provoked a flood of criminal sentence appeals and a mixed scholarly reaction,[4] it has important

element of the aggravated offense).

4. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 620 (2002) (O'Connor, J., dissenting) ("As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*. These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide."); *see also* Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 468 (2001) (analyzing impact of *Apprendi* on allocation of institutional powers between legislatures, prosecutors, judges, and juries, noting ease with which legislatures can circumvent *Apprendi* because "legislatures can raise statutory maxima and then allow judges to lower these maxima by finding mitigating facts. In other words, *Apprendi* applies only to aggravating but not mitigating facts."); Stephanos Bibas, *Judicial Fact Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097, 1100 (2001) [hereinafter Bibas, *Judicial Fact Finding*] (criticizing *Apprendi* for obsessive emphasis on jury trials when most criminal convictions are based on guilty pleas and thereby depriving defendants of the only factual determination they practically enjoy at sentencing hearings); Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 255 (2001) ("In the year since the Court's opinion, more than four hundred federal and state court decisions have dealt with *Apprendi* issues, and a recent article in the Federal Sentencing Reporter listed forty-eight federal statutes that either have been or may soon be challenged under *Apprendi*."); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L. J. 387, 431 (2001) ("The solution to the *Apprendi* puzzle turns on the distinction between fault and eligibility, a related distinction between the functions of the jury and the functions of the sentencing court, and rule-of-law considerations that are unique to determinations of fault."); Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001); Steven A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243, 264-65 (2001) (discussing procedural safeguards to regulate judicial sentencing discretion); Jeffrey Standen, *The End of an Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 780 (2001) (stating that *Apprendi* will lead to better legislative drafting by linking statutory language with corresponding sentences); John Kenneth Zwerling, *Comprendez* Apprendi*?*, 38 AM. CRIM. L. REV. 309 (2001); B. Patrick Costello, Comment, Apprendi v. New Jersey*: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1270 (2002) (criticizing *Apprendi* for creating judicial backlog and confusing judges, prosecutors, and defense attorneys); Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1400 (2000) (arguing that broad interpretation of *Apprendi* calls into question the validity of Federal Sentencing Guidelines); Stephanie B. Stewart, Note, Apprendi v. New Jersey*: Protecting the Constitutional Rights of Criminals at Sentencing*, 49 U. KAN. L. REV. 1193, 1216

implications for the use of juvenile delinquency adjudications to enhance sentences as well. In *McKeiver v. Pennsylvania*,[5] a plurality of the Supreme Court held that juvenile delinquents, unlike adult criminal defendants, do not enjoy a constitutional right to a jury trial, and the vast majority of states do not provide delinquents with a state constitutional or statutory right to a jury trial.[6] The lack of a right to a jury affects the quality of juvenile justice administration in other ways, such as the delivery of legal services, and raises questions about the legitimacy of using delinquency convictions to enhance criminal sentences. Because of these cumulative procedural differences, non-jury delinquency adjudications simply are not as reliable or factually accurate as criminal convictions. Thus, *Apprendi*'s reasons to except "the fact of a prior conviction" from its holding do not apply to delinquency convictions.

Following *Apprendi*, appellate courts have divided over the use of delinquency convictions to enhance criminal sentences. In *United States v. Tighe*,[7] the Ninth Circuit held that "*Apprendi's* narrow 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the 'prior conviction' exception does not include non-jury juvenile adjudications."[8] By contrast, the Eighth Circuit, in *United States v. Smalley*,[9] upheld an enhanced sentence which included a prior juvenile adjudication:

> [W]hile we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudications in any significant way because we think that the use of a jury in the juvenile context would 'not strengthen greatly, if at all, the fact-finding function' and is not constitutionally required. We therefore conclude that juvenile adjudications can rightly be characterized as "prior convictions" for *Apprendi* purposes . . .[10]

Federal and state courts have considered the implications of

(2001) (stating that *Apprendi* adds "much-needed clarity" to criminal sentencing).

5. 403 U.S. 528 (1971).

6. *See infra* notes 97-149 and accompanying text.

7. 266 F.3d 1187 (9th Cir. 2001)

8. *Id.* at 1194-95.

9. 294 F.3d 1030 (2002).

10. *Id.* at 1033 (citation omitted); *see also* United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003) (finding that the absence of right to a jury trial does not disqualify juvenile adjudication for purposes of Apprendi exception).

Apprendi for the use of delinquency convictions in other sentencing contexts.[11] In addition, juveniles have raised *Apprendi* challenges to jurisdictional transfers and argued that the judicial waiver decision to try a youth as an adult increases the maximum penalty to which the youth is exposed and therefore should be submitted to a jury.[12] The Supreme Court has declined to resolve the split among the circuits or to decide the post-*Apprendi* constitutionality of increased sentences based on delinquency convictions obtained without the right to a jury trial.

This article analyzes the implications of *Apprendi* for the use of delinquency convictions to enhance criminal sentences. It uses the Supreme Court's recent sentencing jurisprudence as a vehicle to urge reconsideration of *McKeiver*'s decision to deny juveniles a constitutional right to a jury trial. Part I focuses on the Court's analysis in *Apprendi* and the crucial role of the jury and proof beyond a reasonable doubt in the finding of facts that lead to criminal convictions and longer sentences. Part II reviews the history of the juvenile court and *McKeiver*'s decision to deny delinquents a jury trial. It analyzes the original justifications to deny juries and the validity of those reasons in light of the increased punitiveness of contemporary juvenile courts. Based on the Court's reasoning in *Apprendi*, it argues that the jury is crucial to uphold the standard of "proof beyond a reasonable doubt" and to assure the factual accuracy of delinquency convictions. The absence of jury trials adversely affects other aspects of juvenile justice administration, such as the delivery of legal services, and further detracts from the quality of delinquency pleas and convictions. This section also considers the policy reasons to use delinquency convictions for criminal sentence enhancements. Prior adjudications as a juvenile provide important evidence of a "criminal career" and rational criminal justice policy should include this information when judges make criminal sentencing decisions. Part III analyzes appellate decisions in which defendants have raised *Apprendi*

11. *See, e.g.*, United States v. Richardson, 313 F.3d 121, 125 (3d Cir. 2002) ("We do not therefore decide whether a juvenile adjudication can be characterized as a 'prior conviction' under *Apprendi* and, thus, can be used to increase the penalty for a crime beyond the statutory maximum without being submitted to or found by a jury."); State v. Hitt, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); *see also infra* notes 306-345 and accompanying text.

12. *See, e.g.*, People v. Bertran, 765 N.E.2d 1071 (Ill. App. Ct. 2002); State v. Jones, 47 P.3d 783 (Kan. 2002), *cert. denied*, 537 U.S. 980 (2002); Commonwealth v. Quincy Q., 753 N.E.2d 781 (Mass. 2001); State v. Gonzales, 24 P.3d 776, 778 (N.M. Ct. App. 2001). *See infra* notes 269-304 and accompanying text.

challenges to the use of delinquency convictions. It critically examines the cases involving delinquency convictions used for sentence enhancements in light of *Apprendi*'s concerns about the validity and reliability of judicial fact-finding. While it is important to use delinquency convictions to enhance criminal sentences, justice and fairness require that courts only use convictions that satisfy the procedural requirements of *Apprendi*. The article concludes that *McKeiver* is ripe for over-ruling and urges states to grant juveniles a state constitutional or statutory right to a jury so as to enable criminal courts properly to use delinquency adjudications as a legitimate "fact of prior conviction."

I. *APPRENDI V. NEW JERSEY* AND "THE FACT OF A PRIOR CONVICTION"

Throughout most of the twentieth century, criminal court judges imposed indeterminate sentences.[13] For most offenses, the legislature prescribed a relatively high maximum penalty and, within the statutory range, the judge at a sentencing hearing considered circumstances of the offense, characteristics of the offender, and virtually any other factor deemed relevant to select a sentence or to avoid imprisonment and put the defendant on probation.[14] Because indeterminate sentences allowed

13. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing."). Michael Tonry, in *Sentencing Matters*, summarizes the indeterminate nature of criminal sentencing in the United States until the sentencing reforms of the 1970s.

> Every American state and the federal system in 1970 had an indeterminate sentencing system in which a legislature enacted and amended the criminal code and set maximum penalties. Minimum penalties existed in a few jurisdictions, but they were widely disapproved . . . . Subject only to statutory maximums and occasional minimums, judges had authority to decide whether a convicted defendant was sentenced to probation (and with what conditions) or to jail or prison (and for what maximum term). A parole board would decide when prisoners were released; usually prisoners became eligible for release after serving a third of the maximum sentence, but they could be held until their maximum terms expired.

MICHAEL TONRY, SENTENCING MATTERS 6 (1996). *See also* Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298-99 (1975) (stating that prison and probation officials exercised broad discretion in defining rehabilitative goals for imprisoned offenders and based release decisions on when they met those goals).

14. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986) ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in

individualized judicial discretion, similarly-situated offenders–defendants convicted of the same crime and even co-defendants–could receive vastly dissimilar sentences. No formal criteria governed sentencing discretion, trial courts made decisions about life and death or for terms of years on an idiosyncratic and even arbitrary basis, and appellate courts granted convicted defendants very limited sentence review.[15]

Beginning in the 1970s, states began to adopt determinate sentencing laws, sentencing guidelines, and mandatory minimum sentences to limit judicial discretion, to reduce invidious disparity, and to create greater uniformity, predictability, and certainty in the imposition of criminal sentences.[16] As "just deserts" displaced

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Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.") (citations omitted); Williams v. New York, 337 U.S. 241, 251-52 (1949) (finding that the trial judge has wide discretion in sentencing and "no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that [the] appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all").

15. One prominent critic of indeterminate, discretionary sentencing, U.S. District Judge Marvin Frankel, described the sentencing process:

> The common form of criminal penalty provision confers upon the sentencing judge an enormous range of choice[s]. The scope of what we call "discretion" permits imprisonment for anything from a day to one, five, 10, 20 or [even] more years . . . .
>
> The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place between . . . . Even the most basic sentencing principles are not prescribed or stated with persuasive authority . . . .
>
> Moving upward from what should be the philosophical axioms of a rational scheme of sentencing law, we have no structure of rules, or even guidelines, affecting other elements arguably pertinent to the nature or severity of the sentence . . . . What factors should be assessed—and where, if anywhere, are comparisons to be sought—in gauging the relative seriousness of the specific offense and offender as against the spectrum of offenses by others in the same legal category? . . .
>
> With the delegation of power so unchanneled, it is surely no overstatement to say that "the new penology has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system." The process would be totally unruly even if judges were superbly and uniformly trained for the solemn work of sentencing. As everyone knows, however, they are not trained at all.

Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1, 4-6, 29-31 (1972).

16. *See* TONRY, SENTENCING MATTERS, *supra* note 13, at 13-24 (describing "just deserts" sentencing and sentencing guidelines grids); Richard S. Frase,

rehabilitation as the primary purpose of sentencing, determinate sentences based on the offense superseded individualized indeterminate sentences.[17] Empirical evaluations questioned the effectiveness of correctional treatment programs, the assumptions underlying indeterminate sentencing—human malleability, the availability of appropriate interventions, the ability of clinicians to classify inmates for treatment—and the scientific underpinnings of those who administered the rehabilitative enterprise.[18]

Sentencing Principles in Theory and Practice, 22 CRIME & JUST. 363, 363-65 (1997) (analyzing different sentencing theories embedded in sentencing guidelines); Deborah L. Mills, Note, United States v. Johnson*: Acknowledging the Shift In The Juvenile Court System From Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 921-22 (1996) (reviewing origins of Federal Sentencing Guidelines Commission which Congress created "to eliminate the discretionary sentencing system which was previously in place. This system was considered to be permeated by judicial bias and abuse of judicial power. Congress wanted to ensure that similarly situated criminal defendants received equal sentencing treatment in the courts").

17. *See* JOAN PETERSILIA & SUSAN TURNER, GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES (1985). The report notes:

> By 1985, at least 25 states had enacted determinate sentencing statutes, 10 states had abolished their parole boards, and 35 states had mandatory minimum sentence laws .... [M]any states and jurisdictions had established formal guidelines for sentencing decisions (e.g., prison vs. probation, length of sentence), for determining supervision levels for parolees and probationers, and for parole release.

Id. at 1. For arguments critical of the rehabilitative ideal as a goal of penal reform and supportive of model prison programs based on punishment, see generally AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 45-53 (1970); DAVID FOGEL, ". . . WE ARE THE LIVING PROOF . . . ": THE JUSTICE MODEL FOR CORRECTIONS 260-66 (1st ed. 1975); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 45-50 (1974); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 49-55 (1976) (rejecting the rehabilitative ideal as unworkable and unjust, concluding that the length of an offender's sentence should reflect the seriousness of the offender's crime).

18. There have been numerous studies of the efficacy of both juvenile and adult correctional programs in rehabilitating offenders. Few have encouraged proponents of rehabilitation. *See, e.g.*, David F. Greenberg, *The Correctional Effects of Corrections: A Survey of Evaluations*, *in* CORRECTIONS AND PUNISHMENT 111 (David F. Greenberg ed., 1977); Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 THE PUBLIC INTEREST 22, 25 (1974); THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS (Sechrest et al. eds., 1979). *But see* Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, *in* SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313, 330 (Rolf Loeber & David P. Farrington eds., 1998) (describing characteristics of successful treatment programs for serious juvenile offenders).

Indeterminate sentencing vested too much discretion in judges, parole boards, and clinicians who lacked the ability validly to differentiate among similarly situated offenders. As a result, individualizing sentences often result in inequalities, disparities, and injustices.[19] Determinate sentences punish offenders for their past behavior rather than on predictions about future behavior and rely on more objective, offense-related factors such as the seriousness of the present offense, culpability and degree of the actor's participation, or criminal history. Because determinate sentencing hearings focus on offense factors rather than offender characteristics, they increasingly consider many of the same types of facts as at the criminal trial itself.[20]

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19. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 17, at 124-44. An analysis of the impact of the American Friends Service Committee's *Struggle for Justice* summarizes its premises:

> [C]riminal justice practitioners had never developed the technical capabilities required to implement the [treatment] model. Evaluations of rehabilitation programs had consistently failed to find persuasive evidence for the success of treatment; after fifty years of research on the prediction of criminality, postrelease recidivism still could not be predicted accurately. The prospects of major improvement in these areas were questioned on theoretical grounds: If crime is not the product of an individual pathology, then it cannot be "cured." . . . Going beyond this technical criticism, the [AFSC] Working Party rejected coerced therapy as undignified and potentially repressive, and attacked individualization in sentencing as a violation of fundamental norms of distributive justice and proportionality . . . . Where decisions are unstructured by law, regulation, or even meaningful guidelines and are for the most part unreviewed and unchecked, decisions supposedly to be made on the basis of criteria related to rehabilitation can be and sometimes are made on the basis of other criteria that are legally irrelevant and discriminatory in their impact, such as race, class, sex, life style, and political affiliations . . . . Seen in this light, rehabilitation was not merely a laudable goal that scientific research had unfortunately failed thus far to achieve, but something far more insidious—an ideology that explained crime in highly individualistic terms and legitimated the expansion of administrative powers used in practice to discriminate against disadvantaged groups and to achieve covert organizational goals.

David F. Greenberg & Drew Humphries, *The Cooptation of Fixed Sentencing Reform*, 26 CRIME & DELINQ. 206, 207-08 (1980).

20. *See, e.g.*, Bibas, *Judicial Fact Finding*, *supra* note 4, at 1153 ("A federal defendant in essence has a right to two trials: First, there is a jury trial, at which a jury must find the elements of the offense beyond a reasonable doubt. Second, there is a sentencing hearing, at which a judge must find sentencing facts by a preponderance of the evidence."); Hoffman, *supra* note 4, at 267 (stating that the determinate sentencing movement "helped to ensure that sentencing hearings would more closely resemble the same kind of inquiry into the facts and circumstances of the crime that occurs at a typical guilt/innocence trial . . . . Under the Federal Sentencing Guidelines, for example, instead of asking (as was common in pre-Guideline days) whether the defendant's

Sentencing guidelines base presumptive sentences on the present offense and criminal history, identify aggravating and mitigating factors that warrant a departure from the presumed sentence, require judges to give reasons for their departure decisions, and authorize appellate review of the reasons for departures. After the seriousness of the present offense, the most important factor affecting the length of a defendant's sentence is her prior criminal record.[21] While sentencing guidelines provide more objective criteria to control judicial discretion, state legislatures and the United States Congress simultaneously adopted mandatory minimum sentencing statutes which enabled prosecutors, in their charging decisions, to exercise greater control over sentences and further to limit judges' discretion. The adoption of sentencing guidelines, mandatory minima, and the judicial fact-finding on which courts base their sentencing decisions provide the contextual backdrop against which the Supreme Court decided *Apprendi*.

In *Apprendi v. New Jersey*,[22] the defendant fired several bullets into the home of an African-American family that had recently moved into an all-white neighborhood. Apprendi pled guilty to three counts involving the shooting, the most serious of which was second-degree possession of a firearm for an unlawful purpose, and for which he could receive a sentence of five to ten years.[23] At the sentencing hearing, the trial judge found by "a preponderance of the evidence" that Apprendi acted with a "purpose to intimidate" motivated by racial bias, imposed a "hate crime" enhancement, and sentenced him to twelve years–two years more than the statutory

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personal characteristics are conducive to rehabilitation or will require lengthy incapacitation, sentencing judges are now required to look mostly at the harm caused by the defendant's crime (whether or not the full parameters of that harm were proven at the guilt-innocence trial) and the defendant's prior criminal record.").

21. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST.: A REVIEW OF RESEARCH 303, 304 (1996) ("After the seriousness of the crime, the criminal history of the offender is the most important determinant of sentence severity in common-law jurisdictions. Evidence of the importance of criminal record is to be found in statutory sentencing enhancements for recidivists, case law decisions affirming sentencing differentials between defendants with different criminal histories, and in sentencing practices in trial courts.").

22. 530 U.S. 466 (2000).

23. The second-degree offense to which Apprendi pled guilty carried a sentence range of five to ten years. None of the counts to which Apprendi pled guilty referred to the "hate crime" statute or alleged that he had acted with racial motives. As part of the plea agreement, the State reserved the right to request a "hate crime" sentence enhancement and Apprendi reserved the right to challenge the constitutionality of that sentence enhancement. *Id.* at 470.

maximum for the firearms offense itself.[24] Apprendi appealed on the grounds that Due Process required the finding of racial bias upon which the court sentenced him for a "hate crime" to be proved to a jury beyond a reasonable doubt rather than to be determined by the judge as a "sentencing factor."[25] The divided New Jersey Supreme Court affirmed the sentence because the finding of racial bias involved his "motive" which it regarded as a traditional "sentencing factor" rather than an essential "element" of the offense.[26] In *Apprendi*, the United States Supreme Court, by a 5–4 vote, reversed and held that Fourteenth Amendment Due Process and the Sixth Amendment right to a jury trial entitled a criminal defendant to a jury determination beyond a reasonable doubt of every element of the crime with which he is charged.[27]

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24. *Id.* at 471. The trial court imposed the twelve-year enhanced sentence on one of the firearm counts and shorter concurrent sentences on the other counts to which Apprendi pled guilty. The "hate crime" statute provided for an "extended term" of imprisonment which increased the penalty for a second-degree offense like Apprendi's to between ten and twenty years, based on the trial judge's finding, by a preponderance of the evidence, that the "defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (repealed 2001).

25. *Apprendi*, 530 U.S. at 471.

26. *Id.* at 471-72. The majority of the New Jersey Supreme Court noted that the "hate crime" enhancement "simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *Id.* at 473 (quoting State v. Apprendi, 731 A.2d 485, 494 (N.J. 1999)). The dissent objected that the fact of the defendant's racial motivation must be found by a jury beyond a reasonable doubt because it involves a finding so integral to the offense and sentence as to constitute a material element. *Apprendi*, 530 U.S. at 473.

27. *Id.* at 475-76 ("The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.").

Bibas, *Judicial Fact Finding*, *supra* note 4, at 1102, places *Apprendi* in the broader context of the Court's evolving understanding of what facts constitute "elements" to be found by a jury and which constitute "sentencing factors" to be found by a judge:

> Over the last three decades, the Supreme Court has struggled to explain which facts are elements of crimes and which are sentencing factors. Elements must be charged in an indictment and proved beyond a reasonable doubt to a jury. Sentencing factors, in contrast, are entrusted to the sentencing judge under a lower standard of proof.

The Court's case law in this field, however, has hardly been a model of clarity. On the one hand, the Court has repeatedly recognized that legislatures have historically had broad latitude to define crimes and punishments. It has further stressed that judges have historically had broad latitude to find facts and exercise discretion at sentencing. On the other hand, it has said there must

Apprendi expressly held and applied to the states the Court's ruling the previous year in *Jones v. United States*[28] that implied, in a federal prosecution, that any fact, other than the fact of a prior conviction, that "increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt."[29]

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be some constitutional limits on the legislative prerogative to define elements. Until *Apprendi*, the Court had never clearly enunciated what those limits were.

28. 526 U.S. 227 (1999).

29. *Id.* at 243 n.6. The federal car-jacking statute at issue in *Jones*, 18 U.S.C. § 2119 (1994), contained three provisions with separate penalties for armed car-jacking (fifteen years), armed car-jacking with "serious bodily injury" to the victim (twenty-five years), and armed car-jacking in which "death" to the victim results (up to life imprisonment or death sentence). Although the government indicted and the judge instructed the jury only on the theory that Jones had engaged in armed car-jacking which carried a fifteen-year sentence, at the sentencing hearing the judge found by a preponderance of evidence that Jones' victim had suffered "serious bodily injury" and imposed the twenty-five-year sentence. *Id.* at 230-31. The court of appeals upheld Jones' sentence on the grounds that the "serious bodily injury" constituted an aggravating sentencing factor for enhancement rather than an element of the offense to be proven to the jury beyond a reasonable doubt. The majority of the Court in *Jones* compared the statute with other statutes involving aggravated sentences based on injury to the victim and concluded that "serious bodily injury" constituted an element of the offense to be proved to a jury rather than simply a "sentencing factor" to be found by a judge. *Id.* at 235-36 ("Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime.").

In addition to its statutory interpretation, the Court construed the statute as it did in order to avoid the grave constitutional questions that would arise under a contrary reading. *Id.* at 240 ("As the Government would have us construe it, the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury."). As the Court later explained, the failure to charge in the indictment, submit to a jury, and prove beyond a reasonable doubt the facts which aggravated the length of the sentence could violate the Due Process right to notice and the Sixth Amendment right to a jury trial. *Id.* at 243 n.6. The Court reviewed the colonial history of the right to a jury trial and concluded that a diminution of the right would raise serious Sixth Amendment concerns. "[D]iminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." *Id.* at 248. The Court explained that

> [i]f a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gate keeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.

Jones exempted the fact of a prior conviction based on the Court's earlier decision in *Almendarez-Torres*, which emphasized the procedural safeguards afforded to defendants when the state obtained those prior convictions.[30] As in *Jones*, the Court's *Apprendi*

Id. at 243-44. Accordingly, the Court found that the statute created three separate offenses with distinct elements, each of which must be charged and proven to a jury beyond a reasonable doubt.

The *Jones* dissent read the statute as creating armed car-jacking as the complete offense with the factors of "serious bodily harm" or "death" as "punishment provisions directed to the sentencing judge alone." *Id.* at 256. The dissent objected even more strongly to the majority's invocation of the "constitutional doubt rule" because it found "no real doubt regarding the power of Congress to establish serious bodily injury and death as sentencing factors rather than offense elements . . . ." *Id.* at 254.

> The rationale of the Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States . . . . These States should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury.

Id. at 271.

30. The *Jones* Court exempted recidivism—"the fact of a prior conviction"—from the elements that increased the length of sentence and thus must be submitted to a jury, because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249.

The previous year, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court had exempted recidivism—"the fact of a prior conviction"—from the "elements" that the government must allege and prove to a jury. *Almendarez-Torres* involved a federal statute that criminalized the return of a deported alien. 8 U.S.C. § 1326 (1994). The statute imposed a two-year term of imprisonment, unless the alien was deported after "conviction for commission of an aggravated felony," in which case he could receive a maximum term of twenty years. *See* 8 U.S.C. § 1326(b)(2) (1994). *Almendarez-Torres* raised the constitutional issue whether the offense which carried a twenty year maximum term involved a separate crime which required the government to allege the existence of and to prove to a jury the fact of the prior conviction of the aggravated felony or whether it simply involved an enhanced penalty. *Almendarez-Torres,* 523 U.S. at 226. The Court concluded that the provision did not define a separate offense but simply authorized the trial court to increase the sentence for a recidivist. The Court reasons that the sentencing factor at issue—recidivism–is the most traditional basis for a sentencing court's increasing an offender's sentence. "[P]rior commission of a serious crime—is as typical a sentencing factor as one might imagine." *Id.* at 230. The Court emphasized that "the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. The Court noted that, as a sentencing factor, a state need not allege a defendant's prior conviction in the indictment or information even though the conviction was necessary to bring the defendant within the statute. Indeed, to do so would risk serious prejudice to the defendant by exposing the jury to evidence of his prior crimes. *Id.* at 235.

The Court in *Jones* distinguished its holding in *Almendarez-Torres* and explained that

analysis hinged on the distinction between an "element of an offense" and a "sentencing factor." For *Apprendi*, proof of the elements of an offense determined the severity of the sentence and provided the necessary connection between culpability and punishment.[31]

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.[32]

> not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged. But the case is not dispositive of the question here, not merely because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres, but because the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing . . . . One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.*

Jones, 526 U.S. at 248-49 (emphasis added).

31. *Apprendi*, 530 U.S. at 478. The Court noted that traditionally criminal trial judges exercised very little sentencing discretion. "The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." *Id.* at 479 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36-37 (A. Schioppa ed., 1987)).

32. *Apprendi*, 530 U.S. at 482-83. The Court emphasized that its narrow ruling only affected the procedures by which a state sentenced a defendant to a term in excess of the maximum penalty authorized for that offense based on findings of "aggravating" factors. *Id.* at 474 ("The constitutional question however, is whether the twelve-year sentence imposed on count eighteen was permissible, given that it was above the ten-year maximum for the offense charged in that count."). The Court emphasized that nothing in its analysis precluded trial judges from exercising discretion "taking into consideration various factors relating both to the offense and offender—in imposing a

Apprendi held that a judge may not impose a longer sentence than the statutory maximum for which the state charged and the jury or plea convicted the defendant. The Court's extension of constitutional procedures reflects the increased adversariness of determinate sentencing laws.[33]

Apprendi emphasized that the requirement that a jury find all the facts necessary to constitute the offense beyond a reasonable doubt constituted an essential element of Due Process.[34] Burdens of proof reflect the allocation of risks of error between litigants, the respective stakes at issue to the parties, and the extent to which society desires to minimize the risks of an incorrect verdict.[35]

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judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Id.* at 481.

33. *E.g.*, Hoffmann, *supra* note 4, at 267-68, who argues that

> as an unintended consequence of the recent move from discretionary to determinate sentencing, sentencing hearings have begun to look more and more like adversarial proceedings, which in turn has helped to ensure that they will be treated, for constitutional purposes, more and more like adversarial proceedings. *Apprendi*, in other words, is a natural and perhaps even predictable consequence of the recent trend toward an adversarial-ness in sentencing.

34. *Apprendi*, 530 U.S. at 483-84. Standards of proof—preponderance, clear and convincing, beyond a reasonable doubt—reflect society's interests in the correct outcome of cases.

> [S]ociety's interest in the outcomes of criminal cases is regarded as quite high, and the trier of fact is asked to be satisfied "beyond a reasonable doubt," the highest standard of proof. The disutility of convicting an innocent person is viewed as being much greater than the disutility of freeing a guilty one; hence, the probability of error is intentionally weighted in the defendant's favor.

Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 161 (1985) (citations omitted). *See also*, Dorothy K. Kagehiro, *Defining the Standards of Proof in Jury Instructions*, 1 PSYCHOL. SCI. 194, 195 (1990) ("The higher the standard of proof, the greater the risk of error that has been placed on the initiating parties. This, in turn, reflects a determination that the protection of defendants' rights or interests at stake in the litigation is much more important to society than plaintiffs' interests.").

35. The Court in *Addington v. Texas*, 441 U.S. 418 (1979), emphasized that burdens of proof reflect the societal importance attached to achieving a correct decision in a case. The Court noted that "the law has produced across a continuum three standards or levels of proof for different types of cases." *Id.* at 423. In private civil litigation, the "preponderance" standard allocates the risks of error equally between plaintiffs and defendants. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties . . . . [S]ociety has a minimal concern with the outcome of such private suits . . . ." *Id.* In *Addington*, which involved involuntary civil commitment, the Court held that the Constitution provides greater protections because the state initiates actions which affect an individual's liberty or other important interests. "The

Earlier, in *In re Winship*,[36] the Court found that states must prove a criminal defendant's *and* a juvenile delinquent's guilt beyond a reasonable doubt because criminal prosecution subjected an offender to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction."[37] *Winship* posited a functional equivalence between delinquency and criminal proceedings and emphasized that the highest standard of proof gave vitality to the "presumption of innocence" and guarded against the risk of erroneous convictions.[38]

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interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Id.* at 424. Society bears almost all of the risk of error when it adopts a "reasonable doubt" standard. *Id.* at 428. As the Court noted in *Speiser v. Randall*, 357 U.S. 513 (1958), the allocation of the risk to society is appropriate because

> [t]here is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id. at 525-26. *See generally*, C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982) (analyzing efforts to quantify meanings of different burdens of proof).

36. *In re* Winship, 397 U.S. 358 (1970).

37. *Id.* at 363, 365. *See infra* notes 93-96 and accompanying text.

38. The Court in *Winship* placed the risk of error on the prosecution in order to reassure the community about outcomes in criminal cases:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

In the aftermath of *Winship*, the Supreme Court dealt with a series of cases that considered to what extent a legislature constitutionally could shift the burden of proof in a criminal case from the state to the defendant by redefining an "element of the offense" as an "affirmative defense" which the defendant must establish. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 208 (1977) ("The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits."); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975) (holding a state may not relieve itself of burden of proof by placing an essential

For the *Apprendi* majority, the New Jersey sentencing procedure implicated the same constitutional considerations of culpability, stigma, and loss of liberty involved in *Winship*.[39] After Apprendi pled guilty to the second-degree offense that he unlawfully possessed a firearm, the judge at the sentencing hearing found "racial bias" and imposed a term identical to that which a judge could impose if the jury had convicted him of the more serious crime of unlawful possession in the first-degree.[40] New Jersey argued that the "hate crime" finding was a judicially proper "sentencing factor."[41]

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element of the offense on the defendant as an affirmative defense); Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977); Huigens, *supra* note 4, at 395-96; John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

39. The *Apprendi* majority noted that

> [i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not–at the moment the State is put to proof of those circumstances–be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. 466, 484 (2000). The requirements of due process and the right to a jury trial implicate not only questions of a defendant's guilt or innocence but also the length of his sentence. *Id.*

40. *Id.* at 491. Justice Scalia's *Apprendi* concurrence emphasized the vital role of the jury in determining the degree of guilt and the penal consequences.

> [T]he criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*

Id. at 498 (Scalia, J., concurring).

41. In *McMillan v. Pennsylvania*, the Court used the term "sentencing factor" to describe a fact that could affect whether or not a judge imposed a mandatory minimum sentence on a defendant even though a jury did not find the fact at the time of conviction. 477 U.S. 79, 86 (1986). In *McMillan*, the statute required the judge to impose a mandatory minimum sentence if the judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" while committing a specified offense. The Court emphasized that the sentencing scheme did not affect the maximum penalty for which the judge could sentence the defendant but only limited the "sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88. Although New Jersey argued that the "hate crime" statute's "purpose to intimidate" simply focused on Apprendi's motive, the Court found that it went to the defendant's state of mind or *mens rea* and thus constituted an essential element of the offense itself. *Apprendi*, 530 U.S. at 492-93. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a

However, the *Apprendi* majority emphasized that Due Process and the right to a jury implicated not only the factual questions of guilt or innocence, but also the degree of culpability and the penal consequences of a conviction.[42] "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[43]

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core criminal offense 'element.'" *Id.* at 493.

42. *Apprendi,* 530 U.S. at 484-85. Justice Scalia's concurrence emphasized that *Apprendi* involved the scope of the right to a jury trial and other trial rights. "What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee . . . the right to have a jury determine those facts that determine the maximum sentence the law allows." *Id.* at 498-99 (Scalia, J., concurring). *See also* Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975) (stating the criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability" assessed).

Apprendi emphasized that "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." *Apprendi*, 530 U.S. at 495. In a separate section of the opinion, Justice Stevens distinguished *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986), where the Court upheld a statute that created a mandatory minimum sentence for anyone whom the trial judge found, by a preponderance of the evidence, to "visibly possess a firearm" during the commission of certain designated felonies. The Court characterized the judge's factual finding of the "visible possess[ion] of a firearm" as a "sentencing factor" because it only affected the minimum sentence but did not cause the sentence to exceed the statutory maximum penalty. "We limit [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Similarly, the Court distinguished *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which approved the judicial finding of recidivism to enhance a sentence on the grounds "procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case." *Apprendi*, 530 U.S. at 488.

43. *Apprendi,* 530 U.S. at 494. The Court distinguished the practice approved in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), from that in New Jersey by noting that "[w]hen a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 530 U.S. at 495. *See also*, Bibas, *Judicial Fact Finding, supra* note 4, at 1122 ("The [*Apprendi*] majority once again exalted jury fact-finding, relied heavily on historical arguments about juries' traditional role, and refused to trust judges or legislators. The Court feared the erosion of jury trials and also hinted at the need to give fair notice to defendants of enhancements."). According to Bibas, *Apprendi*'s "elements" rule was designed to protect juries from judicial encroachment on defendant's rights.

Without such a rule, the Court asserted, "the jury right could be

In an extended concurrence and historical analysis, Justice Thomas argued that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment" and the state must prove each element to a jury beyond a reasonable doubt.[44] Any fact which has the effect of aggravating the seriousness of the offense or increasing the severity of the punishment is an "element" which the state must prove as part of its burden.[45] Justice Thomas' analysis was broader than that of the *Apprendi* majority because he also would include "the fact of a prior conviction" as an element to be proved because it, too, had the effect of aggravating the penalty imposed.[46] "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."[47]

Justice O'Connor wrote for the four justices who dissented in *Apprendi* and argued for a more flexible definition of which facts constituted an "element" of an offense to be found by a jury beyond a reasonable doubt and which appropriately could be characterized as a "sentencing factors" and found by a judge by a preponderance of the evidence.[48]

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lost . . . by erosion." Allowing judges to find these facts could lead to judicial arbitrariness and oppression. Jury trials and proof beyond a reasonable doubt protect not only the innocent from stigma and losing liberty. They also protect the guilty from added losses of liberty and stigma . . . .

Id. at 1133.

44. *Apprendi*, 530 U.S. at 501. At common law, legislatures understood that "a fact that is by law the basis for imposing or increasing punishment is an element." *Id.* at 502.

45. *Id.* at 501 ("One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.").

46. *Id.* at 514-16. Justice Thomas expressed the view that the Court wrongly had decided *Almendarez-Torres*, approving the treatment of recidivism as a "sentencing factor," even though he had voted with the majority in that case. *Id.* at 520 ("[O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence.").

47. *Id.* at 521.

48. *Apprendi*, 530 U.S. at 524-27. As the Court noted,

[W]e have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an

> [A] State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determination of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt.[49]

The dissent questioned the historical foundation and constitutional bases of the majority's ruling.[50] It also feared that requiring a jury to find every fact relevant to the length of sentence could invalidate many types of determinate-sentencing systems.[51] Under the more flexible approach it endorsed, the New Jersey sentence enhancement passed muster.[52]

In a separate dissent, Justice Breyer objected to the majority's requirement that the State submit to a jury questions relevant to

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offense element.

Id. at 524.

49. *Id.* at 546.

50. *Id.* at 529-39 (O'Connor, J., dissenting).

51. *Id.* at 549 (O'Connor, J., dissenting).

> The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme. If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades.

Id.

52. *Id.* at 552-53. According to the dissent, the New Jersey statute increase in the maximum penalty was proper because it

> does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense. Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible . . . . Third, the New Jersey statute gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense . . . . In sum, New Jersey "simply took one factor that has always been considered by sentencing courts to bear on punishment"—a defendant's motive for committing the criminal offense—"and dictated the precise weight to be given that factor" when the motive is to intimidate a person because of race.

Id. at 552-53 (O'Connor, J., dissenting) (citation omitted).

sentencing and argued that the decision could erode many of the benefits of determinate sentencing reforms. According to Breyer, many factors bear on the harmfulness of criminal conduct, but once a jury finds the defendant guilty, most of those considerations are appropriately left to the sentencing process.[53] To the extent that judicial discretion produced inconsistent sentencing of similarly-situated offenders, sentencing guidelines and mandatory minimum sentences provide greater uniformity and consistency in sentencing.[54] Once the legislature specifies the factors that should increase a defendant's sentence, Justice Breyer questioned why a jury, rather than a judge, must find those facts.[55] While the majority insisted that a jury should find facts affecting punishment as an element of the offense, Justice Breyer argued that such a rule would not effectively limit judicial discretion nearly as well as more procedural protections at sentencing.[56]

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53. *Id.* at 555 (Breyer, J., dissenting). Breyer argues that
> it is important for present purposes to understand why *judges*, rather than *juries*, traditionally have determined the presence or absence of such sentence-affecting facts in any given case. And it is important to realize that the reason is not a theoretical one, but a practical one . . . an administrative need for procedural *compromise*. There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury.

Id. at 556-57 (Breyer, J., dissenting).

54. *Id.* at 560 (Breyer, J., dissenting).

55. *Id.* at 560-61 (Breyer, J., dissenting).
> [L]egislatures sometimes have directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline. Such a statute might state explicitly, for example, that a particular factor, say, use of a weapon, recidivism, injury to a victim, or bad motive, "shall" increase, or "may" increase a particular sentence in a particular way . . . . The Court holds that a legislature cannot enact such legislation (where an increase in the maximum is involved) unless the factor at issue has been charged, tried to a jury, and found to exist beyond a reasonable doubt. My question in respect to this holding is, simply *"why* would the Constitution contain such a requirement"?

Id. at 560-61 (citation omitted).

56. *Id.* at 562-63 (Breyer, J., dissenting).
> The source of the problem lies not in a legislature's power to enact sentencing factors, but in the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct. Conversely, the solution to the problem lies, not in prohibiting legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a

Apprendi hinges on the crucial role of the jury in the criminal process. As a matter of "fundamental fairness," Due Process requires a fair trial before an impartial tribunal.[57] The Supreme Court in *Duncan v. Louisiana*[58] held that Fourteenth Amendment Due Process "selectively incorporated" the Sixth Amendment and required a jury trial in adult criminal proceedings. *Duncan* emphasized the jury's role to protect a defendant against arbitrary or eccentric judges and overzealous or vindictive prosecutors, to assure both factual accuracy, and to protect against governmental oppression:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority .... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less

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> "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness.

Id. at 562-63 (Breyer, J., dissenting).

Justice Breyer also questioned the majority's logic and consistency that a jury must find factors that increased the maximum sentence, but a judge could find those facts which subjected a defendant to a longer, mandatory minimum sentence:

> I do not understand why, when a legislature *authorizes* a judge to impose a higher penalty for bank robbery (based, say, on the court's finding that a victim was injured or the defendant's motive was bad), a new crime is born; but where a legislature *requires* a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not.

Id. at 563-64 (Breyer, J., dissenting). By focusing only on sentences that exceed the statutory maxima, rather than those which create mandatory minima, he argued that most defendants would receive less procedural fairness rather than more. *Id.* at 564 (Breyer, J., dissenting).

57. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 543 (1965). The Supreme Court in *In re Murchison*, explained the importance of an impartial tribunal:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness .... But to perform its high function in the best way "justice must satisfy the appearance of justice."

349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); *see also* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (noting that "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence").

58. 391 U.S. 145 (1968).

> sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[59]

Thus, *Apprendi* reflects the central role of the jury to find the facts constituting the elements of the offense, to uphold the standard of proof beyond a reasonable doubt, to limit the power of the State, and to provide justice in sentences by linking convictions with culpability.[60]

Two years later, the Supreme Court applied the *Apprendi* principle to capital sentencing in *Ring v. Arizona*.[61] After the jury convicted the defendant of a capital crime, the issue in *Ring* was whether a judge, rather than a jury, could then find the presence of additional "aggravating circumstances" that warranted imposition of the death penalty.[62] Although *Apprendi* earlier had purported to distinguish the capital sentencing procedure employed in Arizona in order to avoid overruling *Walton v. Arizona*,[63] the Arizona Supreme

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59. *Id.* at 156.

60. *See, e.g.*, Jones v. United States, where the Court noted that

> [t]he potential or inevitable severity of sentences was indirectly checked by juries assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

526 U.S. 227, 245 (1999); *see also*, Bibas, *Judicial Fact Finding*, *supra* note 4, at 1101 ("The Jury Clauses were meant to ensure a democratic, populist check on the administration of justice.").

61. 536 U.S. 584 (2002).

62. *Id.* at 597. The jury found Ring guilty of first-degree felony murder, for which the maximum punishment was life imprisonment, unless the judge found additional "aggravating circumstances" that outweighed any "mitigating circumstances." *Id.* at 596.

63. 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002). In distinguishing *Walton*, the *Apprendi* majority asserted that a conviction of first-degree murder authorized the death penalty, but the judge could either affirm that sanction or impose a lesser one. *Apprendi*, 530 U.S. at 496-97. The *Apprendi* dissenters characterized that assertion as "demonstrably untrue," described the purported distinction as "baffling," and argued that even following conviction by a jury, a defendant only could receive the death penalty if a judge made the factual determination that statutory aggravating factors existed. *Id.*

Court's decision in *Ring* asserted that the *Apprendi* dissenters properly understood the fundamental inconsistency between *Walton* and *Apprendi*.[64] Based on *Jones* and *Apprendi*, the Court overruled *Walton* and reversed Ring's capital sentence.[65] With regard to the finding of "aggravating circumstances" that might justify imposition of the death penalty, the Court reasoned that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[66] Justice Scalia concurred on the grounds that the jury, rather than a judge, must find any facts that increase the level of punishment to which the State subjects the defendant.[67] Justice Breyer's concurrence argued that the Eighth Amendment, rather than the Sixth Amendment, requires jury sentencing in capital cases.[68] Because the ultimate justification for the death penalty is retribution, Breyer argued that the jury, which embodies "the community's moral sensibility," rather than a single governmental official, should make the ultimate decision.[69] Justice O'Connor dissented for the reasons that she did in *Apprendi* and argued if any case should be overruled, the appropriate candidate should be *Apprendi* rather than *Walton*.[70]

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at 538 (O'Connor, J., dissenting).

64. The Supreme Court discussed the findings of the Arizona Supreme Court in Ring:

> The Arizona high court concluded that the present case [Ring] is precisely as described in Justice O'Connor's dissent [in *Apprendi*]– Defendant's death sentence required the judge's factual findings." Although it agreed with the *Apprendi* dissent's reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled. It therefore rejected Ring's constitutional attack on the State's capital murder judicial sentencing system.

Id. at 596 (citations omitted).

65. *Id.* at 609.

66. *Id.* at 602. The Court found *Walton* inconsistent with *Apprendi* because it allowed a sentencing judge, rather than a jury, to find the necessary aggravating circumstances to justify imposition of the death penalty. *Id.* at 609. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* (citation omitted).

67. *Id.* at 610 ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").

68. *Id.* at 614 (Breyer, J., concurring) ("I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.").

69. *Id.* at 615 (Breyer, J., concurring).

70. *Id.* at 619 (O'Connor, J., dissenting) ("*Apprendi* was a serious

II. THE JUVENILE COURT AND THE JURY

Many analysts have examined the origins and social history of the juvenile court.[71] Changes in cultural ideas about childhood and social control that accompanied modernization more than a century ago gave rise to the juvenile court.[72] Economic modernization brought with it changes in family structure, modified the function of the family in society, and promoted a new cultural perception of childhood.[73] The new ideology of childhood depicted children as

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mistake . . . [and its rule] that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases."). She objected that "[b]y expanding on *Apprendi*, the Court today exacerbates the harm done in that case. Consistent with my dissent, I would overrule *Apprendi* rather than *Walton*." *Id.* at 621.

71. *See generally*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 101-36 (2d ed. 1977) (discussing the origins of the Cook County Juvenile Court); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980) (discussing the social structural context of the Progressives' building of social welfare and social control institutions); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967) (discussing the impact of industrialization on social institutions). On the role of developing social theories on criminal justice and juveniles, see FRANCIS A. ALLEN, THE BORDERLAND OF THE CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25-41 (1964); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978) (analyzing the impact of social sciences on juvenile courts "rehabilitative" ideology).

72. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1097 (1991) (discussing the creation of juvenile court as reflection of social construction of childhood and adolescence).

73. Economic modernization and industrialization transformed the United States from a rural agrarian society into an urban industrial one. *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916 (1963); WIEBE, *supra* note 71.

Family structure and function changed as economic modernization separated work from the home and fostered a new social construction of childhood. *See generally*, CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT (1977); CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1977) (analyzing the effects on family life of the nineteenth-century emancipation of women and the growth of industrialization). Demographic changes in the number of children and a shift of economic functions from the family to other work environments altered the roles of women and children. The idea of "childhood" is socially constructed and underwent substantial modification during this period. Ainsworth, *supra* note 72, at 1091-93 ("[T]he life-stage we call 'childhood' is likewise a culturally and historically situated social construction . . . . The definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society."). Especially within the upper and middle classes, a more

vulnerable, fragile, and dependent innocents who required supervision and preparation for life. Industrialization, urbanization, and social change also fostered the Progressive movement, many of whose programs shared a unifying child-centered theme.[74]

A. *The Juvenile Court*

Progressive criminal justice reforms reflected changes in ideological assumptions about criminality. Positive criminology attempted to identify the factors that caused crime and contested the classic formulations of crime as the product of free-will choices.[75]

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modern conception of childhood emerged in which children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood. The family, particularly women, assumed a greater role in supervising a child's moral and social development. For analysis of the modernization of the family and the changing conception of childhood, see generally, AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK (Joseph Hawes & N. Ray Hiner eds., 1985); PHILIPPE ARIES, CENTURIES OF CHILDHOOD (1962).

74. Progressives' policies, embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws, reflected and advanced the changing cultural conception of childhood. "The child was the carrier of tomorrow's hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create that bright new world of the progressives' vision." WIEBE, *supra* note 71, at 169. *See also* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 127-28 (1961) (creating compulsory school attendance laws); KETT, *supra* note 73, at 215-44 (regulating children's spare time activities); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE IN THE PROGRESSIVE ERA 187-210 (1982) (discussing child welfare legislation); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 120-21 (1970) (introducing child labor laws).

75. Criminal justice policies reflect underlying ideological assumptions and values, often unstated, about what causes crime and how to deal with it. *See* FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 27 (1982) (crime ideology, whether based on science, religion, or common sense, provides framework for interpreting and responding to offenders); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001). Classical criminal law assumed that rational actors made voluntary choices to commit crimes and that they deserved the consequences for their acts. In the late nineteenth and early twentieth centuries, Progressives reformulated their ideology of crime, modified criminal justice administration, and based social control practices on new theories about behavior and deviance. *See* ROTHMAN, *supra* note 71, at 52-61. Positive criminology asserted that biological, psychological, social, or environmental "determined" or caused criminal behavior. *See id.* at 50-52. Determinism reduced actors' moral responsibility for their crimes and criminal justice personnel attempted to reform them rather than to punish them for their offenses. *See* FRANCES ALLEN,

Positivist criminology regarded deviance as determined rather than chosen, and sought to identify the causes of crime and delinquency. Progressives attributed criminal behavior to deterministic forces that reduced offenders' moral responsibility for their crimes, and attempted to reform rather than to punish them. The conjunction of positivistic criminology, the use of medical models to treat criminals, and the emergence of social science professionals gave rise to the "Rehabilitative Ideal."[76] Progressive criminal justice reforms—probation, parole, indeterminate sentences, and the juvenile court—all emphasized open-ended, informal, and flexible policies to change offenders.[77]

THE DECLINE OF THE REHABILITATIVE IDEAL 3-7 (1981). Because each offender's background, traits, and circumstances differed, Progressives attempted to individualize justice. RYERSON, *supra* note 71, at 22. In its quest for scientific legitimacy, criminology borrowed its methodology and vocabulary from the medical profession. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 57-60 (1999) ("Just as germs caused diseases, deterministic assumptions redirected criminological research scientifically to study offenders in order to identify the causes of crime."). The ability to identify the causes of crime implied the ability to "cure" it as well. *Id.* at 60. Medical metaphors—pathology, infection, diagnosis, and treatment—provided analogues popular with criminal justice professionals. *See* ROTHMAN, *supra* note 71, at 293-323. The medical model of criminality emphasized diagnosis, prescription, and intervention to cure the problems of each offender. *See id*; *see also* RYERSON, *supra* note 71, at 105-24 (discussing the declining importance of punishment and deterrence).

76. The "Rehabilitative Ideal" assumes

> that human behavior is the product of antecedent causes. These causes can be identified . . . . Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally . . . it is assumed that measures employed to treat the convicted offender should serve a therapeutic function; that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.

ALLEN, *supra* note 71, at 26. Progressive reformers assumed both that human behavior is malleable and that they knew the appropriate direction in which to change people. *See id.* at 26-27. Progressives believed that the behavioral and social sciences provided them with the tools with which systematically to change people. *See* RYERSON, *supra* note 71, at 99-136. They also believed in the virtues of their way of life and the desirability of imposing their middle-class values on immigrants and the poor. ROTHMAN, *supra* note 11, at 48-49 ("Progressives were equally convinced of the viability of cultural uplift and of the supreme desirability of middle-class life in cultural as well as material terms . . . . The model was clear: All Americans were to become middle class Americans.").

77. *See* ALLEN, *supra* note 71, at 25-28; ROTHMAN, *supra* note 11, at 45-50 (arguing that Progressives used the state to inculcate their values in others). Progressives believed that professionals and experts could develop rational and scientific solutions to social problems. JOHN SUTTON, STUBBORN CHILDREN 124

The juvenile court movement combined the new ideas about children with the new ideology of social control to remove children from the criminal justice system and to provide them with individualized treatment in a separate system.[78] Progressives expected juvenile court professionals to use informal procedures and to substitute a scientific and preventative approach for the traditional punitive purposes of the criminal law.[79] Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders.[80] Juvenile courts exercised jurisdiction over non-criminal status offenses, such as truancy, sexual activity, or immorality, which the criminal law typically ignored.[81] Characterizing intervention as a civil or welfare proceeding completed the separation of juvenile from criminal courts and allowed greater authority to control and supervise children.

In separating children from adult offenders, juvenile courts rejected the jurisprudence and procedure of adult criminal prosecutions. Reformers modified courtroom procedures to eliminate any implication of a criminal proceeding, adopted a euphemistic vocabulary, and endorsed a physically separate court

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(1988) (identifying social control as an administrative problem rather than as a moral or political one). The Progressives' reliance on the State to implement social reforms reflected their views of State benevolence, government's ability to correct social problems, confidence in their own middle-class values, and in the propriety of imposing those values in others. *See* David Rothman, *The State as Parent: Social Policy in the Progressive Era*, *in* DOING GOOD: THE LIMITS OF BENEVOLENCE 67, 74-76 (1978).

78. *See generally* MARGARET ROSENHEIM, ET AL., A CENTURY OF JUVENILE JUSTICE (2002).

79. *See* PLATT, *supra* note 71, at 43-47; RYERSON, *supra* note 71, at 35-42; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109-11 (1909).

80. *See, e.g.*, *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (justifying the establishment of the House of Refuge, which offered aid to homeless and destitute youth, on the basis of parens patriae); Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C. L. REV. 147, 181 (1970); Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 207-10 (1971).

81. Activities inappropriate for children, such as smoking or truancy, and conduct inconsistent with the new social construction of childhood and adolescence, such as immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life, subjected youths to pre-delinquent intervention by the courts to supervise their upbringing. *See* PLATT, *supra* note 71, at 137-38; Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 70, 81 (1978).

building to avoid the stigma of adult prosecutions.[82] Judges conducted confidential hearings, limited public access to court records, and found children to be delinquent rather than guilty of a crime.[83] Proceedings focused on the child's background and welfare rather than the specifics of the crime. Reformers envisioned a social welfare system rather than a judicial one, and they excluded lawyers, juries, rules of evidence, and formal procedures from delinquency proceedings. "[T]rial by jury was eliminated in most juvenile courts as irrelevant to the proper determination before the court, because the court was less concerned with factually determining whether the child had broken the law than with sensitively diagnosing and treating the child's social pathology."[84] The Pennsylvania Supreme Court approved the absence of a jury and asserted that "[w]hether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it."[85]

Social workers and probation officers assisted judges and investigated the child's background, identified the sources of her misconduct, and developed a treatment plan to meet her needs. Juvenile court personnel enjoyed enormous discretion to make

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82. *See* ROTHMAN, *supra* note 71, at 217-18; RYERSON, *supra* note 71, at 38-39; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92-93 (1967).

83. According to David S. Tanenhaus,

> The inventors of the juvenile court designed this "new piece of social machinery" not only to remove children from the harsh criminal justice system, but also to shield them from stigmatizing publicity. In the juvenile court, its inventors envisioned, hearings would be closed to spectators and the press, a juvenile's record would remain confidential, and no private lawyers or juries would be part of the legal process.

David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 43 (2002).

Id. at 62-63. Although closed and confidential procedures became a fixture of juvenile courts, the Cook County Juvenile Court conducted public hearings for the first decade of its existence. *Id.* Juvenile court supporters used the public proceedings to educate the public about the juvenile court, to explain its rehabilitative mission, and to establish its legitimacy.

> Although the progressives wanted to protect the privacy of the individual child in court, they also sought to publicize the plight of poor children in general. Case histories, which included a great deal of information about a child but not his or her actual name, served as one way of meeting the twin goals of educating the public about children through accounts of specific children who remained nameless.

Id. at 63.

84. Ainsworth, *supra* note 72, at 1101.

85. Commonwealth v. Fisher, 62 A. 198, 200 (1905).

dispositions in the "best interests of the child." Principles of psychology and social work, rather than formal legal rules, guided decision-makers. The court collected information about the child's life history, character, and social environment, and assumed that a scientific analysis of the child's past would lead to a proper diagnosis and intervention to assure her future welfare. Reformers maximized judicial discretion to allow for flexibility in diagnosis and treatment. The offense a child committed did not necessarily indicate her "real needs" and did not affect either the intensity or the length of dispositions. Judges focused first and foremost on the child's character and lifestyle and imposed indeterminate, non-proportional dispositions that could continue for the duration of minority.

B. Constitutional Domestication of the Juvenile Court and the Denial of the Jury

The Supreme Court in *Gault* mandated some procedural safeguards in delinquency adjudications and shifted judicial attention from assessing a child's "real needs" to determining legal guilt or innocence as a prerequisite to sentencing. *Gault* reviewed the history of juvenile courts and the traditional reasons for denying procedural safeguards to juveniles: Delinquency hearings were civil proceedings rather than criminal trials and when the State acted as *parens patriae*, no adversarial relationship existed between the interests of the child and the State.[86] The Court rejected these justifications, observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure," and concluded that denial of procedural rights frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[87] *Gault* insisted that the "claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to the realities of recidivism, the failures of rehabilitation, the stigma of a "delinquency" label, the breaches of confidentiality, or the arbitrariness of the process.[88] Juvenile courts' failure to live up to the Progressive ideal prompted the Court to mandate some elementary procedural safeguards as a matter of "fundamental

86. 387 U.S. 1, 14-17 (1967).

87. *Id.* at 18.

88. *Id.* at 21-25. Several factors motivated the Court to impose procedural safeguards on the juvenile justice process: states adjudicated juveniles as delinquent for behavior that would be a crime if committed by adults; the attendant stigma of delinquency/criminal convictions; and the harsh realities of juvenile institutional confinement. *Id.* at 27-29.

fairness." The Court based the right to advanced notice of charges, a fair and impartial hearing, and the right to the assistance of counsel, including the opportunities to confront and cross-examine witnesses on the Fourteenth Amendment Due Process Clause, and relied on the Fifth Amendment of the Bill of Rights only to grant delinquents the privilege against self-incrimination.[89]

Despite its critical dicta, the Court confined its decision narrowly to delinquency hearings at which the State charged the juvenile with criminal conduct and she faced the possibility of institutional confinement. *Gault* did not consider other aspects of juvenile court procedures, jurisdiction, or dispositional practices.[90]

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89. *Id.* at 31-34 (notice of charges); *id.* at 34-42 (right to counsel); *id.* at 42-55 (privilege against self-incrimination); *id.* at 56-57 (confrontation and cross-examination). The Supreme Court decided *Gault* and the other criminal procedure cases in the context of its broader agenda to protect civil rights, civil liberties, and racial minorities against imposition by state law enforcement officials. *See, e.g.*, Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1451 (2003) (summarizing reasons for extending civil rights guarantees).

The Supreme Court could have decided *Gault* as it did other defendants' challenges to states' criminal procedures, and simply incorporated and applied specific provisions of the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment. Justice Black advocated this procedural equation between delinquency and criminal prosecutions.

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.

In re Gault, 387 U.S. 1, 61 (1967) (Black, J., concurring). The *Gault* majority chose not to make that functional equation.

> The majority of the *Gault* Court, however, was unwilling to agree that juvenile delinquency trials should precisely mirror their adult criminal counterparts. Instead, the majority wished to find a jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process. To effect these results, the *Gault* majority decreed that juveniles would enjoy only those constitutional rights necessary to implement the Due Process Clause's guarantee of "fundamental fairness."

Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998).

90. 387 U.S. at 13. Several analysts examine the narrow holding in *Gault* and its functional limitation of juveniles' procedural rights. *See, e.g.*, Frances Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981) (analyzing limitations on juveniles' procedural rights); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to*

The Court noted that the Due Process rights it granted would not impair juvenile courts' ability to treat delinquents separately from adults.[91] It insisted, however, that adversarial procedures were essential to determine the validity of delinquency charges, to preserve individual freedom, and to protect against the power of the State.[92]

In subsequent juvenile court decisions, the Supreme Court elaborated on the procedural and functional equivalence between criminal and delinquency proceedings. As noted earlier, *In re Winship*[93] decided that states must prove delinquency beyond a reasonable doubt rather than by the lower, civil preponderance of the evidence standard of proof.[94] Because the Constitution contains no explicit provision regarding the criminal standard of proof, *Winship* first held that Due Process required proof beyond a reasonable doubt in adult criminal proceedings and then extended that same requirement to delinquency proceedings both to ensure accurate fact-finding and to constrain governmental overreaching.[95]

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the Not So Distant Past, 27 UCLA L. REV. 656, 661-64 (1980).

91. 387 U.S. at 22.

92. *Id.* at 20-21. The dual functions of procedural safeguards—factual accuracy and preventing governmental oppression—were clearly implicated in the Court's holding to grant the privilege against self-incrimination in delinquency adjudications. *Id.* at 49-50; *see also* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 155-56 nn.46-47 (1984) [hereinafter Feld, *Criminalizing*]. By recognizing the applicability of the privilege against self-incrimination, states no longer could characterize juvenile adjudications either as "non-criminal" or "non-adversarial" because the Fifth Amendment privilege functions as the guarantor of an adversarial process and the primary mechanism to maintain a balance between the state and the individual. *Compare, e.g.*, *Gault*, 387 U.S. at 50, *with* Allen v. Illinois, 478 U.S. 364, 373 (1986) ("The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders.").

93. 397 U.S. 358 (1970).

94. *Id.* at 368.

95. *Id.* at 361-67. It is illuminating to compare *Winship*'s treatment of the standard of proof in criminal and delinquency cases with the standard of proof required by the Court for involuntary civil commitment of the mentally ill. Addington v. Texas, 441 U.S. 418, 432-33 (1979) (holding that despite the loss of liberty, the State need only establish the commitment criteria by "clear and convincing" evidence). In *Addington*, the Court equated criminal and delinquency proceedings, and distinguishing both from involuntary commitment proceedings:

> The Court [in *Winship*] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue—whether the individual in fact committed a criminal act—was the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt .... Unlike the

The Court weighed the value of providing the highest standard of proof against its potential negative impact on the beneficial aspects of the juvenile process and concluded that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*."[96]

In *McKeiver v. Pennsylvania*,[97] however, a plurality of the Court declined to extend to delinquents full procedural parity with criminal defendants and denied juveniles a constitutional right to a jury trial in state delinquency proceedings.[98] In companion cases from Pennsylvania and North Carolina, the juveniles argued that *Gault* and *Winship* functionally had converted delinquency hearings into criminal trials and therefore entitled them to a jury.[99] The *McKeiver* plurality rejected their arguments and held that the Fourteenth Amendment Due Process standard of "fundamental fairness" in delinquency proceedings emphasized only "accurate factfinding"—which a judge could satisfy as well as a jury.[100] Unlike

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> delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Id. at 427-28.

96. 397 U.S. at 368.

97. 403 U.S. 528 (1971). Justice Blackmun wrote the plurality opinion in *McKeiver* which Justices Burger, Stewart, and White joined. Justice White wrote a separate concurrence elaborating on the differences between punishment and treatment in juvenile court. *Id.* at 551-53 (White, J., concurring). Justice Harlan concurred on the grounds that he did not believe that the Fourteenth Amendment incorporated the Sixth Amendment right to a jury trial in state criminal proceedings. *Id.* at 553 (Harlan, J., concurring). Justice Brennan concurred in the Pennsylvania appeal and dissented in the North Carolina appeal on the grounds that the purpose of constitutional procedures is to prevent against governmental oppression and asserted that a public trial performed that function as well as a jury trial. *Id.* at 553-57 (Brennan, J., concurring). Justice Douglas, joined by Justices Black and Marshall, dissented, and argued that juveniles have a right to a jury trial under the Sixth Amendment because the state charged delinquents with a crime, for which they could be confined, thus making delinquency proceedings indistinguishable from criminal trials. *Id.* at 561 (Douglas, J., dissenting).

98. *Id.* at 545.

99. *Id.* at 542-43 ("The North Carolina juveniles particularly urge that the requirement of a jury trial would not operate to deny the supposed benefits of the juvenile court system . . . [and] that no reason exists why protection traditionally accorded in criminal proceedings should be denied young people subject to involuntary incarceration for lengthy periods.").

100. *Id.* at 543. Although the Court recognized some deficiencies of juvenile courts, *id.* at 547-48, it affirmed its confidence in the ability of juvenile court judges to find facts and decide cases as fairly as juries:

> [O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue other ways for

Gault and *Winship*, which recognized the *dual* roles of procedural safeguards—to assure accurate fact-finding *and* to protect against government oppression—*McKeiver* insisted that "fundamental fairness" required *only* accurate fact-finding.[101] For example, *Gault* required the Fifth Amendment privilege against self-incrimination to protect against government oppression even though it might compromise accurate fact-finding.[102] By contrast, *McKeiver* invoked the mythology of the sympathetic, paternalistic juvenile court judge, denied that delinquents required protection against government oppression,[103] and rejected concerns that the informal juvenile

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> determining facts . . . . In *Duncan* [*v. Louisiana*] the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."

Id. at 543 (quoting Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

101. *See infra* notes 118, 127 and accompanying text. *McKeiver* acknowledged that

> Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature . . . . The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding.

403 U.S. at 533. Justice Brennan's opinion in *McKeiver* recognized that procedural justice included protecting individuals against governmental oppression, but he concluded that alternatives to a jury trial, such as a public trial, could make trials visible and accountable to the community and accomplish that purpose. *Id.* at 553-55 (Brennan, J., concurring and dissenting). Justice Brennan noted that "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." *Id.* at 554. The right to a trial by jury protects the individual against governmental oppression by enabling the defendant to appeal to the conscience of the community. *Id.* at 555. Pennsylvania granted juveniles a public trial, which Justice Brennan regarded as a functional equivalent safeguard for the core values protected by the right to a jury trial. *Id.* at 554-55. By contrast, North Carolina procedures excluded the public from delinquency proceedings and thus precluded any protection against "misuse of the judicial process." *Id.* at 556; *see also* Feld, *Criminalizing*, *supra* note 92, at 158-60, 262-66 (analyzing Justice Brennan's opinion in *McKeiver*).

102. *See* Feld, *Criminalizing*, *supra* note 92, at 154-59 nn.46-47.

103. *McKeiver*, 403 U.S. at 550. *Contra* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury."). Amar argues that the jury was intended to be populist and majoritarian to offset judicial elitism, drawn from the local community to counter the power of a centralized government, and political participants designed to serve as a mini-legislature. *Id.* at 1187-89.

system could compromise the accuracy of fact-finding.[104] By denying a need existed to protect delinquents from state over-reaching, *McKeiver* ignored the unique "checking function" that juries provide to assure equality in justice administration and to avoid invidious racial disparities.[105] The need for protection against governmental imposition is especially acute in juvenile courts because the more severe sentences of juvenile courts fall disproportionately heavily on racial minority offenders.[106]

The dissent in *McKeiver* insisted that once the State charged a youth with a crime, for which it could incarcerate her for a term of years, then the delinquent enjoyed the right to a jury trial.[107]

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104. According to *McKeiver*, concerns about procedural safeguards, such as jury trials, to assure accurate fact-finding and protection against governmental oppression ignores the benevolent premises of the juvenile court system.

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

403 U.S. at 550. *See also infra* notes 161-184 and accompanying text (discussing the differences between judge and jury reasonable doubt).

105. *See, e.g.*, DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 107 (2003) ("The instrumental theory encompasses not only due respect for individual dignity, but also due respect for the 'checking value' of preventing tyranny."). Efforts to control racial disparity are essential to assuring the legitimacy of the criminal justice system. *Id.* at 108. From *Norris v. Alabama*, 294 U.S. 587, 589 (1935), to *Batson v. Kentucky*, 476 U.S. 79, 84-85, 89 (1986), the Court has emphasized that a commitment to equality in criminal justice administration bars exclusion of racial minorities from the jury venire or the exercise of racially motivated peremptory challenges. *See also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 193-230 (1997) (analyzing efforts to regulate and control racially discriminatory exercise of peremptory challenges to black jury members).

106. *See* NATIONAL RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 231 (Joan McCord et al. eds., 2001) (noting that the compound effect of small racial disparities in justice administration produces large cumulative differences in handling of minority offenders); EILEEN POE YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 15-16 (2000) (asserting that black youths are disproportionately over-represented at each successive step of juvenile justice decision-making process); Feld, *supra* note 89, at 1565-72 (summarizing research on racial disparities in waiver of youths to criminal court and sentencing of delinquents in juvenile court).

107. *McKeiver*, 403 U.S. at 559 (Douglas, J., dissenting) ("But where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order 'confinement' until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protections as an adult.").

Moreover, the explicit provisions of the Bill of Rights, rather than an amorphous notion of "fundamental fairness," provided the applicable constitutional standard and juveniles deserved the same procedural protections as adults.[108] The dissent repeated the "incorporation" argument it made in *Gault* that the punitive consequences of delinquency adjudications—criminal charges carrying the possibility of confinement—required criminal procedural safeguards.[109] The dissent feared that juvenile courts' informal procedures could contaminate the accuracy of judicial fact-finding[110] and it rejected the plurality's concerns that a jury right might entail excessive administrative burdens.[111]

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108. *Id.* at 560 ("No adult could be denied a jury trial in those circumstances. The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to 'any person,' not denial of rights to 'any adult person'; and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to be tried under a standard of proof beyond a reasonable doubt." (citation omitted)).

109. *Id.* at 559-60. Justice Black's concurring opinion in *Gault* advocated the "total incorporation" approach to constitutional adjudication in determining the procedural rights of juveniles:

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishment could, because they are children be denied these same constitutional safeguards.

In re Gault, 387 U.S. at 61.

110. *McKeiver*, 403 U.S. at 563. ("'[T]rial by jury will provide the child with a safeguard against being prejudged' by a judge who may well be prejudiced by reports already submitted to him by the police or caseworkers in the case.").

111. Justice Douglas appended to his dissenting opinion the opinion of Judge De Ciantis of the Family Court of Providence, Rhode Island, who granted a delinquent a right to a jury trial. *Id.* at 563-572. In that opinion, Judge De Ciantis reviewed the traditional reasons given for denying juveniles the right to a jury trial. In response to concerns about the administrative burdens a jury might impose, he observed that

> there is no meaningful evidence that granting the right to jury trials will impair the function of the court. Some states permit jury trials in *all* juvenile court cases; few juries have been demanded, and there is no suggestion from these courts that jury trials have impeded the system of juvenile justice .... In fact the very argument of expediency, suggesting "supermarket" or "assembly-line" justice is one of the most forceful arguments in favor of granting jury trials. By granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time. *It will*

The *McKeiver* plurality offered reasons, rather than reasoning and analysis, to justify its rejection of a jury right.[112] It feared that jury trials would disrupt the traditional juvenile court and adversely affect its informality, flexibility, and confidentiality.[113] Moreover, the Court recognized that to require jury trials would make juvenile courts procedurally indistinguishable from criminal courts and raise questions whether any reasons exist to maintain a separate juvenile court just to try younger offenders.[114] Although *McKeiver* found

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provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him because of some past occurrence which was heard by the same judge.

Id. at 564-65 (emphasis added).

112. *Id.* at 545. The Court stated, "Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. We so conclude for a number of reasons . . ." The Court then listed thirteen numbered "reasons" why juries were unnecessary in delinquency trials. *Id.* at 545-50.

113. *Id.* at 550. However, the Court did not consider the possibility that informality may harm the administration of juvenile justice and the delinquents it sentences. *See, e.g.*, Susan E. Brooks, *Juvenile Injustice: The Ban On Jury Trials For Juveniles in The District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875, 887-90 (1995) (arguing that "informality, if it exists, only does so as a nicety for courts to latch onto while constituting a meaningless label to those whom it is supposed to benefit"); Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 236-37 (1993) ("It is widely believed that informality neither furthers the cause of rehabilitation nor forces the child to appreciate the wrongfulness of criminal behavior."); Allan H. Horowitz & Nancy L. Nickerson, Note, McKeiver v. Pennsylvania*: A Retreat in Juvenile Justice*, 38 BROOK. L. REV. 650, 689 (1972) ("The fact that a jury, rather than a judge, is the finder of fact would expose the accused juvenile to no additional trauma. It may even prove to be beneficial . . . ."); Sara E. Kropf, Note, *Overturning* McKeiver v. Pennsylvania*: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2170 (1990) ("[I]t is unlikely that the juveniles involved in the juvenile court system—brought before judges, held in prison cells prior to a judicial hearing, counseled by attorneys—view it as anything but formal and adversarial. Juveniles may be harmed when they expect to see a jury—an expectation based perhaps on images from television and films or from contact with adults in the criminal system—and are faced only with a judge . . . .").

114. *McKeiver*, 403 U.S. at 551 ("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."). *See, e.g.*, Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 942 (1995) (criticizing "the single most serious procedural infirmity of the juvenile court—its lack of jury trials . . ."); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. &

faults with the juvenile process, the Court did not believe that granting the right to a jury trial would correct those deficiencies and it feared that a jury only would make the process more formal and adversarial.[115] Yet, the Court did not consider or discuss whether any possible advantages might accrue from increased formality,[116] whether *Gault* effectively had foreclosed its renewed concerns about flexibility and informality, or why procedural formality at trial was incompatible with treatment dispositions at sentencing.[117] Most importantly, *McKeiver* did not analyze the purported distinctions

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CRIMINOLOGY 68, 97 (1997) (arguing for criminal procedural parity between juveniles and adults).

115. *McKeiver* noted that providing for trial by jury in juvenile court "would bring with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." 403 U.S. at 550. *McKeiver* reflects the general hostility evinced by the Burger Court toward the extension and expansion of the right to a jury trial. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404, 412-14 (1972) (allowing non-unanimous verdicts in jury trials); Williams v. Florida, 399 U.S. 78, 103 (1970) (allowing six person jury to decide criminal cases).

116. One of *Gault*'s reasons for requiring procedural formality in delinquency proceedings was that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *Gault*, 387 U.S. at 18-19. *See also* Ainsworth, *supra* note 72, at 1119-21 (holding that formality as reflected in consistency, control of the process by litigant, respectful treatment, and confidence in fact-finders are key elements to sense of legitimacy and procedural justice).

117. The Appendix to Justice Douglas' dissent emphasized that a jury trial was compatible with a therapeutic disposition. *McKeiver*, 403 U.S. at 568-69 ("The role of the jury will be only to ascertain whether the facts, which give the court jurisdiction, have been established beyond a reasonable doubt. The jury will not be concerned with social and psychological factors . . . . Taking into consideration the social background and other facts, the judge, during the dispositional phase, will determine what disposition is in the best interests of the child and society. It is at this stage that a judge's expertise is more important, and the granting of a jury trial will not prevent the judge from carrying out the basic philosophy of the juvenile court.").

The dissent in *People v. Smith*, 1 Cal. Rptr. 3d 901, 917 (Cal. Ct. App. 2003) (Johnson, J., dissenting), noted the illogic of *McKeiver*'s concerns:

> If a juvenile court system allows jury trials, it is assumed, the system cannot and will not retain whatever rehabilitative and parental characteristics is may possess in the absence of such a right. And yet these are completely unrelated phenomena—how a juvenile court decides whether the accused committed the crime of which he or she is charged need have no bearing whatsoever on how it deals with that same juvenile once the judge, or a jury, returns a "true finding." . . . It simply has not been demonstrated the declaration of a constitutional right to jury trial in delinquency proceedings must or will eliminate the remaining rehabilitative parental features of the juvenile court system."

Id. at 917.

between treatment in juvenile courts and punishment in criminal courts that justified different procedures for each forum.[118] The Court did not review any factual record of dispositional practices or conditions of confinement when it concluded that juvenile courts treated, rather than punished, delinquents.[119] It simply noted that the juvenile court ideal envisions "an intimate, informal protective proceeding,"[120] even while it acknowledged that States seldom, if ever, realize that "ideal."[121] Despite *Gault*'s formalization of juvenile court procedures, *McKeiver* remained ideologically committed to the traditional "treatment" model of the juvenile court.[122] While denying

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118. The Court has held that fundamental fairness in *adult* criminal proceedings requires both factual accuracy *and* protection against governmental oppression. For example, in *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), the Court recognized that "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988) (analyzing Court's analysis of punishment and treatment in other doctrinal contexts and the implications of those analyses for delinquency proceedings) [hereinafter Feld, *Punishment, Treatment*].

119. *Compare McKeiver*, 403 U.S. 528 (1971), *with* Allen v. Illinois, 478 U.S. 364 (1986). In *Allen*, the Court denied petitioner the protections of the Fifth Amendment's privilege against self-incrimination in a "sexually dangerous person" commitment proceeding. Because the privilege is only available when the State "punishes" a person, the Court based its ruling, in part, on petitioner's failure to disprove the State's assertion that it treated, rather than punished him:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex .... We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.

Id. at 373-74.

120. *McKeiver*, 403 U.S. at 545.

121. *Id.* at 543-45.

122. Justice White concurred in *McKeiver* and identified some differences between juvenile and criminal proceedings. The criminal law punishes responsible actors for making blameworthy choices, but the deterministic assumptions of the juvenile justice system regard juveniles as less competent or culpable. *Id.* at 551-52 (White, J., concurring). The indeterminate length of juvenile dispositions and the "eschewing [of] blameworthiness and punishment

juveniles criminal procedural parity with adults, *McKeiver* never examined either how juvenile "treatment" differed from criminal "punishment" or whether delinquents also required procedural protections against government oppression.[123] In short, the Court decided *McKeiver* based on juvenile courts' "rhetoric" rather than their "reality."

Of course, the "reality" of juvenile justice, like that of criminal justice, is that the vast majority of defendants plead guilty rather than have their cases decided by juries.[124] But the possibility of invoking a jury trial provides an important check on prosecutorial over-charging, on judges' evidentiary rulings, and the standard of proof beyond a reasonable doubt in marginal factual cases.[125] The possibility of a jury trial also increases the visibility and accountability of justice administration and the performance of

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for evil choice" satisfied Justice White that "there remain differences of substance between criminal and juvenile courts." *Id.* at 552, 553. The *McKeiver* plurality apparently assumed, without any evidence, that juveniles only received positive rehabilitative treatment which requires no further special safeguards against governmental intervention as contrasted with retributive punishment which necessitates greater procedural protections to prevent governmental oppression. *See* Feld, *Punishment, Treatment*, *supra* note 118, at 832; Martin Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV 791, 830-31 (1982).

123. *See, e.g.*, Feld, *Punishment, Treatment*, *supra* note 118, at 831; Gardner, *supra* note 122, at 830-32.

124. *See, e.g.*, Bibas, *Judicial Fact Finding*, *supra* note 4, at 1150 (stating that academic and judicial emphasis on jury trial is anachronistic because "[f]ewer than four percent of adjudicated felony defendants have jury trials, and another five percent have bench trials. Ninety-one percent plead guilty. Our world is no longer one of trials, but of guilty pleas."). *See also* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1107-08 (1995) [hereinafter Feld, *Violent Youth*]:

> The Task Force surveyed states in which juveniles have a right to a jury and found that youths, like adults seldom exercised the option. Some commentators argue that because adult defendants seldom exercise their right to a jury, its denial to juveniles is of little consequence. Even if the right to a jury is little more than a chip in the plea-bargaining game, it is not self-evident why young offenders should be dealt fewer cards than somewhat older players.

See also Patricia L. Shaugnessy, Comment, *The Right to a Jury Under the Juvenile Justice Act of 1977*, 14 GONZAGA L. REV. 401, 421 (1979) (rates of jury trials ranged from 0.36% to 3.2% in states that grant juveniles the right to a jury).

125. *See* Ainsworth, *supra* note 114, at 943 ("The criminal justice system operates in the shadow of the jury trial, so that the potential invocation of that right affects the charging decision and plea negotiation even in cases that eventually culminate in guilty pleas.").

lawyers and judges.[126] The jury's checking function may be even more important in the highly discretionary, low-visibility juvenile justice system dealing with dependent youths who are unable effectively to protect themselves.

There are several additional reasons to question the contemporary validity of *McKeiver*'s 1971 plurality decision. As a matter of constitutional analysis, *McKeiver* marked a departure from the Court's then-prevailing mode of adjudication. During the previous decade of criminal procedure decisions, the Warren Court "incorporated" various provision of the Bill of Rights and emphatically rejected the "fundamental fairness" standard which *McKeiver* revived to justify the denial of juries to juveniles.[127] For

126. *See, e.g.*, R.L.R. v. State, 487 P.2d 27, 38 (Ala. 1971) (granting juveniles a state constitutional right to jury and public trials, in part, because "[w]e cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases, and wonder whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings"). On the performance of lawyers in juvenile courts, see *infra* notes 185, 187-88 and accompanying text.

127. *See generally*, DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 99-115 (2003) (noting the rejection of "fundamental fairness" and ascendance of "selective incorporation" of provisions of the Bill of Rights as constitutional basis for Supreme Court's criminal procedure decisions during the 1960s).

Professor Dripps describes the "fundamental fairness" test as a version of illegitimate substantive due process to regulate state criminal procedure which the Warren Court rightly rejected. *Id.* at xiv. In an extended critique of "fundamental fairness," Dripps notes that

> [t]ested by the criteria of legitimacy, instrumental reliability, and clarity and consistency, the fundamental fairness regime fares poorly indeed .... First, even rudimentary procedural requirements exceeded the appropriate scope of substantive due process review .... [F]undamental fairness analysis can be legitimate only within the limits that cabin legitimate substantive due process analysis, and those limits are quite properly exceedingly narrow. Fundamental fairness, therefore, could not legitimately secure the instrumental theory of criminal procedure ....
>
> The second key to understanding the illegitimacy of fundamental fairness analysis is that substantive due process doctrine *displaced* procedural due process completely .... Procedural due process means a fair hearing before conviction, and hearings can be unfair without evoking the intense moral disapproval required to invalidate a law as a matter of substantive due process [because it "shocks the conscience"] ....
>
> Finally, ... the justices never specified the values that determine fundamental fairness, let alone assign them consistent priorities. Instead, the standard of fundamental fairness was "to be tested by an appraisal of the totality of facts in a given case." The combination of so nebulous and normative a standard as "fundamental fairness" with

example, "selective incorporation" of the Sixth Amendment provided the constitutional rationale for the Supreme Court's decision to grant adult criminal defendants the right to a jury trial in *Duncan v. Louisiana*.[128] *McKeiver* declined to follow *Duncan*, but failed to explain its reasons for not doing so other than to assert its conclusion that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label."[129]

On the other hand, if the Court were called upon to decide *McKeiver* today as a "civil" rather than "criminal" case, then the appropriate mode of analysis would be the three-factor test employed in *Mathews v. Eldridge*[130] rather than the "fundamental fairness" standard it used. In deciding what procedural safeguards the state must provide when governmental action would deprive an individual of a constitutionally protected liberty or property interest, the Court balances three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[131]

In terms of the private interests involved, the Court in *Gault*, *Winship*, and *Breed v. Jones*[132] recognized that a delinquency proceeding was comparable in seriousness and consequences to a felony prosecution.[133] Second, despite *McKeiver*'s confidence in

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case-by-case adjudication amounted to a constitutional chancellors foot.

Id. at 110-12. *See also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 65 (2000) ("During the 1960s, the prevailing due process position shifted from the fundamental fairness doctrine to the selective incorporation doctrine.").

128. 391 U.S. at 162; *see also supra* note 56.

129. *McKeiver*, 403 U.S. at 541.

130. 424 U.S. 319 (1976).

131. *Id.* at 335. *See also* DRIPPS, *supra* note 127, at 60 ("The test requires the reviewing court to consider the weight of the individual's interest, the risk of error, and the costs to the government of additional procedural safeguards.").

132. 421 U.S. 519 (1975).

133. *See, e.g.*, *Gault*, 387 U.S. at 36 ("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."). *Gault* based its decision, in part, on the likelihood of incarceration and the conditions

judicial fact-finding, juvenile court judges are more likely erroneously to adjudicate youths delinquent than are juries, thereby posing a significant risk of error adversely affecting a substantial private interest.[134] Thirdly, and despite *McKeiver*'s concern about the fiscal and administrative burdens that a right to a jury trial would entail, the available evidence suggests that providing this additional procedural safeguard would have, at most, only a modest impact on juvenile justice administration.[135] Thus, a proper

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of confinement associated with a delinquency prosecution:

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence . . . that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.

Id. at 27. *Winship* required "proof beyond a reasonable doubt" in delinquency adjudications because the Court found that "he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction .... The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *Id.* at 363, 365.

In *Breed v. Jones*, 421 U.S. 519, 541 (1975), the Court used the Fourteenth Amendment to require the states to apply the Double Jeopardy provisions of the Fifth Amendment to the adjudication of juvenile offenses and to decide whether to prosecute a youth as a juvenile or as an adult before proceeding to a trial on the merits of the charge. *Breed* established a functional equivalence between an adult criminal trial and a delinquency proceeding. *Id.* at 531. The Court described the identical interests implicated in a delinquency hearing and a traditional criminal prosecution: "anxiety and insecurity," a "heavy personal strain," and the increased burdens of delinquency prosecutions as the juvenile system became more procedurally formalized. *Id.* at 530-31.

134. *See infra* note 319 and accompanying text.

135. *See, e.g.*, Feld, *Violent Youth*, *supra* note 124, at 1107 (describing the Minnesota Juvenile Justice Task Force's efforts to ascertain the administrative impact of providing jury trials in delinquency proceedings):

> The available empirical evidence, however, contradicts concerns that jury trials substantially disrupt delinquency proceedings. Instead, the right to a jury appears to have, at most, a marginal practical impact on juvenile justice administration. The Task Force surveyed states in which juveniles have a right to a jury and found that youths, like adults seldom exercised the option.

Id.

Earlier research reported that juveniles seldom exercised the right to a jury. *See also id.* at 1108 n.643; Sanborn, *supra* note 113, at 237 (1993) (noting that juveniles rarely exercise right to jury trial, hence such trials are a minimal administrative burden); Patricia L. Shaughnessy, Comment, *The Right to a Jury Under the Juvenile Justice Act of 1977*, 14 GONZAGA L. REV. 401, 420-21 (1978) (discussing survey of states that reports rates of delinquents who received jury trials ranged between 0.36% and 3.2% of formal petitions filed). The Minnesota Task Force also found that in those states in which juveniles enjoyed the right to a jury trial, delinquents exercised the right in about 1% to 3% of cases.

Eldridge analysis would lead to a different outcome.

Finally, *McKeiver*'s factual predicate that the sanctions that juvenile courts impose are not "punishment" has been superseded by the new reality of juvenile justice. Notwithstanding *McKeiver*'s reluctance to hasten the demise of the juvenile court, *Gault* and *Winship* already drastically had altered the form and function of juvenile courts. By emphasizing procedural regularity in the adjudication of guilt as a prerequisite to delinquency sanctions, the Court shifted the focus of juvenile courts from "real needs" to proof that the youth committed a crime.[136] In reaction to the greater procedural formality, changes in States' juvenile codes have fostered a substantive, punitive convergence with criminal courts as well. The increased emphasis on punishment in juvenile courts is reflected in legislative amendments of juvenile codes' purposes clauses,[137] court opinions endorsing "punishment,"[138] States' enactment of determinate and mandatory minimum sentencing statutes,[139] evaluations of juvenile court judges' sentencing

136. *See, e.g.*, *In re* Javier A., 206 Cal. Rptr. 386, 430 (Cal. Ct. App. 1984) (denying petitioner a jury trial in a juvenile proceeding, but urging the Supreme Court to reconsider *McKeiver* in light of evidence that juvenile court proceedings have many attributes of criminal trial proceedings). In *Javier A.*, the Court noted that "[j]uvenile proceedings now feature the same contests over admission of evidence as adult proceedings since only proof admissible in a criminal trial can be used to support a finding the juvenile committed the criminal offense." *Id.* at 419.

137. *See, e.g.*, Feld, *Punishment, Treatment, supra* note 118 at 838-47; Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J. L. & POLICY 223, 232-37 (1996); Kropf, *supra* note 113 at 2174-75 (noting that language employed by legislatures emphasizes punishment over treatment).

138. *See, e.g.*, *In re* Javier A., 206 Cal. Rptr. at 417 ("[E]mphasis is on protecting the citizens of the state of California from the child"); *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983) ("By formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population."); State v. Lawley, 591 P.2d 772, 773 (Wash. 1979) (concluding that sometimes punishment is treatment); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 415-16 (W. Va. 1980) ("[O]ur treatment looks a lot like punishment . . . treatment is often disguised punishment"; "'treatment' is often a caricature—something worthy of a story of Kafka or a Soviet mental hospital.").

139. *See, e.g.*, PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 11, 15-16 (1996). Feld, *Punishment, Treatment, supra* note 118, at 850-79 (analyzing determinate and mandatory minimum juvenile sentencing statutes); Gardner, *Punishment and Juvenile Justice, supra* note 122, at 833-35; Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the*

practices,[140] and the harshness of conditions of confinement.[141] All of these changes clearly indicate that juvenile courts punish youths for their past offenses rather than treat them for their future welfare.[142]

Although a few states allow juveniles jury trials as a matter of state law,[143] the vast majority of states do not. In the three decades of criminalizing juvenile justice since *McKeiver*, advocates of jury trials have advanced several constitutional arguments to circumvent that plurality decision.[144] Some have argued that juveniles should

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Juvenile Justice System, 48 VAND. L. REV. 479, 500 (1995) (equating mandatory minimum sentences with retribution).

140. *See, e.g.*, Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, *in* 24 CRIME AND JUSTICE: A REVIEW OF RESEARCH 189, 223-29; Ainsworth, *supra* note 72, at 1105-06 (describing role of "just deserts" in juvenile sentencing). Feld, *Violent Youth*, *supra* note 124, at 1087-94.

141. *See In re* D.J., 817 So. 2d 26, 37 (La. 2002) (Johnson, J., dissenting) ("The four Louisiana Training Institutes to which convicted juvenile offenders are sent are reportedly the scenes of the most violent and abusive practices of any children's prisons in the nation.") (quoting Fox Butterfield, *Few Options or Safeguards In a City's Juvenile Courts*, N.Y. TIMES, July 22, 1997, at A1); DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES 7-9 (1994) (describing institutional crowding and violence as pervasive problems); Feld, *Punishment, Treatment*, *supra* note 118, at 891-96 (analyzing empirical evaluations of institutions and juvenile "right to treatment" cases challenging conditions of confinement).

142. *See generally* Ainsworth, *supra* note 72; Feld, *Punishment, Treatment*, *supra* note 118; Sheffer, *supra* note 139.

143. *See, e.g.*, COLO. REV. STAT. § 19- 2-107 (2002); MASS. GEN LAWS ANN. ch. 119, § 55A (2002); MICH. COMP. LAWS ANN. § 712A. 17(2) (2001); MONT. CODE ANN. § 41-5-1502(1) (2001); N.M. STAT. ANN. § 32A-2-16.A (Michie 2003); TEX. FAM. CODE ANN. § 54.03(C) (Vernon 2002); W. VA. CODE § 49-5-6 (2001); WYO. STAT. § 14-6-223(C) (2003).

144. Virtually all of the academic commentary on *McKeiver* has been critical of its analysis and constitutional ruling. *See, e.g.*, Ainsworth, *supra* note 72; Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875 (1995); Feld, *Violent Youth*, *supra* note 124; Barbara F. Katz, *Juveniles Committed to Penal Institutions—Do They Have The Right to a Jury Trial?*, 13 J. FAM. L. 675 (1974); Edward J. McLaughlin & Lucia Beadel Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force, and NAC Standards*, 46 BROOK. L. REV. 1 (1979); Sanborn, *supra* note 113; Carol R. Berry, Comment, *A California Juvenile's Right to Trial by Jury: An Issue Now Overripe for Consideration*, 24 SAN DIEGO L. REV. 1223 (1987); W.J. Keegan, Comment, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L.J. 811 (1977); Carlan J. Kraft, Note, *A Right to a Jury Trial for Juveniles?—The Implications of McKeiver*, 49 N.D. L. REV. 6725 (1973); Korine L. Larson, 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 (1994); David C. Owens, Comment, *Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's 'Three*

enjoy a constitutional right to a jury as a matter of Equal Protection.[145] Others have urged state supreme courts to interpret their state constitutions to find a state constitutional right to a jury trial.[146]

The strongest and most fundamental challenges contend that changes in juvenile justice administration require a re-examination of *McKeiver*'s factual premise that juvenile courts only treat, rather than punish, delinquents. *McKeiver* never analyzed the differences between treatment in juvenile court and punishment in criminal court,[147] and virtually every state has revised and greatly "toughened" its juvenile codes in the decades since that decision.[148] Whether or not the Court properly decided *McKeiver* in 1971, legislative amendments to states' juvenile codes have fostered a punitive convergence with criminal courts and completely eroded the rationale for less effective procedural safeguards in delinquency trials.[149] In short, the unproved factual premise on which the Court

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Strikes' Legislation, 29 U.C. DAVIS L. REV. 437 (1996).

145. *See, e.g.*, *In re* T.M., 742 P.2d 905, 911-12 (Colo. 1987) (rejecting the argument that state and federal equal protection clauses grant juveniles the same right to a jury trial enjoyed by adult criminal defendants); *In re* D.J., 817 So. 2d 26, 40 (La. 2002) (Johnson, J., dissenting) ("Equal protection of the laws requires that, upon his request, a juvenile is entitled to receive the same mode of jury trial which is available to an adult charged with the same offense."); *In re* K.A.A., 410 N.W.2d 836, 841 (Minn. 1987) (stating that a juvenile does not have an equal protection right to waive juvenile court jurisdiction in order to obtain jury trial in criminal court); State v. Little, 423 N.W.2d 722, 725 (Minn. Ct. App. 1988) (holding that equal protection does not prohibit use of juvenile priors to enhance adult sentences because obtained without right to a jury trial); State v. Schaaf, 743 P.2d 240, 248-50 (Wash. 1987) (holding that age is not a suspect category and does not require strict scrutiny of procedural differences between juvenile and adults).

146. Prior to *McKeiver*, some state supreme courts had found a state constitutional right to a jury trial. *See* R.L.R. v. State, 487 P.2d 27, 32 (Alaska 1971); Peyton v. Nord, 437 P.2d 716, 722-26 (N.M. 1968) (holding that juveniles have constitutional right to jury trial for offenses that would be felonies if committed by an adult); State v. Benjamin C., 781 P.2d 795, 797-99 (N.M. Ct. App. 1989) (showing that New Mexico state constitutional right to a jury trial does not extend to offenses that would be misdemeanors if committed by an adult).

Most delinquents' attempts to obtain recognition of a state constitutional right to a jury trial have failed. *See, e.g.*, *In re* Myresheia W., 72 Cal. Rptr. 2d 65, 69 (Cal. Ct. App. 1998); State *ex rel.* Juvenile Dep't of Klamath County v. Reynolds, 857 P.2d 842, 850 (Or. 1993); State v. Lord, 822 P.2d 177, 215 (Wash. 1992).

147. *See supra* notes 118-123 and accompanying text.

148. *See, e.g.*, TORBET ET AL., *supra* note 139, at 4, 7, 25-27; Feld, *supra* note 140, at 189.

149. *See, e.g.*, *In re* D.J., 817 So. 2d 26, 30 (La. 2002) (stating the juveniles' argument that "this policy-based analysis applied more than 20 years ago when

based *McKeiver* simply does not exist today.

Despite the vast change in juvenile justice policy and sentencing practices since *McKeiver*, appellate courts consistently reject these constitutional arguments.[150] They sometimes use a "glass half-full"

McKeiver and *Dino* were decided is outdated and that recent changes in state law, as well as an ongoing national critique of the juvenile justice system, render the reasoning behind the two cases outdated and inapplicable to current conditions").

In *State v. Hezzie R.*, 580 N.W.2d 660, 668-70 (Wis. 1998), juveniles argued that substantial legislative amendments—changes in purpose clause to emphasize accountability and community protection, statutory relocation of juvenile code next to criminal code, provisions for long term secure confinement, and the increased collateral consequences of delinquency convictions including to increase adult sentences—effectively had converted the juvenile code into a "criminal code." The majority upheld the legislative amendments, including the repeal of a statutory right to a jury trial, as "consistent with the United States Supreme Court's decision in *McKeiver* and . . . with a majority of the states in the union which have determined that juveniles do not have a state or federal constitutional right to a trial by jury in the adjudicative phase of a juvenile delinquency proceeding." *Id.* at 678. The dissent argued that the court should focus on the changes in the juvenile code in its entirety to decide whether its "purpose and effect is [so] criminal in nature" as to require a jury trial. *Id.* at 687. It concluded that Wisconsin had shifted the focus of its juvenile justice system and that "[w]e must either restore the juvenile court's primary rehabilitative approach or restore the constitutional right of juveniles to trial by jury." *Id.*

In *In re J.F. and G.G.*, 714 A.2d 467, 469 (Pa. Super. Ct. 1998), the Pennsylvania Superior Court confronted the question whether the legislative amendment had "radically transformed the nature and function of Pennsylvania's juvenile court from a benevolent institution concerned with the welfare and rehabilitation of young offenders into a more punitive system, much more akin to the adult criminal justice system." After analyzing the various legislative changes, the court "cannot conclude that . . . adjudication has . . . become the equivalent of an adult criminal proceeding." *Id.* at 471. After going through a "glass-half-full" analysis, the court opined that "[m]uch of the reasoning of the plurality in *McKeiver*, despite the changes in society and the juvenile system in the intervening twenty-seven years, remains valid and compelling in reference to the juvenile court system of today." *Id.* at 473; *see generally* Ainsworth, *supra* note 72, at 1105 ("[S]entences in the new punitive juvenile court are designed to hold the youth accountable for the offense committed; any rehabilitative services or programs provided during incarceration are incidental to the punishment meted out. The 'just deserts' sentencing model bases the length of incarceration on how much punishment the offense merits, not on how long it might take to reform the offender."); Feld, *supra* note 92 at 246-62; Feld, *Punishment, Treatment*, *supra* note 118; Feld, *Violent Youth*, *supra* note 124, at 1099-108; Kropf, *supra* note 113, at 2150 ("[A]lthough *McKeiver* may have been correctly decided in 1971, it should be reexamined in light of the fundamental changes in the juvenile justice system. Specifically, the Supreme Court should overrule *McKeiver* and guarantee the jury trial right to juveniles charged with nonpetty offenses. In turn, courts should not use juvenile convictions entered after nonjury trials to enhance adult sentences under the Guidelines.").

150. State court decisions have denied juveniles the right to a jury trial. *See, e.g.*, Raines v. State, 317 So. 2d 559, 562-63 (Ala. 1975); Elkins v. State, 646

rather than "glass half-empty" logic to distinguish delinquency trials from criminal prosecutions.[151] In other instances, they uncritically invoke *McKeiver* as continuing authority despite the complete erosion of its three-decades-old jurisprudential foundation.[152] And, in a few states, legislators have added insult to injury and retracted a previous statutory right to a jury trial even as they increased the punitiveness of the juvenile justice system.[153] While appellate courts

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S.W.2d 15, 17 (Ark. Ct. App. 1983); *In re* T.M., 742 P.2d 905, 909-11 (Colo. 1987) (denying jury trial for misdemeanors when court does not order incarceration); *In re* Dino, 359 So. 2d 586, 597-98 (La. 1978); *In re* K.A.A., 397 N.W.2d 4, 5-6 (Minn. Ct. App. 1987), *rev'd on other grounds*, 410 N.W.2d 836 (Minn. 1987); *cf. In re* Javier A., 206 Cal. Rptr. 386, 430 (Cal. Ct. App. 1984) (showing an appellate court urging California Supreme Court to reconsider earlier decision denying juveniles the right to a jury trial); *In re* C.B., 708 So. 2d 391, 400 (La. 1998) (stating that a juvenile has a right to a jury trial if the related judicial proceeding is more "criminal" than "civil" in nature); *In re* J.F. & G.G., 714 A.2d 467, 475 (Pa. Super. Ct. 1998) (analyzing the juvenile's right to a jury trial in light of policy underlying the juvenile justice system); State v. Hezzie R., 580 N.W.2d 660, 678 (Wis. 1998) (holding that, under state law, juveniles have a right to a jury trial in criminal but not civil proceedings); B. Finberg, Annotation, *Right to Jury Trial in Juvenile Court Delinquency Proceedings*, 100 A.L.R.2d 1241 (1965 & Supp. 1997) (summarizing state cases analyzing juveniles' right to a jury trial).

151. *See, e.g., In re* D.J., 817 So. 2d at 33 (La. 2002) ("[N]otwithstanding the changes in the juvenile justice system discussed above, there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime."); State v. Schaaf, 743 P.2d 240, 243 (Wash. 1987) ("The fact that juveniles are accountable for criminal behavior does not erase the differences between adult and juvenile accountability. The penalty, rather than the criminal act committed, is the factor that distinguishes the juvenile code from the adult criminal justice system .... [T]he purpose of the juvenile system is to provide an alternative to incarceration in adult correctional facilities."); State v. Rice, 655 P.2d 1145, 1150-51 (Wash. 1982) ("[T]he [Juvenile Justice Act] has not utterly abandoned the rehabilitative ideal which impelled the juvenile justice system for decades. It does not embrace a purely punitive or retributive philosophy. Instead, it attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution.").

152. *In re* D.J., 817 So. 2d at 34-35 (La. 2002) ("While we recognize that the Louisiana juvenile justice system is far from perfect, we are 'not yet ready to spell the doom of the juvenile court system by requiring jury trials in juvenile adjudications.'" (quoting *In re* C.B., 708 So. 2d 391, 398 (La. 1998)); *In re* C.B., 708 So. 2d 391, 398 (La. 1998); *In re* J.F. & G.G., 714 A.2d 467, 470 (Pa. Super. Ct. 1998); State v. Hezzie R., 219 Wis. 2d 848, 892, 580 N.W.2d 660, 676 (1998).

153. *See* State v. Hezzie R., 580 N.W.2d 660, 668 (Wis. 1998); *see also* Kara E. Nelson, Comment, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1105 (1998) (analyzing changes in Wisconsin's juvenile justice laws and noting that the "Code favors societal protection and personal accountability over rehabilitation and the juvenile's best interests"); Jaime L. Preciado, Comment,

caution that at some point, a juvenile justice system may become so punitive as to cross the line into criminalization and require a jury trial, courts only find that states cross that line when a statute authorizes juveniles convicted without a jury trial to be confined in adult penal facilities.[154]

A danger exists in advocating jury trials for delinquents. A relationship exists between procedural formality and sentencing severity in juvenile courts.[155] More formal, bureaucratized juvenile courts hold more youths in pretrial detention and sentence more severely similarly charged offenders than do more traditional, informal juvenile courts.[156] Providing the right to a jury trial and procedural parity with adults might encourage some legislators to seek more penal "bang for the buck" and to impose even longer sentences on delinquents.[157] Procedural formality also creates

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The Right to a Juvenile Jury Trial in Wisconsin: Rebalancing The Balanced Approach, 1999 WIS. L. REV. 571, 605-06 (1999) (criticizing legislation repealing statutory right to jury trial in light of increased punitiveness of juvenile code).

154. The statute in Louisiana authorized the department of correction to transfer convicted juveniles to adult prisons when the youth turned seventeen, even though they were denied a right to a jury trial at the time of their delinquency adjudication. *In re* C.B., 708 So. 2d 391, 400 (La. 1998) ("We therefore hold that the statute through its corresponding regulation has sufficiently tilted the scales away from a 'civil' proceeding, with its focus on rehabilitation, to one purely criminal."); *see also* State v. Hezzie R., 219 Wis. 2d 848, 887-88, 580 N.W.2d 660, 674 (1998) ("Juveniles transferred under these provisions are subject to placement in the exact environment to which adults with criminal convictions are subject. In addition, those juveniles are subject to being housed with the general population of criminally convicted adults. However, the juvenile subject to placement in adult prisons are not afforded the right to a trial by jury, unlike the adult offenders.").

155. *See, e.g.*, BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 238 (1993) ("A relationship between procedural formality and the severity of sanctions prevailed whether the higher rates of representation were associated with urbanism . . . or the presence of lawyers per se . . . . The more formal courts, where lawyers appeared routinely, sentenced juveniles more severely than did the informal courts where the presence of lawyers was the exception . . . .") [hereinafter FELD, JUSTICE FOR CHILDREN]; Barry C. Feld, *Justice By Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration,* 82 J. CRIM. L. & CRIMINOLOGY 156, 157-58 (1991).

156. *Id.* at 208 ("This study provides even stronger support for the formality-severity relationship. The urban courts sentenced youths charged with similar offenses more severely than did the suburban or rural courts. The pattern of urban severity remained even after controlling for the present offense and prior record.").

157. *See, e.g.*, Feld, *supra* note 124, at 1105-06 ("Some Task Force members denied juveniles the right to a jury based on a political calculus about the impact of such a recommendation on the legislature . . . . Task Force members

perverse incentives to plea bargain which subverts any procedural rights granted.[158] Ultimately, granting the right to a jury might realize *McKeiver*'s ultimate fear of providing impetus for the abolition of the juvenile court.[159] While the future of the juvenile court as a separate institution remains a controverted issue,[160] as

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feared that equating juvenile and adult criminal procedures would strengthen the position of 'get tough' legislators who wanted to exclude offenses from juvenile court jurisdiction and who could argue that procedural equality with adults should produce correspondingly longer sentences.").

158. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001) (stating one explanation for the expansion of criminal liability is that "prosecutors keep courts at bay by using the charging opportunities legislators give them to generate guilty pleas. Guilty pleas, of course, avoid adjudication altogether; they leave courts very little role to play."). Stuntz argues that a natural bureaucratic alliance exists between legislators interested in re-election who advocate "get tough" and symbolic crimes, and prosecutors and police who desire new crimes or over-lapping crimes that facilitate their enforcement and plea bargain strategies in the most cost-effective manner. *Id.* at 534. Elected prosecutors share some of the same incentives as politicians, and both are more inclined to pursue strategies that reduce the costs of enforcement. *Id.* at 535. The result is an increased premium on plea bargains to avoid trials or appellate review and reversal. *Id.* at 536-37.

> But there is more than one way to hold costs down: if the number of cases cannot be reduced, the incentive is to reduce the time and energy spent on each case. The best way to do *that* is to convert potential trials into guilty pleas .... Guilty pleas are not simply cheaper than trials; they are enormously cheaper. And prosecutors' bargaining strategies tend to ensure that this remains so. The literature on plea bargaining suggests that most prosecutors insist on bargains very early in the process, and punish defendants who resist settlement until shortly before trial.
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> So prosecutors have some incentive to keep costs down, which they can do either by limiting the number of cases filed or by limiting the amount of time and energy expended per case .... Recall that legislatures can push toward greater efficiency by expanding criminal law, thereby making it easier for prosecutors to obtain guilty pleas. If crimes are defined in ways that make guilt hard to prove, the threat of trial will be less serious to many defendants, and the inducements to plead will be accordingly less substantial. If, on the other hand, crimes are defined so as to make conviction easy, the threat value of trial is increased. And if prosecutors are able to threaten defendants who take their cases to trial with a range of overlapping charges that produce a severe sentence, the ability to induce a plea is magnified still more.

Id. at 536-37 (citation omitted).

159. McKeiver v. Pennsylvania, 403 U.S. 441, 551 (1971) ("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.").

160. *See, e.g.*, Ainsworth, *supra* note 72, at 1085 (arguing that "the supposed benefits of juvenile jurisdiction do not depend on the existence of a separate

currently administered, juvenile courts pose substantial questions about the quality of delinquency adjudications and the appropriateness of using those convictions for sentence enhancements following *Apprendi*.

1. Accurate Fact-Finding and Judge versus Jury Reasonable Doubt

Apprendi emphasized the importance of the jury to assure the constitutional reliability of fact-finding and to uphold the standard of proof beyond a reasonable doubt. The Supreme Court's conclusion in *McKeiver* that states do not need to provide juries to assure accurate fact-finding follows neither the logic nor the policies in *Winship*,[161] and fails to take account of the real differences in fact-finding processes between juries and judges. *Winship* reasoned that the seriousness of the proceedings and the potential consequences for a defendant, whether juvenile or adult, required proof beyond a reasonable doubt to avoid convicting innocent people.[162] Having the

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juvenile court, and that juveniles would receive positive advantages from being tried within a unified criminal justice system"); Ainsworth, *supra* note 114, at 930; Gary L. Crippen, *The Juvenile Court's Next Century—Getting Past the Ill-Founded Talk of Abolition*, 2 U. PA. J. CONST. L. 195, 198 (1999); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990); Feld, *supra* note 114, at 128, 133 (arguing for abolition of juvenile court, trial of all offenders in a unified criminal court, and separate sentencing policy for younger offenders); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 182-84 (1993) (arguing that legislatures would not give juveniles either greater procedural protections or shorter sentences in a unified criminal court); Stephen Wizner and Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete*, 52 N.Y.U. L. REV. 1120, 1133 (1977) ("But if the goal — and limit—of juvenile delinquency proceedings is to be prosecution and sentencing of criminal offenders, if sentencing is to be proportional to the seriousness of the criminal offense and prior record of the offender, and if participation in rehabilitative programs by incarcerated offenders is to be voluntary, then how do juvenile delinquency proceedings differ from criminal proceedings?"); David Yellen, *What Juvenile Court Abolitionists Can Learn From the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 602 (1996); Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2493-95 (2000) (arguing for separate juvenile court as a means of insulating youth against criminal sanctions imposed on adults).

161. *In re* Winship, 397 U.S. 358 (1970); *see supra* notes 93-96 and accompanying text.

162. *Winship*, 397 U.S. at 363-64; *cf.* Addington v. Texas, 441 U.S. 418, 428-29 (1979) (showing that the Court's adoption of "clear and convincing" standard of proof in civil commitment proceedings is consistent with *Winship* because commitment proceedings are not punitive and mentally ill person benefit from treatment during commitment).

same rigorous standard of proof for both adults and juveniles assures the greatest possible factual accuracy, protection against government oppression, public confidence in decisions, and the likelihood of similar outcomes in juvenile and criminal proceedings.

McKeiver's rejection of jury trials for juveniles, however, undermines factual accuracy and creates the strong probability that outcomes will differ in delinquency and criminal trials.[163] Because there is no way to know the "correct" outcome or how an "ideal" decision-maker should resolve a factually disputed case, most research compares the decisions of jurors with those of judges, the only other decision-maker practically available. These comparisons indicate that juries serve special protective functions to assure the accuracy of factual determinations. Although judges and juries agree in their judgments of defendants' guilt or innocence in about four-fifths of cases, when they differ, juries are far more likely to acquit defendants than are judges given the same types of evidence.[164]

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163. PETER GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA: A REPORT TO THE LEGISLATURE 30-31 (1983) (comparing the attrition rates of similar types of cases in juvenile and adult courts in California and concluding that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases"); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 183, 185-90, 209-13 (1966) (noting the differences in interpretation of "reasonable doubt" between judge and jury and the role of the youthfulness of defendant in eliciting sympathy).

164. *See, e.g.*, JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 4 (1979) (discussing a judge's independent assessment of verdicts and his conclusion that juries reached correct verdict in at least 85% of cases); KALVEN & ZEISEL, *supra* note 163, at 58-59 (comparing juries' actual verdicts and judges' hypothetical verdicts in civil and criminal cases and found agreement 78% of the time; juries acquit 16% more often than judges); Ainsworth, *supra* note 72, at 1123 ("[I]t is one of the less well-kept secrets of our criminal justice system that juries acquit more frequently than do judges . . . . [A] defendant ordinarily stands a far better chance with a jury trial than with a bench trial."); Rebecca Bromley, *Jury Leniency in Drinking and Driving Cases Has it Changed? 1958 versus 1993*, 20 LAW & PSYCHOL. REV. 27, 27 (1996) (showing juries more lenient than judges in DUI cases); Valerie P. Hans, *Jury Decision Making*, *in* HANDBOOK OF PSYCHOLOGY AND LAW 56, 65 (D.K. Kagehiro and W.S. Lavfor eds., 1992) ("When they disagreed in criminal cases, juries were more likely than judges to find the defendant not guilty."); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 46 (1994) ("[I]n both criminal and civil trials, judges in our sample are somewhat more likely to convict or find for the plaintiff."); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 44-45 (1997) (reviewing studies comparing judge and jury decision-making); Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 329 (1971).

Fact-finding by judges and juries is inherently different, because the former may preside over hundreds of cases annually while the latter may hear only one or two cases in a lifetime.[165] As a result of routinely hearing many cases, judges sometimes become less meticulous in considering evidence, evaluate facts more casually, and apply less stringently the concepts of "reasonable doubt" and "presumption of innocence" than do jurors.[166] Although the personal characteristics of judges differ from those of jurors, defendants have greater difficulty learning how those individual qualities might affect the decision in a case.[167] Through *voir dire*,

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165. While decision-making by an exceptional judge will outperform most juries, average juries generally will make better decisions than average judges.

> Basic research and theory on group decision-making indicate that for the sorts of decision tasks posed by trials, groups generally outperform individuals. They bring more informational and cognitive resources to the task. Larger groups, certainly up to size twelve, afford a greater probability of someone having or seeing or remembering information essential to reaching correct factual conclusions.

Saks, *supra* note 164, at 42-43 (citations omitted). Juries and judges react differently to the same evidence because of the novelty of deciding cases.

> A judge who has presided over numerous trials in which the accused invoked such a defense falsely (or, more precisely, in which the judged deemed the defense to be false) cannot help but be skeptical when yet another defendant or juvenile respondent comes forward with the same story. Accordingly, unlike a jury which would assess the accused's credibility with an open mind, a judge may start from the cynic's position that the story is false until proven otherwise.

Guggenheim & Hertz, *supra* note 89, at 575 (citations omitted). *See also* Lisa Forquer, Comment, *California's Three Strikes Law—Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 SAN DIEGO L. REV. 1297, 1336 (1995) ("[H]eavy juvenile court caseloads . . . may result in the court becoming 'less meticulous in considering the evidence' or the court applying 'less stringent concepts of reasonable doubt and presumption of innocence.'").

166. *See, e.g.*, Guggenheim & Hertz, *supra* note 89, at 564 (reviewing a number of appellate reversals of bench trial verdicts that call into question the fairness and quality of judicial decision-making). "The case law suggests that judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt." *Id.* Because appellate courts indulge a strong presumption in favor of fact-findings by the trial judge, they only may reverse a case for insufficient evidence when no rational fact finder could have found as the trial court did. *Id.* at 566. Judges may rely on stereotypes based on previous cases which can bias their decision-making in the present one. *See, e.g.*, Ronald A. Farrell & Malcolm D. Holmes, *The Social and Cognitive Structure of Legal Decision-Making*, 32 SOC. Q. 529, 532-33 (1991) (showing that court actors internalize crime stereotypes as cognitive schemata that provide a shorthand for information-processing in a system characterized by time and resource constraints).

167. Saks notes,

> Judges are lawyers; lawyers are people who, disproportionately more

litigants may examine jurors about their attitudes, beliefs, and experiences to assess how they may affect the way they will decide the case, but defendants have no comparable opportunity to explore a judge's background to determine how her experiences might influence her decisions.

Juries and judges evaluate testimony differently. Juvenile court judges hear testimony from police and probation officers on a recurring basis and develop a settled opinion about their credibility.[168] Similarly, as a result of hearing earlier charges against a juvenile or presiding over a detention hearing or pre-trial motion to suppress evidence, a judge already may have a pre-determined view about a youth's credibility and character or the merits of the case.[169] Fact-finding by a judge differs from that by a

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> than most educated Americans, are uncomfortable with quantitative, scientific, and technological information; avoided it as students, and are incompetent with it as adults. By contrast, a well assembled jury containing a high school science teacher, an accountant, or an engineer, should have greater potential than the average judge to understand complex technical or quantitative evidence.

Saks, *supra* note 164, at 43.

168. Guggenheim & Hertz, *supra* note 89, at 568, report a pattern of:

> [T]rial judges unduly leaning in the prosecution's favor when appraising the evidence. There are numerous instances in which the appellate courts have reversed trial court rulings denying motions to suppress evidence because the higher court concluded that the trial judge had credited police testimony that was so obviously false that the prosecution did not meet its minimal burden of producing a credible witness.

One reason that judges may unduly credit questionable testimony is their familiarity with the witnesses.

> [J]udges who sit in a criminal or juvenile court for years come to know the police officers of the jurisdiction. If the judge knows that a particular officer is a "good cop" and particularly if the judge has found that the officer testified truthfully in previous cases, the natural tendency is to presume that the officer would not lie.

Id. at 574.

169. Numerous studies indicate that jurors exposed to inadmissible evidence, such as a defendant's prior record, may use it impermissibly to infer that the defendant committed the present offense. Saks, *supra* note 164, at 26. However, studies of judicial decision-making indicate that judges are not impervious to the affects of prejudicial exposure to inadmissible evidence. *See, e.g.*, Guggenheim & Hertz, *supra* note 89, at 574-75 ("[A] judge's experience in presiding over criminal and juvenile cases may make the judge unduly skeptical of the testimony of the accused. Judges who sit for years in a criminal or juvenile court tend to hear the same stories over and over . . . . A judge who has presided over numerous trials in which the accused invoked such a defense falsely (or, more precisely, in which the judge deemed the defense to be false) cannot help but be skeptical when yet another defendant or juvenile respondent comes forward with the same story."); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on*

jury because an individual fact-finder does not have to discuss either the law or the evidence with a group before reaching a conclusion.[170] Indeed, Justice Blackmun, who wrote the *McKeiver* plurality opinion, later recognized the superiority of group decision-making over individual judgments in *Ballew v. Georgia*,[171] which defined the constitutional minimum number of jurors whom a state must empanel.[172] Some group members remember facts that others may forget, and the give-and-take of group deliberations promotes more accurate outcomes by airing competing points of view.[173] Although a

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Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113, 119-25 (1994); Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERSONALITY & SOC. PSYCHOL. 739 (1992).

170. Jurors from different walks of life bring "a variety of different experiences, feelings, intuitions and habits" to bear when they assess the credibility of witnesses and the facts. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955). As a consequence, "By drawing upon a pool of twelve people's experiences and perspectives, rather than a single judge's, the jury model increases the likelihood that witnesses' credibility will be assessed accurately and facts correctly found." Guggenheim & Hertz, *supra* note 89, at 576. One consequence of reducing the number of decision-makers is to increase the variability and unpredictability of outcomes. Saks, *supra* note 164, at 14 ("The conclusion of nearly every statistician and social scientist who has examined the question has been that reducing the size of the decision-making group is a recipe for increasing the variance of the decisions rendered.").

171. 435 U.S. 223, 232-39 (1978).

172. *Id.* at 233-34.

> When individual and group decisionmaking were compared [in social scientific studies], it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups . . . exhibited . . . self-criticism . . . . Because juries frequently face complex problems laden with value choices, the[se] benefits are important . . . . In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.

Id. at 233-34.

173. Guggenheim & Hertz, *supra* note 89, at 578, observe that the process of acting as a judge may detract from the accuracy of fact finding. Unlike jurors, whom most states prohibit from taking notes, judges try to maintain an on-going record.

> [E]ven the most assiduous note-taking judge may neglect to jot down an important response by a witness or argument of counsel because the judge failed to appreciate its significance at the time. Moreover, in her effort to take careful notes, the judge may fail to notice some meaningful aspect of a witness's demeanor or some highly salient gesture or meaningful glance by the witness while on the stand. Indeed, judges suffer from a particular disadvantage in this regard because, unlike jurors, their attention is constantly diverted by the need to resolve pending evidentiary matters, to control the courtroom, and to attend to a series of clerks and lawyers filing in and out of the courtroom.

judge instructs a jury about the law to apply to the case, in a bench trial the judge does not explicitly state the law, and this makes it more difficult to know whether the judge correctly understood and applied it.

The youthfulness of a defendant is another factor that elicits jury sympathy and accounts for some of the differences between jury and judge trial outcomes.[174] Consequently, it is easier to convict a youth in juvenile court without a jury than to convict a younger person in a criminal proceeding. Indeed, juvenile court judges may be more predisposed to find jurisdiction than criminal court judges or juries in order to "help" an errant youth.[175] A comparison of the

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> A final advantage of group decisionmaking, and perhaps the most important one, is that the give-and-take of a discussion format promotes accuracy and good judgement by ensuring that competing viewpoints are aired and vetted. As social scientific studies of decisionmaking by juries and other groups have shown, group members common reconsider and change even the firmest of prejudgements as they come to appreciate the complexities of a subject and take heed of viewpoints which they initially did not recognize or sufficiently value.

Id. at 578-79; *see also* Heuer & Penrod, *supra* note 164, at 30 ("[N]ot all judges are bright and diligent and because they do not have the advantages of collective recall, they may be incapable of rendering more rational decisions than juries . . . . [J]uries are less influenced by the political implications of their decisions, partly because, unlike many judges, they were not chosen because of their political biases.").

174. KALVEN & ZEISEL, *supra* note 163, at 209-13. Although Kalven and Zeisel conducted their research in adult criminal proceedings, they concluded that the youthfulness of a defendant was the personal characteristic that elicited the greatest sympathy from jurors. *Id.* at 210.

175. Guggenheim & Hertz, *supra* note 89, at 569-70, suggest a variety of institutional and ideological reasons why individual judges' biases may incline them to convict youths more readily.

> Some judges may tip the balance in the prosecution's favor to guard against acquiring a reputation for being "soft on crime," a reputation which can jeopardize a judge's prospects for re-election or reappointment to the bench. Judges who conduct bench trials in criminal or delinquency cases also may over-convict in close cases out of a misguided notion that the best way to protect the community from potentially dangerous offenders is to err on the side of conviction . . . . Finally, judges in the juvenile court setting may inappropriately lean in favor of conviction in order to ensure that youths in need of rehabilitative services will receive them as a condition of probation or placement.

Id. at 569-70. *See also* People v. Smith, 1 Cal. Rptr. 3d 901, 926 (Cal. Ct. App. 2003) (Johnson, J. dissenting) ("In the juvenile context, the real danger in fact may come not as much from 'compliant, biased, or eccentric judges', as from the 'kindly, fatherly or motherly judge' who sees a youngster mired in a horrendous environment and wants to rescue the juvenile before it is too late. The temptation, often irresistible, is to remove the child from those terrible circumstances even though that may require bending the reasonable doubt

outcomes of cases in juvenile and adult courts with comparable evidence suggests that it is easier to convict a delinquent in juvenile court than a defendant in criminal court.[176]

The greater flexibility and informality of non-jury, closed proceedings in juvenile court compounds the differences between judge and jury "reasonable doubt" and places delinquents at a further disadvantage. Juvenile court judges preside at detention hearings and receive prejudicial information about a youth's offense, criminal history, and social circumstances prior to trial. This increases the likelihood that a juvenile court will convict and subsequently institutionally confine her.[177] The lack of a jury allows judges to conduct suppression hearings during the trial, exposes them to prejudicial information about the youth, and further increases the likelihood of erroneous conviction.[178]

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standard in order to find him or her guilty of the charged offense.").

176. *See* GREENWOOD ET AL., *supra* note 163, at 30-31.

177. *See supra* note 169, and accompanying text. *See also* Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 212 (1998) ("Another problematic aspect of juvenile court procedure is the abundance of contaminants that diminish the prospect of impartial fact finding. In many juvenile courts the same individual conducts both preliminary/detention hearings as well as the adjudicatory hearing. This exposes the fact finder to prejudicial information (like prior record) that is inadmissible at the trial stage. Often, juvenile court judges also are familiar with defendants from previous prosecutions . . . .").

178. *See* Feld, *Criminalizing*, *supra* note 92, at 231-41.

> Whenever a judge knows information that it not admissible at trial but is prejudicial to a defendant, the impartiality of the tribunal is open to question. The presumption that judges can successfully compartmentalize admissibility and guilt is a frail reed on which to build an adjudicative apparatus. The presumption against evidentiary "seepage" is particularly troublesome in juvenile court proceedings because the same judge typically handles the same case at different stages. For example, at a detention hearing, a judge may be exposed to a youth's "social history" file and the youth's prior record of police contacts and delinquency adjudications, all of which bear on the issue of the appropriate placement of the youth. When the same judge is subsequently called on to determine the admissibility of evidence in a suppression hearing and the guilt of the juvenile in the same proceeding, the risks of prejudice become almost insuperable. To whatever degree a judge is unable to compartmentalize, a juvenile is denied the basic right to a fair trial by an impartial tribunal with a determination of guilt based on admissible evidence.

Id. at 239-40. Guggenheim and Hertz, *supra* note 89, at 571, identify other sources of evidentiary contamination which may prejudice judicial fact-finding:

> [T]rial judges are often exposed to inadmissible, extra-record evidence. Such evidence often suggests, and sometimes virtually proves incontrovertibly, that the accused committed the crime(s) charged. For example, by presiding at a pretrial suppression hearing that

Criminal guilt does not involve just "factual guilt," but entails a complex assessment of moral culpability.[179] The power of nullification provides the link between the legislature's original decision to criminalize conduct and the community's sense of justice when it applies the law to the facts of a particular case.[180] Analysts attribute the differences in decision-making outcomes between juries and judges to various factors, including differences in jury-judge evaluations of evidence, jury sentiments about the "law" (jury equity), and jury sympathy for the defendant.[181] Kalven and Zeisel

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> results in the suppression of evidence (a statement of the accused, tangible evidence, or identification testimony), the judge will be apprised of highly incriminating evidence that is inadmissible at trial and would be kept from a jury. By presiding over the trial or a guilty plea of a co-respondent or adult co-perpetrator, the judge may hear another individual implicate the accused. In the course of encouraging the parties to settle the case with a guilty plea, the judge may learn from defense counsel that the accused admits guilt. Even in cases where the judge lacks such extra-record information about the accused's involvement in the charged crime, the judge may learn inadmissible information about the accused's prior record as a result of presiding over prior hearings in the case or while resolving evidentiary matters at trial.

Id.

179. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160-68 (1968) (analyzing distinction between "factual" and "legal guilt"); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 214 (1983).

180. *Id.* at 215; *see* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 51 (1980).

181. The Court in *Duncan v. Louisiana* emphasized that

> juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

391 U.S. 145, 157 (1968); *see also* KALVEN & ZEISEL, *supra* note 163, at 182, 185-90; Hans, *Jury Decision Making*, *supra* note 164, at 65 ("Disagreements [about outcomes] are caused by the judge and jury's divergent reactions to factors in the case, such as different standards of reasonable doubt, sympathy for the defendant, and the jury's quarrel with the law itself . . . . In disagreeing with the judge for specific reasons in particular cases, the jury reflected community motions of equity and justice that were at odds with judicial views."); Timothy E. Foley, Comment, *Juveniles and their Right to a Jury Trial*, 15 VILL. L. REV. 972, 992-95 (1970). BALDWIN & MCCONVILLE, *supra* note 164, at 48, analyzed jury verdicts in England and made similar findings about patterns of acquittals in which judges would have convicted.

> The possibility that defendants may, in a strict legal sense, be wrongfully acquitted by jury might not of itself give cause for concern. Indeed, several writers have argued that it is at the heart of the jury's function to mitigate the harshness of certain laws or in other ways to introduce common sense and equity when the exercise of cold legal

attribute the substantial differences between judge and jury verdicts to the jury's use of a higher evidentiary threshold standard of "proof beyond a reasonable doubt."[182] They conclude that "[i]f a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system."[183] The factual and legal issues in delinquency hearings are exactly the same as those in criminal trials—has the state proven beyond a reasonable doubt that the defendant committed a crime? Given the importance of juries to answer this question, *McKeiver*'s decision to dispense with juries in juvenile court makes it easier to convict a youth appearing before a judge in juvenile court than it would be to convict an adult criminal defendant, on the basis of the same evidence, before a jury of detached citizens. *Apprendi* exempted "the fact of a prior conviction" from its holding because of the Court's confidence in the quality of the criminal justice system to produce reliable prior convictions.[184] The right to a jury trial was the fundamental constitutional predicate. The differences between the quality, validity, and reliability of delinquency adjudications compared with criminal convictions call into question the legitimacy of including them within *Apprendi*'s exception.

2. Right to Counsel and the Quality of Delinquency Adjudications

The lack of a right to a jury trial affects other aspects of juvenile

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judgment would be inappropriate or unjust. There is no doubt that, looking at acquittals as a whole, [judge] respondents often took the view that extra-legal considerations did influence, and in some cases determine, the jury's verdict. In most cases, respondents identified several factors which in their view explained the acquittal, and these frequently included matters which are usually considered to be part of 'jury equity'—sympathy with the defendant, disapproval of the behaviour of the victim, and the like.

Id. at 48.

182. KALVEN & ZEISEL, *supra* note 163, at 182, 185-90.

183. *Id.* at 189-90.

184. Apprendi v. New Jersey, 530 U.S. 466, 488 (2000) (noting that a defendant's criminal history is the result of judicial proceedings that met due process standards and is therefore supported by "substantial procedural safeguards of [its] own"). *See also* Huigens, *supra* note 4, at 404 (*Apprendi* "put in place the second of its two limitations on the broad principle that the facts that are used to justify punishment must be proved beyond a reasonable doubt to a jury."); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 233 (2002) ("[B]ecause of the significant differences between the juvenile and criminal courts, juvenile adjudications often lack the same level of reliability as criminal convictions.").

justice administration in important ways.[185] The informality of delinquency proceedings enables juvenile courts in many jurisdictions to adjudicate juveniles without the presence or assistance of an attorney which further prejudices the accuracy and reliability of the fact-finding process.[186] Studies in many states consistently report that juvenile courts adjudicate youths delinquent without the appointment of counsel.[187] Many other studies strongly

185. *See supra* notes 169, 177 and accompanying text; BARBARA FLICKER, PROVIDING COUNSEL FOR ACCUSED JUVENILES 2 (1983) ("[I]n some defender offices, assignment to 'kiddie court' is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments."); Ainsworth, *supra* note 72, at 1128 ("[L]awyers in juvenile courts are all too frequently both inexperienced and overworked. Particularly in jurisdictions where juveniles have no right to jury trial, public defender offices often assign their greenest attorneys to juvenile court to season them.").

186. *See generally* FELD, *supra* note 155; N. Lee Cooper et al., *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 654-60 (1998).

187. *See e.g.* Cooper et al., *supra* note 186, at 655-56, who note that

> prior to *In re Gault*, attorneys appeared on behalf of children in 5% of juvenile delinquency cases. Through an analysis of data from six states, . . . Professor Feld found that many jurisdictions still failed to appoint counsel in a majority of juvenile court cases. Large urban states were more successful at assuring juveniles the assistance of counsel, with rates of 85% to 95% representation, as opposed to 37.5% and 52.7% in Midwestern states . . . .
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> In Professor Feld's analysis of other studies on access to counsel, he reported wildly varying representation rates in different parts of individual states. For example, lawyer appointment rates ranged from 19.3% to 94.5% in different counties of Minnesota. Professor Feld attributed the disparities, in part, to different appointment of counsel practices in urban, suburban and rural areas . . . . Studies from other jurisdictions confirm Professor Feld's findings that access to counsel remains a serious problem in many states.

See also FELD, JUSTICE FOR CHILDREN, *supra* note 155; AM. BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 44-45 (1995) [hereinafter A CALL FOR JUSTICE] (noting that a large number of juveniles appear without counsel, often induced to waive representation by court's suggestion that "lawyers are not needed because no serious dispositional consequences are anticipated"); AM. BAR ASS'N, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 60 (1993) ("Many children go through the juvenile justice system without the benefit of legal counsel. Among those who do have counsel, some are represented by counsel who are untrained in the complexities of representing juveniles, and fail to provide 'competent' representation . . . . Under pressure from parents or judges, they often sign documents waiving their right to counsel, without understanding the implications of their decision."); GEORGE BURRUS & KIMBERLY KEMPF-LEONARD, ATTORNEY REPRESENTATION & IMPACT IN SERIOUS DELINQUENCY CASES: AN EVALUATION OF THREE MISSOURI CIRCUITS 60 (2000) ("[R]epresentation by legal counsel was relatively uncommon among

question the quality of representation that appointed attorneys provide for those delinquents who do receive the assistance of counsel.[188]

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juveniles who were accused of felony offenses in 1998 . . ."); GABRIELLA CELESE & PATRICIA PURITZ, THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 59-62 (2001) (observers in several parishes estimate 80% to 90% of delinquents waive right to counsel); GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 13 (1995) (wide range of variation in rates of representation among states and within states); PATRICIA PURITZ & KIM BROOKS, KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (2002) (despite efforts to improve delivery of legal services, "it is clear that large numbers of youth are still waiving counsel . . . ."); PATRICIA PURITZ ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24-25 (2002) (estimating that 50% of juveniles waived their right to counsel, regardless of the seriousness of the charges).

188. *See, e.g.*, A CALL FOR JUSTICE, *supra* note 187, at 52-56 (heavy caseloads detract from quality of representation); JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 84-85 (1984) (more than two-thirds of law guardians had no special training or interest in juvenile law, half appeared unprepared for trial, and half of transcripts reviewed included errors that lawyers failed to challenge or appeal).

Attorneys may not represent their juvenile clients effectively even when counsel are appointed for delinquents. The juvenile court as an institution actually works against the adversarial process. Stevens H. Clarke & Gary Koch, *Juvenile Court: Therapy or Crime Control, and do Lawyers Make a Difference?*, 14 L. & SOC. REV. 263, 305 (1980) (noting juvenile courts' treatment of lawyers as an "impediment"); Feld, *supra* note 92, at 187 ("Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles 'beat a case,' or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court."); *see generally* M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 136-39 (1982) (illustrating the role of counsel in juvenile court). Indeed, organizational pressures to maintain stable, cooperative working relations with other adult personnel in the system may impede effective adversarial advocacy on behalf of the child. *See, e.g., id.* at 136-37 (examining the influence of court personnel on lawyer's perceived role in juvenile court); W. VAUGHAN STAPLETON & LEE TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 102-06 (1972) (discussing the juvenile court as a "quasi-cooperative system"); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 18-24 (1967) (arguing the impact of institutional pressures upon the ability of attorneys to maintain advocacy posture).

Several scholars question whether lawyers can perform as advocates in a *parens patriae* rehabilitative juvenile justice system. *See, e.g.*, STAPLETON & TEITELBAUM, *supra* note 188, at 156-64 (finding juvenile court philosophy limits the ability of lawyers to adequately perform as advocates); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1236

While the Supreme Court recognized the seriousness of a delinquency prosecution, *Gault* granted juveniles the right to counsel based on the Fourteenth Amendment Due Process Clause, rather than the explicit provision for counsel in the Sixth

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(1970) (characterizing the role of attorneys as accommodating to the institutional needs of the juvenile justice philosophy). Some studies indicate that when lawyers represent juveniles in more traditional juvenile courts, they actually may place their clients at a disadvantage at trial or sentencing. *See, e.g.*, BORTNER, *supra* note 188, at 139-40 (characterizing the disadvantages of attorney representation for juvenile defendants); FELD, JUSTICE FOR CHILDREN, *supra* note 155, at 98 (presence of an attorney appears to be aggravating factor in the sentencing of juveniles). For example, courts appear more likely to incarcerate juveniles who appear with counsel than they do those without counsel. BORTNER, *supra* note 188, at 139-40 ("*[R]egardless of the types of offenses with which they were charged*, juveniles represented by attorneys receive more severe dispositions."); STAPLETON & TEITELBAUM, *supra* note 188, at 63-96; Clarke & Koch, *supra* note 188, at 306; David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 552 (1971). An evaluation of the impact of counsel in delinquency proceedings in six states reported that

> it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition .... In short, while the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 418-19 (1988). After controlling for the influence of other legal variables, such as the seriousness of the offense, prior record, and pre-trial detention status, it appears that "representation by counsel is an additional aggravating factor in a juvenile's disposition." Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1330 (1989).

Several observers of the quality of litigation in juvenile courts decry the quality of representation and report that trials often are

> "only marginally contested," marked by "lackadaisical defense efforts." Defense counsel generally make few objections, and seldom move to exclude evidence on constitutional grounds. Defense witnesses rarely are called, and the cross-examination of prosecution witnesses is "frequently perfunctory and reveals no design or rationale on the part of the defense attorney." Closing arguments are sketchy when they are made at all. Watching these trials, one gets the overall impression that defense counsel prepare minimally or not at all.

Ainsworth, *supra* note 72, at 1127-28.

Analysts attribute the poor quality of attorneys' performance to lack of preparation, crushing caseloads, and inadequate compensation. CELESE & PURITZ, *supra* note 187, at 62-65 (grueling caseloads preclude any meaningful contact with clients); PURITZ AND BROOKS, *supra* note 187, at 31-35 (high caseloads and limited resources adversely affected quality of representation); PURITZ ET AL., *supra* note 187, at 24-26 ("[M]ost juvenile defenders do not adequately prepare delinquency cases .... There was no written submission to the court, no legal pad, and it was clear that [the attorney] was still thinking about what to say moments before the hearing.").

Amendment.[189] By relying only on "fundamental fairness," *Gault* did not mandate automatic appointment of counsel for delinquents but only required that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[190] However, the Court also held that a juvenile could waive her right to counsel.[191] Courts typically use the adult waiver standard—"knowing, intelligent, and voluntary under the totality of the circumstances"—to assess the validity of juveniles' waivers of constitutional rights including the right to counsel.[192]

Many juveniles commonly appear without lawyers because juvenile court judges find that they waived their right to counsel.[193]

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189. *In re* Gault, 387 U.S. 1, 27-30 (1967). Like in *Gault*, the Supreme Court initially relied on the Fourteenth Amendment Due Process Clause when it granted adult criminal defendants a constitutional right to counsel. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that a court must appoint counsel for indigents in capital cases); Betts v. Brady, 316 U.S. 455, 472-73 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that due process does not require automatic appointment of counsel for indigent defendants, unless case presents special circumstances of complexity). However, *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruled *Betts*, and based the appointment of counsel for adult felony defendants on the Sixth Amendment. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

190. *Gault*, 387 U.S. at 41. By contrast, the Court's decision based on the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); *see also* note 130 *supra* and accompanying text.

191. *Gault*, 387 U.S. at 42.

192. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) (stating requirements for adequate waiver of a juvenile's right to an attorney).

193. *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Court*, 54 U. FLA. L. REV. 577, 649-50 (2002) ("The broad discretion granted to juvenile court judges by the court's founders and later by state statutes, coupled with the informality of juvenile court proceedings, have impeded the full recognition of juveniles' constitutional rights . . . . Juveniles do not have the capacity for sound decision making or an understanding of the significance of right to counsel and the consequences of waiving the right.")

There are several explanations for why so many youths still appear without counsel. Affluent parents may be reluctant to retain an attorney. Public-defender legal services may be inadequate or non-existent in non-urban areas. Juvenile court judges may encourage and readily find waivers of the right of counsel in order to ease administrative burdens on the courts. For example, courts may give cursory advisories of rights that imply that waiver is just a formal technicality. Moreover, traditional, treatment-oriented judges may resent legal advocacy that attempts to limit their discretion. *See, e.g.*, *In re*

In most states, courts determine the validity of a juvenile's waiver of a constitutional right by assessing whether it was "knowing, intelligent, and voluntary" under the "totality of the circumstances."[194] The Supreme Court's decisions in *Johnson v. Zerbst*[195] and *Faretta v. California*[196] recognized adult criminal defendants' right to waive counsel and appear *pro se*. *Faretta* held that adult defendants in state criminal trials have a constitutional right to proceed without counsel if they voluntarily and intelligently choose to do so.[197] Although the Supreme Court has not decided explicitly whether juveniles validly can waive their right to counsel in delinquency proceedings, it has upheld youths' waiver of their *Miranda* right to counsel during pretrial "custodial interrogation" under the "totality of the circumstances."[198] State courts routinely

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M.R.S., 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) (reversing a trial court that had summarily dismissed a juvenile's court appointed attorney for appealing its decision, noting that "[t]his kind of arbitrary action can have no other but a chilling effect on conscientious advocacy"). Judges also may decide what a juvenile's likely disposition will be, and decline to appoint counsel when they anticipate a probationary sentence. *See* FELD, *supra* note 155, at 190; M.A. BORTNER, INSIDE A JUVENILE COURT 140 (New York University Press 1982) (noting that court officials are likely to recommend counsel only in cases with the potential for serious dispositions). Whatever the reasons, many juveniles waive their right to counsel without consulting with an attorney or appreciating the consequences of foregoing their right to counsel, and confront the coercive power of the state without legal assistance.

194. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) (articulating requirements for adequate waiver of a juvenile's right to an attorney); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (finding that a defendant may waive her right to counsel); *In re* M.D.S., 345 N.W.2d 723, 732 (Minn. 1984) (placing burden on state to show a valid waiver of rights); *In re* L.R.B., 373 N.W.2d 334, 337 (Minn. Ct. App. 1985) (stating that the totality test must consider all the surrounding circumstances); State v. Nunn, 297 N.W.2d 752, 755 (Minn. 1980) (upholding juvenile's waiver of *Miranda* rights). *See generally* Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105 (The University of Chicago 2000) (detailing waiver of right to counsel jurisprudence in the juvenile court setting).

195. 304 U.S. 458 (1937).

196. 422 U.S. 806 (1975).

197. *Id.* at 836. The *Faretta* Court emphasized that the Sixth Amendment guarantees defendants the "assistance of counsel." *Id.* at 832. The *Faretta* Court noted, however, that in order to represent himself, the waiver of counsel must be "knowing and intelligent." *Id.* at 835. *Accord Zerbst*, 304 U.S. at 464-65.

198. Fare v. Michael C., 442 U.S. 707, 728 (1979); *see generally* Feld, *Criminalizing*, *supra* note 92, at 171-72 (discussing application of the "totality of the circumstances" test to juvenile proceedings); Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waiver Counsel Under Faretta*, 23 J. CRIM. & CIVIL CONFINEMENT 559, 585-93 (1997)

uphold juveniles' waivers of the right to counsel at trial.

The crucial question, of course, is whether juveniles possess the competence to waive counsel "voluntarily and intelligently," particularly without consulting counsel. When the judges who give youths advisories seek predetermined results—waivers of counsel—they compound the problem, as this affects both what and how they inform juveniles and how they interpret their responses.[199] Every scholar has criticized the "totality" approach to juveniles' waiver of rights for failing adequately to compensate for youths' immaturity and lack of adjudicative competence.[200] Not surprisingly, the

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(analyzing difficulty of administering Faretta in the context of juveniles' waivers of right to counsel).

199. CELESTE & PURITZ, *supra* note 187, at 59-60, describe the problems posed by judges who "coerce" waivers of counsel by juveniles:

> The overall impression I had of the treatment of these cases was one of coercion. The judge's chambers were very tight; often there were not enough chairs for the child's parents to sit. The hearings were held in chambers around a rectangular table; at the table were the judge, ADA [assistant district attorney], children with their parent/guardian, clerk, court reporter, probation officer and a court officer. Prior to the hearing the ADA would speak with the parent about their child agreeing to waive counsel. In chambers the judge would review the waiver form with the parent and ask the parent if the child wished to waive. The child and his or her parent were confronted in this room with six strangers. It was clear that the ADA and the judge wanted the children to waive counsel and admit the offenses. Children were never allowed to review police reports or to speak to a defense attorney . . . . The process of waiver often took less than five minutes . . . .
>
> Probably the most notable aspect of [this parish] . . . was the astoundingly high percentage of children who never had a chance to consult with an attorney on their cases." Here, judges and defenders report that "most children" waive counsel. As one judge puts it, "if children ask to have an attorney, we're going to give them one; however, most of the time children do not choose to have one." And judges prefer it that way. This judge explains that he is quite content with this system because cases are handled more efficiently by probation "without the interference of a lawyer" and though he would like to see lawyers on felony cases, he rarely appoints them.

By contrast, appellate courts envision a very different role for the trial judge in assessing the validity of waivers. *See, e.g.*, *In re* John D., 479 A.2d 1173, 1178 (R.I. 1984) ("[E]xceptional efforts must be made in order to be certain that an uncounseled juvenile fully understands the nature and consequences of his admission of delinquency.").

200. *See generally* Feld, *Criminalizing*, *supra* note 92, at 173-76; Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1139-40 (1980); Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195 (1976); Berkheiser, *supra* note 193, at 631-48 (criticizing cases approving juveniles' waivers of counsel); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation For*

empirical research indicates that juveniles are not as competent as adults to waive their rights in a "knowing and intelligent" manner.[201] Particularly for younger juveniles, their capacity to understand and waive rights is especially problematic:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension .... The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.[202]

Although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the research also questioned whether youths sixteen and older possess adjudicative competence or adequately understand the implications of waiver.[203] A few states recognize the developmental differences

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Children Accused of Crime, 62 MD. L. REV. 288, 316-20 (2003) (describing circumstances under which juveniles waive counsel and judicial pressures to do so).

201. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 106-07 (Plenum Press 1981); Grisso, *supra* note 200, at 1160; Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 113-15 (Thomas Grisso & Robert G. Schwartz, eds. 2000); Berkheiser, *supra* note 193, at 625-30 (analyzing social science research on juveniles' capacity and competence to waive the right to counsel).

202. Grisso, *supra* note 200, at 1160.

203. *Id.* at 1157. Juveniles' diminished understanding of rights, confusion about trial processes, limited language skills, and inadequately developed decision-making abilities undermine their ability effectively to participate or to assist counsel. Most youths younger than thirteen or fourteen years of age lack the basic competence to understand or meaningfully to participate in their defense. *See, e.g.*, Richard E. Redding and Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353 (2001). Many youths younger than sixteen years of age lack adjudicative competence either to stand trial as adults or to make legal decisions in juvenile court without the assistance of counsel. *See, e.g.*, Laurence Steinberg and Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996); Laurence Steinberg and Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389 (1999). Juveniles' lesser competence does not derive from mental illness, as is the case for adult defendants, but rather from generic developmental limitations—immaturity, lack of knowledge, attitude toward risk, emphasis on short-term rather than long-term consequences, susceptibility to peer and parental influences—which affect their ability to communicate, to reason and understand, and to exercise judgment and make sound decisions.

between juveniles and adults and prohibit waivers of the right to counsel or incarceration of unrepresented delinquents.[204] In most states, however, juveniles may waive their right to counsel in delinquency proceedings without even consulting with an attorney.[205]

Because of the high rates of delinquency convictions without the assistance of counsel, the dubious competence of most juveniles to waive their rights, and the inability of appellate courts subsequently to assess the validity of their waivers of counsel, it may be improper to consider prior delinquency convictions to enhance subsequent sentences. In *Gideon v. Wainwright*,[206] the Court incorporated and applied the Sixth Amendment's right to counsel to state felony proceedings.[207] The Supreme Court in *Gault* cited *Gideon* and emphasized that "[a] proceeding where the issue is whether a 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. The child 'requires the guiding hand of counsel at every step in the proceeding against him'."[208] Based on *Gideon*, the Court in *Burgett v. Texas*[209] held that because it was unconstitutional to convict a person of a felony without benefit of a lawyer or a valid waiver of that right, it was also impermissible to

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See, e.g., Thomas Grisso, *What We Know About Youth's Capacities as Trial Defendants*, *in* THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL, *supra* note 202; Elizabeth Scott and Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

204. *See* Feld, *supra* note 201, at 119-120; *see also* INST. OF JUDICAL ADMIN., STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 89 (1980) (advocating that the juvenile should have the mandatory and nonwaivable right to effective assistance of counsel at all stages of the proceedings); AM. BAR ASS'N, A CALL FOR JUSTICE (1995); Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 630-31 (1996) (noting that only seven states require mandatory appointment of counsel for juveniles in delinquency proceedings). "The majority of states, twenty-seven, are less protective of a juvenile's right to counsel in that they make appointment of counsel discretionary or do not provide strict waiver requirements. Thus, although the right to counsel exists, provision of an attorney to juveniles is conditional in many states." *Id.* at 624.

205. *See, e.g.*, *In re* L.R.B., 373 N.W.2d 334, 338 (Minn. Ct. App. 1985) (upholding *Miranda* waiver by fourteen-year-old who had a below normal I.Q.). *But see* Burt v. State, 256 N.W.2d 633, 635-36 (Minn. 1977) (requiring extensive inquiry into defendant's capacity to waive right).

206. 372 U.S. 335 (1963).

207. *Id.* at 344. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*

208. *Gault*, 387 U.S. at 36.

209. 389 U.S. 109 (1967).

use that conviction to enhance subsequent sentences.[210] In *United States v. Tucker*,[211] the Court remanded for re-sentencing when the judge enhanced an adult criminal defendant's sentence using an uncounseled prior felony conviction.[212] And, in *Custis v. United States*,[213] the Court held that a defendant has a constitutional right collaterally to challenge a prior conviction used to enhance a sentence which he alleges the state obtained in violation of the *Gideon* Sixth Amendment right to counsel.[214] Courts apply the principle of *Tucker* and *Burgett* when states use uncounseled juvenile convictions to enhance criminal sentences.[215]

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210. *Id.* at 115. The Court stated:

> To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew form the deprivation of that Sixth Amendment right.

Id. at 115. The defendant must be notified and validly waive the right to counsel on the record when entering a guilty plea for the conviction to be used to enhance the term of incarceration for a subsequent offense. *See, e.g.*, Reeves v. Mabry, 615 F.2d 489, 491 (8th Cir. 1980) ("Where . . . a jury in imposing an enhanced term of imprisonment . . . considered or may have considered a constitutionally invalid prior conviction, the . . . sentence that was imposed must generally be set aside . . . ."); United States *ex rel.* Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973) ("If [the defendant] was not represented by counsel [the court] cannot use the conviction for the purpose of enhancing [the defendant's] sentence.").

211. 404 U.S. 443 (1972).

212. *Id.* at 449 ("The *Gideon* case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one.'"); Kropf, *supra* note 149, at 2153-54 (In *Burgett* and *Tucker* "the Court disallowed the use of prior convictions that were entered without advice of counsel. These earlier cases were concerned that later sentencing courts would erode constitutional protections by applying enhancement statutes. The Court reasoned that if prior convictions obtained in violations of established constitutional protections—such as in violation of *Gideon v. Wainwright*—were used to enhance later sentences then those constitutional protections had been essentially destroyed, and the defendant's constitutional rights had been violated.").

213. 511 U.S. 485 (1994).

214. *Id.*

> If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amednment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty . . . . The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

Id. at 494.

215. *See, e.g.*, Rizzo v. United States, 821 F.2d 1271, 1274 (7th Cir. 1987)

In *Argersinger v. Hamlin*,[216] the Court considered whether the state must appoint counsel for an indigent defendant whom it charged with and imprisoned for a misdemeanor. *Argersinger* held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony unless he was represented by counsel."[217] Because the State actually imprisoned Argersinger, it was unclear whether the Court drew the line for the right to appointed counsel on the type of charge–felony or misdemeanor–and the statutorily authorized penalty, or on the actual sentence of imprisonment that the judge imposed. Subsequently, in *Scott v. Illinois*,[218] the Court clarified this ambiguity and held that whether or not the trial judge actually sentenced a defendant to a term of confinement determined whether the court must appoint counsel as a pre-requisite.[219] Shortly after *Scott* prohibited "incarceration without representation," *Baldasar v. Illinois*[220] prohibited enhancement of a

("[T]he judge may have impermissibly relied on the uncounseled [juvenile] adjudication in imposing sentence."); People v. Carpentier, 521 N.W.2d 195 (Mich. 1994) ("[A] defendant who collaterally challenges an antecedent [juvenile] conviction allegedly procured in violation of *Gideon* bears the initial burden of establishing that the conviction was obtained without counsel or without a proper waiver of counsel .... [T]o prevail upon a request for *Tucker* relief, a defendant must present prima facie proof that a prior conviction violated *Gideon* or present evidence that the sentencing court either 'failed to reply' to a request or 'refused to furnish' requested copies of records and documents."); Majchszak v. Ralston, 454 F. Supp. 1137, 1142 (W.D. Wis. 1978) (remanding for resentencing a denial of parole release because the presentence report included prior uncounseled delinquency adjudications); Stockwell v. State, 207 N.W.2d 883, 889 (Wis. 1973) (holding juvenile adjudications obtained without counsel could not be considered in subsequent sentencing proceedings);.

216. 407 U.S. 25 (1972).

217. *Id.* at 37 (court may not incarcerate defendant unless represented by counsel). The Court observed that

> every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

Id. at 40.

218. 440 U.S. 367 (1979).

219. *Id.* at 373-74 (right to court appointed counsel restricted to cases in which court actually imprisons defendant). Basing the initial decision to appoint counsel on the subsequent sentence the court may impose presents significant administrative difficulties. Without prejudicing the defendant's right to a fair and impartial trial, how could a judge decide initially what sentence she eventually will want to impose? *See, e.g.*, Feld, *Right to Counsel*, *supra* note 188, at 1198.

220. 446 U.S. 222 (1980) (per curiam).

defendant's sentence based on a prior, uncounseled misdemeanor conviction that had not resulted in incarceration.[221] *Baldasar* reasoned that a conviction that could not initially sustain incarceration could not be used to extend subsequent confinement. However, *Nichols v. United States*[222] overruled *Baldasar* and held that states could use uncounseled misdemeanor convictions to enhance later sentences as long as they were constitutionally valid when the state obtained them because the trial court did not order a sentence of imprisonment.[223] The dissent in *Nichols* objected to the

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221. *Id.* at 224. Because *Baldasar*'s initial misdemeanor conviction resulted only in a fine and probation, but not actual incarceration, the right to counsel, as announced in *Scott v. Illinois*, 440 U.S. 367 (1979), did not apply. *Baldasar*, 446 U.S. at 222-24. When Baldasar was convicted a second time for a similar offense, under the enhanced penalty statute, the court used the prior conviction to convert the second conviction into a felony for which the defendant was imprisoned. In a *per curiam* opinion, the Supreme Court reversed Baldasar's felony conviction. *Id.* at 224. Justice Potter Stewart's concurrence condemned the increased penalty noting that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Id.* (Stewart, J., concurring). Justice Thurgood Marshall's concurrence stated that a defendant's "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." *Id.* at 226 (Marshall, J., concurring).

222. 511 U.S. 738 (1994).

223. *Id.* at 746. "[A]n uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes . . . do not change the penalty imposed for the earlier conviction." *Id.* at 746-47. *See* Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment,* Baldasar *and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165, 194 (1992) (urging Court to adopt rationale of *Baldasar* dissent and rule that all constitutionally procured uncounseled misdemeanor convictions be used for sentence enhancements); Ralph Ruebner et al., *Shaking the Foundations of* Gideon*: A Critique of Nichols in Overruling* Baldasar v. Illinois, 25 HOFSTRA L. REV. 507, 546 (1996) ("[T]he holding in *Nichols* reflects an abrupt departure from previous Sixth Amendment decisions and endangers the reliability of convictions and fairness of sentencing proceedings. The Court was mistaken in allowing judges to rely on inherently unreliable uncounseled convictions to enhance an offender's sentence because judges traditionally may only use reliable evidence to determine a sentence.").

In *United States v. Early*, 77 F.3d 242, 244-45 (8th Cir. 1996), the court applied *Nichols* and approved sentence enhancement based on uncounseled juvenile delinquency convictions. Although *Early* asserted that he was unrepresented, the court held that

> we will only exclude the use of uncounseled juvenile convictions if there is some particularized defect in the juvenile proceedings. For sentencing purposes, however, once the government has carried its

use of a conviction collaterally to extend a period of imprisonment when it could not validly support incarceration initially.[224] As a result of *Scott* and *Nichols*, trial court judges may deny counsel to misdemeanor defendants, even if they request a lawyer, as long as they do not incarcerate them at that time, and then may use those convictions to increase substantially a defendant's subsequent sentence.[225] Some courts use the rationale of *Nichols* that convictions valid at the time obtained may be used for subsequent enhancements to support their conclusion that delinquency adjudications obtained without the right to a jury also may be used to extend later sentences.[226]

C. *Juvenile Records of Prior Delinquency Adjudications*

Criminal courts' access to records of delinquency convictions poses a policy conflict between the traditional rehabilitative goals of juvenile justice and public safety interests in identifying, incapacitating, and punishing career offenders more severely.[227]

> initial burden of proving the fact of conviction, it is the defendant's burden to show a prior conviction was not constitutionally valid.

Id. at 245.

224. *See Nichols*, 511 U.S. at 754-65 (Blackmun, J., dissenting) (contending that the rationale of *Nichols* is inconsistent with *Scott*). "It is more logical, and more consistent with the reasoning in *Scott*, to hold that a conviction that is invalid for imposing a sentence for the offense itself remains invalid for increasing the term of imprisonment imposed for a subsequent conviction." *Id.* at 757.

225. *See, e.g.*, Ruebner, Berner, & Herbert, *supra* note 223, at 508 ("The immediate impact of *Nichols* is that a sentencing judge is no longer prohibited from enhancing a sentence on the basis of a prior uncounseled misdemeanor conviction . . . . [A] prior uncounseled misdemeanor conviction may not be used to convert a subsequent misdemeanor into a felony and result in imprisonment.").

226. *See supra* notes 311-318 and accompanying text.

227. *See generally* BARRY C. FELD, BAD KIDS, *supra* note 75, at 233-25 (describing policy conflict between rehabilitative goals of juvenile courts and crime control interests in identifying career criminals); Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206 (1998) ("On the one hand is the argument that crimes by youths are neither committed with adequate culpability nor adjudicated with sufficient justice to trail these offenders into adulthood. On the other side is the contention that adult criminals with juvenile records should not be forgiven a history of criminal behavior simply because it occurred while they were juveniles."); Kara E. Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1101-02 (1998) ("[T]o prevent a juvenile from being scarred by his delinquent acts, preventing the release of juvenile records was one of the juvenile justice system's central goals. Today, the juvenile justice system's emphasis has changed, and the confidential status juvenile

Although juvenile courts historically restricted criminal courts' access to avoid stigmatizing youths, the bifurcation does not seem reasonable for juveniles whose delinquency careers are serious and who persist into serious adult offending. Thus, while juvenile records should continue to be protected from general public access, the adult criminal justice system should have access to juvenile records of at least those offenders arrested as adults on a felony charge.[228]

Research on the development of criminal careers provides ample justification to use delinquency convictions to enhance young adult offenders' sentences. A strong relationship exists between age and criminal activity and rates of criminality peak in mid-to-late adolescence.[229] Although most delinquent youths desist after one or two contacts with the justice system, once a youth becomes a chronic offender with five or more criminal contacts, then a substantial likelihood exists that the youth will continue to engage in criminal activity.[230] Career offenders become involved in crime in their early-to-mid teens, persist into their twenties, and then gradually "mature out" of criminal behavior.[231] Moreover, chronic offenders, a relatively small subset of all delinquents, account for a disproportionately large amount of serious, violent, and repetitive property crime.[232] A

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records traditionally enjoyed has started to erode.").

228. *See generally* 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 197 (Alfred Blumstein et al., eds., 1986) [hereinafter CRIMINAL CAREERS]. Sanborn, *supra* note 227, at 208, summarizes the reasons courts give for including delinquency priors in their sentencing decisions:

> [S]entencing judges required access to juvenile court records in order to learn offenders' character and threat to society, and to determine their appropriate punishment or rehabilitative potential and needs. Other courts explained that failure to consider juvenile court records would penalize adult defendants with no criminal history, that these records were supposed to be forgiven but not forgotten, and that the commission of new crimes indicated both the failure of juvenile court rehabilitation and the lack of any further need to prevent disclosure of youthful indiscretions.

229. 1 CRIMINAL CAREERS, *supra* note 228, at 22-23. Studies of the development of delinquent careers suggest that serious offenders are best identified by their persistence rather than by the nature of their initial offense. The criminal career research indicates that young offenders do not "specialize" in particular types of crime, that serious crime occurs within an essentially random pattern of delinquent behavior, and that a small number of chronic delinquents are responsible for many offenses and most of the violent offenses committed by juveniles. *Id.*

230. *Id.* at 75-76.

231. *See, e.g.*, David P. Farrington, *Age & Crime*, 7 CRIME & JUST. 189 (Michael Tonry & Norval Morris eds., 1986) (analyzing age-specific crime rates and noting that crime rates peak in mid-to-late adolescence and then decline).

232. PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS

rational sentencing policy should identify criminally active young offenders for selective incapacitation or greater punishment, and a prior record of persistent offending, whether acquired as a juvenile or as an adult, provides the best evidence of career criminality.[233] The confidentiality of juvenile proceedings and the practice of expunging records to avoid stigmatizing delinquents often hindered criminal courts' access to juvenile conviction records.[234] For administrative and policy reasons, criminal courts sometimes could not gain access to an offender's juvenile history at sentencing.[235]

279-80 (1990) (small group of chronic offenders account for the majority of all delinquent acts and an even larger proportion of the most serious and violent crime); MARVIN E. WOLFGANG, ROBERT M. FIGLIO, & THORSTEN SELLIN, DELINQUENCY IN A BIRTH COHORT 88-105 (1972) (small group of chronic offenders committed over half of all delinquent acts and most of the more serious ones); Sanborn, *supra* note 227, at 208 ("disproportionate amount of crime is committed by relatively few offenders and that career adult criminals tend to have roots in juvenile delinquency.").

233. *See, e.g.*, Roberts, *supra* note 21, at 327, who analyzes the appropriate role of juvenile records in various justifications for punishment:

> There seems little justification from the perspectives of deterrence or incapacitation for expunging a juvenile record when the offender reaches the age of majority. Indeed, utilitarian sentencing theorists would consider the juvenile offense record to be a critical indicator of the likelihood of further offending . . . . Desert theorists should also have difficulty with a system that completely erased records at the age of majority. Sentencing adults who have a significant juvenile record as first offenders is tantamount to offering a double discount: the offender received a discount at the juvenile level (first juvenile offense) and should not now be accorded a second completely fresh start.

234. Policies on access to juvenile records pose a conflict between the rehabilitative goals of the juvenile court and the public safety interests of identifying career criminals. 1 CRIMINAL CAREERS, *supra* note 228, at 197 ("[W]hile juvenile records should continue to be protected from general public access, the adult criminal justice system should have access to juvenile records of at least those offenders arrested as adults on a felony charge.").

235. Juvenile courts' practices of sealing or expunging records to avoid stigmatizing offenders impedes the use of juvenile court records to identify young career offenders and to enhance their subsequent sentences. *See, e.g.*, T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 289 (1998) (policy of expungement interfere "with the just and appropriate sentencing of youthful adult offenders by judges, impedes law enforcement investigations . . . [and] perversely penalize persons who have conformed their behavior to the dictates of the law, while providing unjustified gains to those who have not"); T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 890-91 (1996) ("The primary reason for expungement statutes is an understandable concern that the juvenile offender will be forced to endure the stigma of being labeled a 'juvenile delinquent' for the rest of his life as a result of mere 'youthful misconduct.' . . . Expungement statutes, therefore, are at

Despite the tradition of confidentiality and restricted access to juvenile records, the use of prior delinquency convictions to enhance adult sentences has a long lineage.[236] Even prior to the adoption of

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minimum attempts to lessen the additional penalty that public opinion places upon former offenders. . . ."); T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 161-62 (1997) (purpose of expungement policy is "to allow young men who have been guilty of youthful indiscretion to enter adulthood without the heavy stigmatic freight of a criminal record.").

Criminal courts often lack access to the juvenile component of offenders' criminal histories because of the confidentiality of juvenile court records, the functional and physical separation of juvenile and criminal court staff who must collate and combine these records, bureaucratic record-keeping ineptitude, and the difficulty of maintaining integrated systems to track offenders and compile complete criminal histories across both justice systems. *See* Peter W. Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, 7 CRIME & JUSTICE 151, 173 (1986); Joan Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 1746, 1747-49 (1981); Roberts, *supra* note 21, at 328 ("There has also been recognition by several guidelines commissions and scholars that the poor state of juvenile record information systems (relative to comparable systems at the adult level) would result in inequities of application if all juvenile adjudications were included.").

Courts have rejected defendants' equal protection claims that the uneven availability of state juvenile records may produce sentencing disparities. *See, e.g.*, United States v. Inglesi, 988 F.2d 500, 503 (4th Cir. 1993) ("[A]ny distinction in sentencing potential resulting from the availability of some but not all state juvenile records for use in federal sentencing under the provisions of Guidelines § 4A1.2(d) is not an arbitrary one but is based on a rational sentencing scheme . . . . [Defendant's] challenge is based solely on the inherent potential for disparities arising from the uneven availability of state court juvenile records.").

The National Academy of Science's study of career criminals concluded that:

> [t]he prohibitions against merged juvenile and adult records, the failure to routinely include juvenile court data in policy record systems, and the sealing and purging of juvenile records create a situation in most jurisdictions in which criminal justice authorities frequently make their decisions with no information about police contacts with juveniles . . . . For those who advocate the use of juvenile records, the challenge is to respond to these concerns by designing systems and procedures that inform adult just system decision makers more fully about juvenile delinquent careers without undermining the rehabilitative goal of juvenile courts.

1 CRIMINAL CAREERS, *supra* note 228, at 193.

236. *E.g.*, United States v. Gardner, 860 F.2d 1391 (7th Cir. 1988), *cert. denied*, 490 U.S. 1751 (1989); Commonwealth v. Phillips, 492 A.2d 55 (Pa. 1985); Harris v. Commonwealth, 497 S.E.2d 165, 172 (Va. App. 1998) ("mere fact that a juvenile adjudication is not a criminal conviction does not bar its admission into evidence at a sentencing hearing."); *see generally* Daniel E. Feld, Annotation, *Consideration of Accused's Juvenile Court Record in Sentencing for Offenses Committed as an Adult*," 64 A.L.R.3D 1291 (1975) (discussing cases

state and federal sentencing guidelines, courts regularly approved the use of delinquency records to enhance the sentences of adult offenders.[237] However, some states limit the impact of delinquency convictions on criminal sentences because of concerns about the quality of procedural justice in juvenile courts.[238] In addition, the factual ambiguity of delinquency adjudications sometimes makes it difficult for criminal courts to determine for what offense the

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where adult courts have considered whether to include juvenile records for sentencing purposes); Neal Miller, *State Laws on Prosecutors' and Judges Use of Juvenile Records*, NAT'L INST. OF JUST RES. IN BRIEF 1, 1 (1995).

237. State v. Johnson, 216 N.W.2d 904, 907-08 (Minn. 1974) ("[W]e see nothing improper in the court's taking into consideration the past conduct of a juvenile in determining what sentence could be proper. How else could he evaluate the past performance of a juvenile who had been in trouble before he came before the court?"); *see also* MINN. SENTENCING GUIDELINES § II.B.4 (2003) (analyzing inclusion of juvenile convictions in Minnesota's Sentencing Guidelines); 42 PA. CONS. STAT. § 9721(b) (1982) (juvenile adjudications may be counted when there was an express finding that the offense constituted a felony or one of the weapons misdemeanors); U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (1994) (sentence enhancements based on "offenses committed prior to age eighteen").

238. *See, e.g.*, MINNESOTA SENTENCING GUIDELINES § II.B.4 cmt. II.B.406 (expressing serious reservations about "the disparities in the procedures used in the various juvenile courts"). The denial to juveniles of a constitutional or statutory right to a jury trial and the practical unavailability of counsel in many of Minnesota's juvenile courts raised concerns for the Commission about the validity and reliability of delinquency convictions. *See* Feld, *Violent Youth*, *supra* note 124, at 1060-61. *See also* Roberts, *supra* note 21, at 328, who observes that "the administration of juvenile justice fails to accord the young offender the same degree of protection that is offered to offenders at the adult level. The full due process protections that are accorded adult offenders are not generally extended to juveniles."

Some states include the juvenile record as a discretionary "factor" to consider when available while others formally include some component of a juvenile record in calculating a youth's criminal history score. MILLER, *supra* note 236; Roberts, *supra* note 21, at 330. Some states' sentencing guidelines weigh juvenile prior offenses less heavily than comparable adult convictions, or only include juvenile felonies committed after age sixteen. *See* Feld, *Violent Youth*, *supra* note 124, at 1059-61. Roberts, *supra* note 21, at 329, describes these policies:

> Almost all the sentencing guidelines systems count some juvenile adjudications. However, relative to previous adult convictions, the juvenile priors play a limited role in subsequent sentencing hearings. The American guidelines systems typically employ prior juvenile convictions in complex ways that reflect the defendant's current age, the time since the previous (juvenile) infractions, as well as the seriousness of the juvenile offending.

Other states do not distinguish qualitatively between juvenile and adult prior convictions, and count both equally in an offender's criminal history score. *See, e.g.*, Kan. Stat.Ann. § 21-4170(a) (1995); Roberts, *supra* note 21, at 330. *See also infra* note 304 and accompanying text.

juvenile court actually convicted a youth when it uses those convictions for sentence enhancements or other collateral purposes.[239]

239. Taylor v. United States, 495 U.S. 575 (1990), did not address the use of juvenile prior convictions as such. Rather, *Taylor* involved the issue of what definition of "burglary" courts would use when they decided whether to use those prior "violent felony" convictions for enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The statutory elements of burglary vary widely among the states and the ACCA provides no definition of "generic" burglary. *Taylor*, 495 U.S. at 580. The Court declined to adopt each state's definition of burglary, because that would introduce inappropriate variation in sentences for similar prior conduct. *Id.* at 590-93. The Court also rejected a "factual approach" in which the trial court would review the prior factual record to determine whether the defendant had committed a "violent" burglary intended under the ACCA for enhancement. *Id.* at 600-02. Rather, *Taylor* employed a "categorical approach," and held that regardless of a state's statutory definition or label, a burglary conviction appropriate to use for enhancements has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. The sentencing judge only need examine the charging documents, statute, burglary instruction and conviction itself to determine whether the definition of the offense established the elements of the "generic" burglary used in the ACCA. *Id.* at 602.

Despite the seeming clarity of *Taylor*'s "categorical approach," courts find it difficult to apply to delinquency "violent felony" convictions because the charging documents, which allege the elements of the offense, may not exist and the ACCA requires a specific factual determination that the juvenile's "violent" prior conviction involved the use of a weapon.

> While the categorical approach prescribed by *Taylor* is simply stated and relatively easily applied when considering a defendant's prior adult convictions, it can become more difficult when a court must determine whether a juvenile adjudication comes within the ACCA. For one thing, although the categorical approach prohibits factual determinations concerning a defendant's prior convictions, an "act of juvenile delinquency" introduces an additional wrinkle, for it will only count as a violent felony if the offense involved "the use or carrying of a firearm, knife, or destructive device," 18 U.S.C. 942(e)(2)(B), a seemingly paradigmatic factual determination. For another, the documents that the Supreme Court and the various Courts of Appeals have held that a district court may consider in the context of an adult conviction–the indictment or information, the jury charge, and/or plea agreements–may be nonexistent where there has been an adjudication of juvenile delinquency given that, for starters, there is no right to trial by jury for juvenile offenses. That having been said, we can perceive no basis for saying that the reasons the *Taylor* Court found as warranting the categorical as opposed to the factual approach when considering an adult conviction are not equally persuasive when considering a juvenile adjudication. We note, however, that we are in uncharted waters because, in the context of juvenile adjudications and the ACCA, virtually nothing has been written by any court.

United States v. Richardson, 313 F.3d 121, 126 (3d Cir. 2002); *see also* United States v. M.C.E., 232 F.3d 1252, 1255 (9th Cir. 2000) (use of "categorical approach" to assess "violent" quality of prior delinquency burglary to determine

A number of states' sentencing guidelines and the United States Sentencing Guidelines include some juvenile prior convictions in an adult defendant's criminal history score.[240] Under California's "three-strikes" sentencing law, some juvenile felony convictions constitute "strikes" for purposes of sentence enhancements.[241] Sentencing judges often assert the importance of access to

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whether youth fits statutory criteria for mandatory transfer to criminal court); United States v. Jones, 332 F.3d 688 (3d Cir. 2003) (use of categorical approach requires court to look only at statutory definition of prior offense and fact of conviction).

240. *See, e.g.*, UNITED STATES SENTENCING GUIDELINES MANUAL § 4A1.2(D)(2)(A) (1995) ("each adult or juvenile sentence to confinement of at least sixty days"); Cassandra S. Shaffer, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 171-75 (2002) (analyzing use of juvenile sentences as predicate offenses for imposition of career offender provisions of federal sentencing guidelines).

A survey of state statutes reports that about half of states systematically consider juvenile records in setting adult sentences. MILLER, *supra* note 236, at 3 ("Twenty-four States' laws provide for structured consideration of defendants' juvenile records in the setting of sentences. The most common structuring method is through inclusion of the juvenile record among the factors used in State sentencing guidelines (14 States). Typically, the juvenile record is included in calculating a criminal history score."); Kropf, *supra* note 149, at 2175 (more than twenty states use delinquency convictions to enhance adult criminal sentences); Kay Redeker, *Solidifying the Use of Juvenile Proceedings as Sentence Enhancement and Clarifying Second-Degree Murder*, 37 WASHBURN L.J. 483, 488 (1998) (delinquency convictions regularly used to enhance subsequent adult sentences); Roberts, *supra* note 21, at 326-31.

241. CAL. PENAL CODE § 667(d)(3) (Deering 1994). *See, e.g.*, People v. Davis, 938 P.2d 938, 949-50 (Cal. 1997) (upholding validity of using juvenile adjudications as strikes under three strikes law); People v. Garcia, 980 P.2d 829, 830-38 (Cal. 1999) (statutory interpretation limiting types of juvenile felony adjudications that could count as "strikes" under three strikes law); *see also* Tonya K. Cole, *Counting Juvenile Adjudications as Strikes Under California's "Three Strikes" Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 343 (1998) ("Using prior juvenile adjudications as strikes is in direct conflict with the rehabilitation goal of the juvenile court."); Lise Forquer, *California's Three Strikes Law–Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 SAN DIEGO L. REV. 1297, 1315-26 (1995) (analyzing qualifying criteria for use of juvenile adjudications as "strikes"); David C. Owen, *Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's "Three Strikes" Legislation*, 29 DAVIS L. REV. 437, 440 (1996) (juveniles should have a right to a jury trial if state uses prior convictions as "strikes" or for sentence enhancements); Amanda K. Packel, *Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law*, 90 CAL. L. REV. 1157, 1165 (2002) (analyzing contradiction between "rehabilitative and diversionary spirit of juvenile justice system," punitive intent behind three strikes legislation, and unfairness of using delinquency convictions as strikes).

defendants' prior records of juvenile convictions to distinguish errant offenders from recidivists. In *United States v. Davis,*[242] the court observed that "These pubescent transgressions, when considered along with adult offenses, help the sentencing judge to determine whether the defendant has simply taken one wrong turn from the straight and narrow or is a criminal recidivist."[243] In *United States v. McDonald,*[244] the court noted the policy conflict between confidentiality and punishing repeat offenders:

> Setting aside a conviction may allow a youth who has slipped to regain his footing by relieving him of the social and economic disabilities associated with a criminal record. But if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.[245]

Although states often use delinquency adjudications for sentence enhancements, it is wrong to equate delinquency convictions with adult criminal convictions and to count them as one-for-one equivalents. Even though juvenile offenders may cause the same physical harm or property loss as older actors, their choices to engage in that conduct are not as culpable or blameworthy as that of older offenders and should not be weighted the same as adult prior convictions.[246] Youths' ability to exercise self-control and the qualities of their judgment and decision-making are not developmentally comparable to those of adults.[247] Youths

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242. 48 F.3d 277, 280 (7th Cir. 1995).

243. *Id.* at 280. The Court further noted:

> [I]t is imperative that the defendant's sentence account for his criminal history "from the date of birth up to and including the moment of sentencing. [T]he consideration of the defendant's juvenile record is essential, because it is clear that the 'magic age' of eighteen, seventeen, or sixteen, whatever it may be in a specific state, cannot wipe out all previous contacts with the law.

(citations omitted) (quoting United States v. Madison, 689 F.2d 1300, 1314, 1315 (7th Cir. 1982)).

244. 991 F.2d 866 (D.C. Cir. 1993).

245. *Id.* at 872 (citations omitted).

246. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 98-115 (1997) (developing rationale for reduced culpability as rationale for youthfulness as a mitigating factor at sentencing). Feld argues that

> [i]n a framework of deserved punishment, it would be fundamentally unjust to impose the same penalty upon offenders who do not share equal culpability. If young people are neither fully responsible nor the moral equals of adults, then they do not deserve the same legal consequences even for their blameworthy misconduct.

Id. at 102. *See also* Elizabeth Scott and Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

247. *See, e.g.*, Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1610 (1992); Laurence Steinberg &

and adults "differ in their breadth of experience, short-term versus long-term temporal perspective, attitude toward risk, impulsivity, and the importance they attach to peer influences."[248] These differences affect their maturity of judgment, their self-control, and their culpability.[249] State laws treat juveniles differently from adults in a host of areas—e.g. serving on a jury, voting, marrying, driving, and drinking—because of their lack of experience, propensity to engage in risky behavior, and immature judgement.[250] I have argued that youths deserve less severe punishment than do adults when they commit the same crimes—a "youth discount" —because of their diminished responsibility.[251] Some states' sentencing laws formally recognize youthfulness as a mitigating factor.[252] The same

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Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251 (1996) ("[T]he intuition behind paternalistic policies is that developmentally linked traits and responses systematically affect the decisionmaking of adolescents in a way that may incline them to make choices that threaten harm to their own and others' health, life, or welfare, to a greater extent than do adults."); *see also* Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000).

248. Feld, *supra* note 246, at 106; Scott and Steinberg, *supra* note 245, at 811-18 (adolescents' psycho-social development contributes to their immature judgment and tendency to make risky and harmful decisions).

249. Feld, *supra* note 246, at 106-07 ("Three developmentally unique attributes of youth—temporal perspective, attitudes toward and acceptance of risk, and susceptibility to peer influences—may affect young peoples' qualities of judgement in ways that distinguish them from adults and bear on their criminal responsibility."). The Supreme Court has recognized that youths are less mature and responsible than adults.

> [D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults . . . . The Court has already endorsed the proposition that *less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.*

Thompson v. Oklahoma, 487 U.S. 815, at 834-35 (emphasis added). *See also* Scott & Steinberg, *supra* note 246, at 813 ("The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management."); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L.& CRIMINOLOGY 137 (1997).

250. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 835. The Court noted:

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Id.

251. Feld, *supra* note 246, at 98-121; Feld, BAD KIDS, *supra* note 75, at 303-19.

252. *See e.g.*, FLA. STAT. ANN. § 921.0026(2)(k) (West 2001); IND. CODE ANN. § 35-38-1-7.1(a)(4)(1998); MONT. CODE ANN. § 46-18-304(1)(g)(2001); Tenn. Code

principle of lesser consequences for the reduced culpability of youths applies to the weight given to their prior convictions as well as to their current sentences.

States' expanded uses of juveniles' prior records to enhance the sentences of young adult offenders raise troubling issues in light of the quality of procedural justice by which juvenile courts originally obtained those convictions. As noted above, juvenile courts in many states adjudicate as many as half of all youths delinquent without the assistance of counsel, including many convicted of felonies, and the vast majority of states deny juveniles access to a jury trial. As a result, a substantial number of delinquency adjudications occur that would not result in criminal convictions or pleas if defendants received all procedural safeguards.[253]

The Supreme Court in *McKeiver* denied juveniles a constitutional right to a jury trial because delinquents supposedly received treatment rather than punishment. The question is not whether delinquency convictions are sufficiently reliable to allow for therapeutic juvenile dispositions, but rather whether they were obtained in a sufficiently reliable manner to justify the much harsher consequences of their use as criminal sentence enhancements. States use delinquency convictions obtained with less stringent procedures to *treat* youths as juveniles, but then subsequently *punish* them more severely as adults. In *United States v. Williams,*[254] the court upheld the use of a delinquency conviction obtained without a jury trial in order to enhance the defendant's subsequent criminal sentence.[255] *Williams* reasoned

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Ann. § 40-35-113(6)(1997). Scott and Steinberg, *supra* note 246, at 830-31, argue that "the developmental factors that drive adolescent decisionmaking predictably contribute to choices based on immature judgment" and provide the legislative rationale for recognizing the reduced culpability of youths.

253. *See* David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1798-99 (1991). Dormont argues that substantive outcomes in juvenile and criminal cases are not the equivalent:

> Because the procedural safeguards employed in therapeutic proceedings are less rigorous than those employed in criminal procedures, a sentence of incarceration is more likely to result from juvenile procedures. Therefore, juvenile adjudications which result in incarceration should be more constitutionally suspect when used for enhancement purposes.

Id. (footnotes omitted); *see also* Sanborn, *supra* note 227, at 212 ("Juvenile courts are notorious for relaxing, if not ignoring, due process standards. This is understandable due to juvenile court's traditional commitment of pursuing the best interests of the child . . . . [T]he rehabilitation mission encourages some judges to bend results and adjudicate borderline cases so as to ensure offenders receive help . . . .").

254. 891 F.2d 212 (9th Cir. 1989).

255. *Id.* at 215 ("If it does not violate due process for a juvenile to be

that the later use for enhancement of a conviction that was valid at the time it was obtained does not violate Due Process.[256] The court also rejected the defendant's claim that the purpose of his earlier juvenile disposition was for rehabilitation, rather than punishment, and noted that the court need only determine the fact of confinement itself and not the reasons behind the sentence.[257] Even though treatment of delinquents provided the rationale for employing less stringent procedural safeguards, *Williams* saw no anomaly in using those convictions, valid for one purpose, to accomplish their antithesis of extending punishment. Moreover, courts presume the validity of predicate prior convictions, place the

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deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication."); *see also* United States v. Mackbee, 894 F.2d 1057, 1058 (9th Cir. 1990) (rejecting argument that informality of delinquency proceedings made juvenile convictions less reliable to use for sentence enhancement).

256. 891 F.2d at 215 ("If a judge could have enhanced a sentence because of factors which have not been fully adjudicated with due process guarantees, a judge can enhance a sentence due to a prior adjudication when . . . the defendant has had such due process safeguards as the right to counsel and the right to cross-examine adverse witnesses."); *see also* Forquer, *supra* note 241, at 1333:

> If it is constitutionally permissible to increase a sentence based upon conduct underlying an offense that did not result in a convection and that was proved by a preponderance of evidence, then certainly it is permissible to use a finding of delinquency that was obtained in a procedure that provided a right to notice, counsel, confrontation, and cross-examination, in addition to requiring proof beyond a reasonable doubt.

257. 891 F.2d at 216 ("Although the purpose of juvenile sentencing is rehabilitative rather than strictly punitive, the effect is nonetheless to deprive the juvenile of liberty. The sentencing guidelines do not direct the sentencing court to examine the purpose behind the specific form of a prior confinement, they merely direct the judge to consider the fact of confinement."). However, for other sentencing purposes, courts recognize that important differences exist between juvenile and adult sentences. Contrary to *Williams*, the use of juvenile sentences as predicate offenses for sentencing under the career offender provisions require courts to examine the nature of juvenile imprisonment. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (2002). The issue arises when juveniles are transferred to and convicted in adult criminal court, but then receive sentences to juvenile facilities. *See* Shaffer, *supra* note 240, at 171-75; *compare, e.g.*, United States v. Carillo, 991 F.2d 590, 592-94 (9th Cir. 1993) (finding that courts may consider any sentence imposed on a youth after an adult conviction that satisfies other requirements of career offender provisions), *with* United States v. Mason, 284 F.3d 555, 559 (4th Cir. 2002) (finding that commitment to a delinquency facility following adult conviction does not constitute career offender predicate because "only those [offenses] that resulted in *adult* sentences . . . are counted") (alteration in original) (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. 7 (1998).

burden on the defendant to demonstrate that a challenged delinquency conviction was constitutionally invalid, and assess the trial judge's ruling on its validity under a highly deferential "clearly erroneous" standard of review.[258] These presumptions and burdens place on youths, at the peril of extended punishment as an adult, all of the risks of error created by the procedural laxity of juvenile courts.

In *United States v. Johnson*,[259] the defendant challenged the U.S. Sentencing Guidelines' policy of equating juvenile sentences of confinement with adult sentences of imprisonment when judges calculate the criminal history score.[260] The court did not find the policy unreasonable:

> It is a method, rough to be sure, of measuring relative culpability among offenders and the likelihood of their engaging in future criminal behavior. Those who have committed crimes after serving sixty days or more in a prison like facility, whether they were then a juvenile or an adult, prove that they have not been deterred.[261]

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258. *See, e.g.*, Parke v. Raley, 506 U.S. 20, 23, 24 (1992) (Court will not presume denial of counsel from the absence of record of knowing and intelligent waiver and presumption of administrative regularity places burden on defendant to demonstrate conviction resulted from unconstitutional denial of counsel); United States v. Unger, 915 F.2d 759, 762 (1st Cir. 1990) (even if delinquency conviction is obtained without counsel, defendant has burden to prove prior adjudication invalid); United States v. Early, 77 F.3d 242, 245 (8th Cir. 1996) (holding that placing burden on defendant to prove prior delinquency conviction is unconstitutional). The *Early* court noted, "Neither the Sentencing Guidelines nor our precedents provide any basis for distinguishing between counseled and uncounseled juvenile convictions on a *per se* basis. Thus, we will only exclude the use of uncounseled juvenile convictions if there is some particularized defect in the juvenile proceedings." *See also* United States v. Jones, 332 F.3d 688, 697 (3rd Cir. 2003) (defendant has burden of establishing that his prior conviction resulted from constitutional infirmity by denial of right to counsel); *supra* notes 215, 256.

259. 28 F.3d 151 (D.C. Cir. 1994).

260. *Id.* at 155. Under the Sentencing Guidelines, "a juvenile sixty-day sentence of confinement warrants the same number of points as an adult sentence of imprisonment for the same time." *Id. See also* Deborah L. Mills, United States v. Johnson*: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 905 (1996) ("[C]ourt's decision was soundly rooted in history and precedent.").

261. 28 F.3d at 155. The court asserted that no inconsistency existed between equating juvenile and criminal sentences of confinement: "When yesterday's juvenile delinquent becomes today's adult criminal the reasons behind society's earlier forbearance disappear. The question before the sentencing court is what punishment to mete out to an adult criminal, not how to treat and rehabilitate a youthful offender." *Id.*; *see also* United States v.

While *Johnson* recognized that the nature and purpose of delinquency confinement differs from criminal imprisonment and does not relate directly to a youth's culpability, the court noted that a sentencing judge has discretion to make downward departures when appropriate.[262]

Judge Patricia Wald dissented in *Johnson*, characterized the policy of equating juvenile and adult confinement as "manifestly irrational,"[263] and objected that it unfairly treats different things as similar because of the differences in purposes between the two systems:

> Unlike criminal punishment, which might be imposed in pursuit of retributive as well as rehabilitative objectives, the focus of juvenile confinement traditionally has been primarily, or even exclusively, on reforming and treating the offender .... [W]hile the purposes of confinement in the juvenile and adult spheres may occasionally converge, they have never been congruent. Two-thirds of the states continue to employ the offender-specific rehabilitation model, and in all states the initially distinct emphases of the juvenile and adult criminal systems have led to the development of a very different set of procedures and standards for confinement and incarceration.[264]

McKeiver denied delinquents the right to a jury trial because juvenile proceedings were not criminal prosecutions and because judges based dispositions on the needs of the offender rather than

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Hanley, 906 F.2d 1116, 1120 (6th Cir. 1990) (guidelines' "prior incarceration provisions cover both adult and juvenile offenses").

262. 28 F.3d at 156 ("Distinctions between juvenile dispositions and adult convictions and sentences of imprisonment may warrant a sentencing court's departing from the Guidelines' sentencing range ... on the basis that the defendant's criminal history category 'does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.'") (quoting *Davis*, 929 F.2d at 933).

263. *Id.* at 157 (Wald, J., dissenting).

264. *Id.* at 159 (citations omitted); *see also* Dormont, *supra* note 253, at 1793-94, who argues that

> [t]he Supreme Court approves of lower standards for incarceration procedures only in treatment-oriented proceedings where the government has disavowed any interest in criminal prosecution or punishment. Only when treatment is the objective of the juvenile's sentence does *McKeiver* allow for different sentencing standards and a correspondingly lower level of due process in juvenile proceedings. Accordingly, courts should not interpret *McKeiver* to justify using juvenile convictions with reduced procedural protections for punitive purposes at the adult level. Interpreted in this manner, *McKeiver* would not allow courts to enhance an adult's sentence based on juvenile sentences obtained during proceedings governed by the lower "fundamental fairness" standard.

the gravity of the offense.[265] It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use convictions and sentences obtained for treatment purposes to punish them more severely as adults.[266]

Although rational sentencing policy supports systematic use of juvenile records of convictions, justice and fairness require adult criminal procedural safeguards to assure the quality and legitimacy of their use. Despite the importance of including juveniles' prior records in the adult criminal history score, the denial of a right to a jury trial and the questionable waivers of and delivery of effective legal services call into question the quality of delinquency convictions. Although courts routinely approve sentence enhancements with prior delinquency convictions, *Apprendi*'s emphasis on the vital role of the jury to assure the validity and reliability of prior convictions requires reconsideration of those

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265. *Johnson*, 28 F.3d at 160 ("Juvenile confinement, unlike adult incarceration, is still largely imposed on the basis of characteristics of the offender, rather than characteristics of the offense. The imposition and duration of juvenile confinement may be set irrespective of proportionality; irrespective of the sentence ranges for adult offenders .... [If a juvenile spent sixty days or more in confinement, it] may simply mean that the juvenile lacked an adequate home or that the community lacked adequate services."); *see also* Neal Miller, *National Assessment of Criminal Court Use of Defendants' Juvenile Adjudication Records*, *in* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NONCRIMINAL JUSTICE USES 51 (April, 1997), *at* http://blackstone.ojp.usdoj.gov/bjs/pub/ascii/ncjjr.txt ("[S]entencing laws that mandate juvenile record use assume that there is some substantive meaning to a juvenile adjudication for a particular offense .... Because the juvenile justice system is still often treatment-oriented, there is no necessary relationship between the adjudicated offense and the 'sentence' imposed by the court.").

266. *See, e.g.*, Dormont, *supra* note 253, at 1791 (analyzing use of juvenile adjudications under the Federal Sentencing Guidelines). Dormont argues that

> [i]f a sentence was imposed under the guise of therapy, it should remain a therapeutic sentence; it should not be allowed to metamorphosize into a criminal conviction at the prosecution's convenience. In the same vein, enhancing a sentence because of an earlier period of incarceration imposed under a mental illness statute would be inherently unfair. Because the procedural protections found sufficient in juvenile proceedings are not sufficient in adult proceedings, McKeiver cannot support the collateral use of such juvenile proceedings against juveniles when they reach adulthood.

Id. at 1794-95 (footnotes omitted); *see also* Forquer, *supra* note 241, at 1330-31 ("When a juvenile adjudication is used to increase an adult sentence under the Federal Sentencing Guidelines or Three Strikes, the adjudication is used for a punishment purpose. Thus, the treatment-only justification that permits the lower due process standard in the juvenile system is not served by this subsequent punitive use of the juvenile adjudication.").

policies.[267]

III. *APPRENDI*, DELINQUENCY ADJUDICATIONS, AND THE "FACT OF A PRIOR CONVICTION"

In *Apprendi* and *Jones*, the Court created an exception for recidivism to avoid over-ruling its earlier decisions in *Almendarez-Torres* and *Monge*.[268] In *Apprendi*, Justice Thomas confessed that he erred in voting in *Almendarez-Torres* to treat recidivism as a "sentencing factor" rather than an "element" to be proven to a jury.[269] He switched his position, cast the swing-vote in *Apprendi*,

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267. Huigens, *supra* note 4, at 432, argues that the core of *Apprendi*'s holding hinges on the responsibility of the jury to determine the defendant's fault:

> If we have a meaningful jury right at all, then the jury's function includes at least the determination of whether wrongdoing has been committed. Because fault is an aspect of wrongdoing, fault can be determined only by the body conducting the deliberations in which wrongdoing is determined, in those same deliberations. These are, of course, highly fact-specific determinations. The determination of wrongdoing and fault, therefore, is the jury's province, as is the determination, beyond a reasonable doubt, of the facts on which wrongdoing and fault are predicated .... [C]riminal fault is not confined to those [mens rea] mental states. The manner and circumstances of the offender's wrongdoing also serve as indicators of fault, and the jury's determination of fault is inextricable from its determination of wrongdoing. The jury right that unquestionably extends to both the determination of wrongdoing and mens rea extends to all objective indicators of fault as well.

Because *McKeiver* denies juveniles the opportunity ever to have a jury determine fault, it undermines the central validity of using delinquency convictions for sentence enhancements.

268. *See supra* notes 28-33 and accompanying text. Both cases may be ripe for overruling. *See, e.g.*, *Apprendi*, 530 U.S. at 489 (stating that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested") (footnote omitted); *id.* at 499 (Scalia, J., concurring) (asserting that the Constitution requires a broad rule "that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury"); *id.* at 520-22 (Thomas, J., concurring) (stating that the Court incorrectly decided Almendarez-Torres).

269. 530 U.S. at 520 (Thomas, J., concurring) ("[O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence.). On the basis of Justice Thomas' change of heart, analysts suggest that *Almendarez-Torres* and *Monge* may be ripe for overruling:

> Nevertheless, it is clear the Justices forming the 5-4 majority in *Apprendi* view those two 5-4 cases as wrongly decided: the four previously dissenting Justices are now joined by Justice Thomas, who had cast the swing vote against applying the *Apprendi* principle in those cases but who wrote separately in *Apprendi* to explain his

and argued for a broader rule that "every fact that was by law a basis for imposing or increasing punishment (including the fact of a prior conviction) was an element."[270] Even without overruling *Almendarez-Torres* and *Monge*, appellate courts have struggled to apply the *Apprendi* principle to delinquency convictions.

A. United States v. Tighe

In *United States v. Tighe*,[271] the defendant pled guilty to a three-count indictment charging him with bank robbery and being a felon in possession of a firearm.[272] The indictment did not allege that Tighe could be sentenced under the Armed Career Criminal Act ("ACCA") and subject to a mandatory minimum sentence of fifteen years, if he had three prior convictions for violent felonies.[273] At his sentencing, the trial judge found three predicate violent offenses, one of which was a juvenile delinquency adjudication,[274] and sentenced Tighe to the fifteen year mandatory minimum, rather than the ten year maximum sentence for which a non-ACCA felon-in-possession of a firearm otherwise could be sentenced.[275] Because

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switch. Thus, although presently still good law, it seems likely *Almendarez-Torres* and *Monge* soon will be overruled.

Priester, *supra* note 4, at 291 n.64 (citations omitted); *see also* Huigens, *supra* note 4, at 412 ("Justice Thomas's concurrence explicitly endorses the overruling of *Almendarez-Torres* and *McMillan*, and implicitly acknowledges that this may entail declaring unconstitutional the Federal Sentencing Guidelines.") (footnote omitted).

270. 530 U.S. at 512. "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment." *Id.* at 518.

271. 256 F.3d 1187 (9th Cir. 2001).

272. The indictment charged Tighe with bank robbery, being a felon in possession of a firearm, and interstate transportation of a stolen vehicle. *Id.* at 1190.

273. *Id.* at 1190. The Armed Career Criminal Act, 18 U.S.C. § 924(e) (2002), imposes a mandatory minimum fifteen-year sentence for any person convicted as a felon-in-possession of a firearm, pursuant to 18 U.S.C. § 922(g), and who has three previous convictions for violent felonies or serious drug offenses. *Id.* at 1189.

274. *Id.* at 1189. One of the three predicate felonies the trial court used to enhance Tighe's sentence was a delinquency adjudication for reckless endangerment, robbery, and unauthorized use of a motor vehicle. At the time of his adjudication, Tighe did not have a state or federal right to a jury trial. *Id.*

275. *Id.* at 1192. The trial judge sentenced Tighe for 235 months for bank robbery, and 180 months for being a felon-in-possession of a firearm. *Id.* at 1190. Without the previous convictions for three violent felonies, a defendant convicted of being a felon in possession of a firearm could only receive a maximum sentence of ten years. 18 U.S.C § 924(a)(2) (2002). Tighe challenged the applicability of the ACCA because it "allows for a substantial increase in [the] statutory maximum [sentence] based on prior convictions, the existence of which need only be proved to the judge by a preponderance of the evidence." *Tighe*, 266 F.3d at 1191.

Apprendi held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt, Tighe argued that his delinquency adjudication should have been charged in the indictment and found by a jury in order to increase his felon-in-possession sentence under the ACCA beyond the statutory maximum of ten years. Although courts and Congress routinely approve use of non-jury delinquency adjudications to enhance criminal sentences,[276] the 2-1 majority in *Tighe* found that the *Apprendi* principle applied because his delinquency conviction increased his sentence beyond the statutory maximum penalty to which the offense otherwise exposed him.[277] Although *Apprendi* created an exception for "prior convictions," *Tighe* reasoned that those prior convictions assumed the right to a jury trial at the time they were obtained to assure their validity.[278]

The issue in *Tighe* was whether "prior juvenile adjudications, which do not afford the right to a jury trial, fall within the 'prior conviction' exception to *Apprendi*'s general rule that a fact used to increase a defendant's maximum penalty must be submitted to a jury and proved beyond a reasonable doubt?"[279] Earlier, *Almendarez-Torres* and *Jones* treated prior convictions as "sentencing factors" rather than as "elements of the offense" that the state must prove to a jury, even though they could increase the defendant's sentence beyond the statutory maximum. In distinguishing prior convictions from other sentence-enhancing "facts," *Jones* emphasized that "unlike virtually any other

276. *See supra* note 145 and accompanying text. Congress provided under the ACCA, that juvenile delinquency adjudications could provide predicate violent felony "convictions." 18 U.S.C. § 924 (e)(2)(C) (2000) ("[T]he term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony."); *see also* United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (use of non-jury juvenile delinquency adjudication to enhance sentence under the sentencing guidelines within statutory maximum range); *supra* notes 254-258 and accompanying text.

277. *Tighe*, 266 F.3d at 1192. According to the court, "under the ACCA the fact of Tighe's prior juvenile adjudication was used to increase his statutorily mandated maximum punishment from not more than 10 years, under 18 U.S.C. § 924(a)(2), to at least fifteen years. A fact that is used to increase the maximum statutory penalty to which a defendant is exposed raises an entirely different set of constitutional concerns than a fact that merely affects where a sentence is fixed within an undisputed statutorily mandated range." *Id.*

278. *Id.* at 1193. "Neither *Apprendi*, nor *Almendarez-Torres*—the case upon which *Apprendi* relied to create the 'prior conviction' exception to its general rule—specifically addressed the unique issues that distinguish juvenile adjudications from adult convictions, such as the lack of a right to a jury trial in most juvenile adjudications." *Id.*

279. *Id.*

consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.*"[280] Similarly, *Apprendi* recognized the unique validity of "prior convictions" because defendants enjoyed the right to a jury trial at the time they were obtained.[281] Because juveniles do not have a right to a jury trial, *Tighe* reasoned that delinquency adjudication does not fall within the "prior conviction" exception.

> [T]he 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s 'prior conviction' exception.[282]

Tighe declined to extend *Apprendi*'s "prior conviction" exception to delinquency adjudications because of the Supreme Court's reservation about the continuing validity of that exception, at least where the defendant contests the validity of those prior convictions.[283] The Oregon state law under which Tighe acquired the delinquency conviction that provided the ACCA felony-predicate denied him the right to a jury trial. Therefore, the court concluded that the trial court erred when it used that conviction to impose to

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280. Jones v. United States, 526 U.S. 227, 249 (1999) (emphasis added). The court in *Tighe* reasoned that *Jones*' and *Apprendi*'s exception for prior convictions "was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial." *Tighe*, 266 F.3d at 1193.

281. Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Id.

282. *Id.*

283. *Id.* The *Apprendi* majority questioned the continuing vitality of *Almendarez-Torres*, at least where the defendant contests the validity of the prior convictions. *Apprendi*, 530 U.S. at 489-90 ("[I]t is arguable that *Alemndarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . ." (footnote omitted)). Justice Thomas' concurrence was even more forthright in its repudiation of the validity of *Almendarez-Torres*. *Id.* at 520-21 ("[T]he fact of a prior conviction is an element under a recidivism statute."). *See also supra* notes 268-270 and accompanying text.

an ACCA-enhanced sentence.[284]

The dissent in *Tighe* objected to the majority's rejection of *Apprendi*'s "prior conviction" exception to increase his sentence. The dissent invoked *Williams*,[285] where the court approved the use of prior delinquency adjudications to enhance criminal sentences under the federal sentencing guidelines.[286] Even though *McKeiver* denied juveniles the constitutional right to a jury trial, *Williams* reasoned that delinquency trials provided sufficient procedural protections to confine the juvenile at the time of adjudication and to justify their use for later sentencing purposes as well.

> [W]here a juvenile received all the process constitutionally due at the delinquency proceeding stage, we found the later use of the juvenile adjudication for an adult enhancement to be constitutionally sound because 'the conviction was constitutionally valid for purposes of imposing a sentence of imprisonment for the [juvenile] offense itself."[287]

Williams asserted the illogic of requiring greater procedural safeguards to use a delinquency conviction for subsequent enhancement than to impose a disposition at the time of adjudication.[288] However, *Williams* did not examine the illogic of allowing convictions obtained with fewer procedural safeguards in order to provide treatment subsequently to be used to extend punishment. According to the *Tighe* dissent, no reasons exist to treat delinquency convictions used to enhance sentences differently from those used to exceed the maximum penalty.

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284. *Id.* at 1194-95.

> [W]e conclude *Apprendi*'s narrow 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the 'prior conviction' exception does not include nonjury juvenile adjudications. Therefore, the district court violated *Apprendi* when, at sentencing it increased Tighe's penalty beyond the prescribed statutory maximum based on an adjudication which denied Tighe the right to a jury trial.

Id. (footnote omitted).

285. United States v. Williams, 891 F.2d 212 (9th Cir. 1989); *see also* United States v. Johnson, 28 F.3d 151 (D.C. Cir. 1994) (approving consideration of juvenile records in sentencing decision); *supra* notes 254-264 and accompanying text.

286. *Tighe*, 266 F.3d at 1198 (Brunetti, J., dissenting) (juvenile convictions allowed to enhance criminal sentence). *See supra* notes 254-258 and accompanying text.

287. *Tighe*, 266 F.3d at 1198-99 (Brunetti, J., dissenting) (quoting *Williams*, 891 F.2d at 215).

288. *Williams*, 891 F.2d at 215 ("[W]e would in essence have to hold that the enhancement of an adult criminal sentence requires a higher level of due process protection than the imposition of a juvenile sentence.").

> Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. Extending Jones' logic to juvenile adjudications when a juvenile receives all the process constitutionally due at the juvenile stage, there is no constitutional problem (on which Apprendi focused) in using that adjudication to support a later sentencing enhancement.[289]

Moreover, if the prosecution has to allege and prove the fact of a prior juvenile conviction to the jury as an element of the offense, then the introduction of evidence of prior crimes could unduly prejudice the defendant.[290]

B. United States v. Smalley

United States v. Smalley[291] presented facts and issues virtually identical to those in *Tighe*. Smalley pled guilty to being a felon in possession of a firearm, the prosecution sought enhancement under the Armed Career Criminal Act, and the trial court increased his sentence from the ten years statutory maximum to the fifteen year mandatory minimum based in part on his prior delinquency adjudications.[292] Smalley objected to use of his delinquency adjudication as a "prior conviction" within the *Apprendi* exception.[293] The *Smalley* court rejected the *Tighe* court's reasoning that because juveniles did not enjoy the right to a jury trial, their delinquency

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289. *Id.* at 1200.

290. *Id.* at 1200-01.

> If a juvenile adjudication (without the right to a jury trial) does not fall within the *Almendarez-Torres* exception, then, to comply with *Apprendi*, prosecutors will be required to prove the *fact* of the prior convictions to the jury in order to support the sentencing enhancement . . . . [T]he Supreme Court has long recognized 'that the introduction of evidence of a defendant's prior crimes risks significant prejudice.' Thus, a defendant with a prior juvenile adjudication will be put to the Hobson's choice of stipulating to the priors or parading them before a jury. But, as *Almendarez-Torres* recognized, "[e]ven if a defendant's stipulation were to keep the name and details of the previous offense from the jury, . . . jurors would still learn, from the indictment, the judge, or the prosecutor that the defendant had committed [three violent felonies]."

Id. (citations omitted).

291. 294 F.3d 1030 (8th Cir. 2002).

292. *Id.*

293. *Id.* ("The question before us is whether juvenile adjudications can be characterized as prior convictions as that term is used in *Apprendi*. If so, it follows that they can be used to increase the penalty for a crime beyond the prescribed statutory maximum without being submitted and proved to a jury.").

convictions did not provide the fundamental procedural safeguards necessary to assure their reliability and to fall within the "prior conviction" exception.[294]

Smalley reasoned that *Apprendi* excepted "prior convictions" from its general rule because the procedural safeguards of trial by jury and proof beyond a reasonable doubt assured their reliability.[295] While *Apprendi* identified those procedural safeguards that clearly established the reliability of prior convictions—notice, right to a jury trial, and proof beyond a reasonable doubt—it did not hold that they were essential prerequisites to a valid conviction.

> We think that while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser [preponderance] standard of proof), the Court did not take a position on possibilities that lie in between these two poles. In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the "fundamental triumvirate of procedural protections" . . . underly [sic] an adjudication before it can qualify for the *Apprendi* exemption.[296]

Rather than focusing on the specific procedural safeguards of a criminal prosecution, *Smalley* focused on "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."[297] The court reviewed the procedural safeguards available to juveniles as a result of *Gault* and *Winship* and concluded that "these safeguards are more than

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294. *Id.* at 1032.

295. *Id.*

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496.

296. *Smalley*, 294 F.3d at 496.

297. *Id.* at 1033 *see also* United States v. Bevard, 44 Fed. Appx. 748, 749 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 1262 (2003) (claiming that juvenile adjudications are not "prior convictions" under *Apprendi* foreclosed by *Smalley*). *But see People v. Smith*, 1 Cal. Rptr. 3d 901, 924-25 (2003) (Johnson, J., dissenting), where Judge Johnson stated that *Apprendi*, *Jones*, and *Tighe* held that the right to a jury trial, proof beyond a reasonable doubt, and notice

> form an essential "triumvirate," all three of which must be present before it can be said a prior adjudication by a court qualifies as a "prior conviction" . . . justifying an enhanced sentence for the current crime. That a defendant enjoyed one of those rights or even two of them—is simply irrelevant to the question whether a trial court can utilize the prior adjudication as a reason to elevate the defendant's sentence . . . .

sufficient to ensure the reliability that *Apprendi* requires."[298] The court reiterated *McKeiver*'s assertion that the absence of a jury would not detract from the accuracy of fact-finding in delinquency adjudications.[299] Accordingly, the trial court did not err in treating delinquency adjudications as "prior convictions" for purposes of enhancement under *Apprendi*. Again, however, *Smalley* did not examine *McKeiver*'s "treatment" rationale for less stringent procedural safeguards or the inconsistency of using convictions obtained for a benign purpose subsequently to be used for a more punitive one.

Both *Tighe* and *Smalley* focused on the procedural safeguards necessary to assure the reliability of a "prior conviction" under *Apprendi*.[300] For *Tighe*, the right to a jury trial was part of the "procedural triumvirate" that distinguishes criminal trials from other proceedings and non-jury delinquency adjudications simply failed to ensure such reliability. *Tighe*'s understanding of the importance of the jury appears more consistent with the Court's jury-jurisprudence in *Jones* and *Apprendi* than does *Smalley*'s reasoning which had recourse only to *McKeiver*.[301] *Smalley*'s

298. *Smalley*, 294 F.3d at 1033 ("[J]uvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. A judge in a juvenile proceeding, moreover, must find guilt beyond a reasonable doubt before he or she can conflict."). *Id.* (citations omitted); *see also*, United States v. Jones, 332 F.3d 688, 696 (3rd Cir. 2003):

> [W]e find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court . . . that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence under the ACCA . . . . A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes.

299. *Smalley*, 294 F.3d at 1033.

> [W]hile we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudication in any significant way because we think that the use of a jury in the juvenile context would "not strengthen greatly, if at all, the fact-finding function" and is not constitutionally required.

300. *See, e.g.*, Comment, *Constitutional Law—Right to Jury Trial—Eighth Circuit Holds an Adjudication of Juvenile Delinquency To Be a "Prior Conviction" for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding.*—United States v. Smalley, *294 F.2d 1030 (8th Cir. 2002)*, 116 HARV. L. REV. 705, 706 (2002).

301. *Tighe* questioned the reliability of non-jury criminal adjudications based on the language of *Jones* and *Apprendi*. *Tighe*, 266 F.3d at 1193-94. *See, e.g.*, *Apprendi*, 530 U.S. at 496 ("[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the

doctrinal reliance on *McKeiver* seems even more tenuous in light of the questionable reliability of delinquency adjudications in comparison with criminal convictions.[302] The United States Solicitor General recognized that the conflict among the circuits, the important and recurring nature of the question, and the implications for state as well as federal sentencing practices required a prompt resolution of the issue.[303]

C. *Other* Apprendi *Challenges To Juvenile Sentencing and Waiver Hearings*

Juveniles have raised *Apprendi* issues in state proceedings to challenge criminal sentence enhancements and to oppose judicial waiver from juvenile to criminal courts. The state enhancement cases raise issues similar to *Tighe* and *Smalley*, albeit with somewhat different analyses. Because transfer to criminal court greatly increases the sentence that a youth may receive if tried as an adult, a waiver proceeding involves a form of sentencing enhancement beyond the delinquency maximum and presents an *Appendi* issue unique to juvenile courts.

1. *Sentence Enhancements*

In *State v. Hitt*,[304] the defendant raised the *Apprendi* issue whether a delinquency conviction constituted a "prior conviction" under the Kansas Sentencing Guidelines Act ("KSGA").[305] Because the trial court used the prior delinquency conviction to sentence Hitt within the presumptive sentencing range, the Kansas supreme court

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required fact . . ."); *see also Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and *jury trial guarantees*.") (emphasis added).

302. *See supra* notes 136 and 253 and accompanying text.

303. *See* State v. Hitt, 42 P.3d 732 (Kan. 2002), *cert. denied*, 123 S. Ct. 962 (2003). The Solicitor General was invited to file a brief in this case. 537 U.S. 1104 (2002) (mem.). The Solicitor General's brief concluded that

> [i]n light of the square circuit conflict, which involves a question of recurring importance, review by this Court is warranted to determine whether a criminal defendant's sentence may be enhanced beyond the otherwise-applicable statutory maximum, based on the sentencing judge's finding that the defendant had sustained a prior juvenile adjudication in which the juvenile defendant was not afforded a right to jury trial.

Hitt v. Kansas, No. 01-10864 (Dec. 2002), *available at* http://www.usdoj.gov/osg/briefs/ 202/2pet/6invit/2001-10864.pet.amni.inv.html. However, the Solicitor General concluded that *Tighe* and *Smalley* presented more suitable pending cases in which to resolve the issue. *Id.*

304. State v. Hitt, 42 P.3d 732 (Kan. 2002), *cert denied*, 123 S. Ct. 962 (2003).

305. *Hitt*, 42 P.3d at 735.

concluded that the *Apprendi* principle did not directly apply.[306] However, Hitt also argued that because Kansas denied juveniles the right to a jury trial, his delinquency adjudications should not constitute a "prior conviction" within the *Apprendi* exception for recidivism.[307] *Hitt* reviewed the Supreme Court's decisions in *Almendarez-Torres*, *Jones*, and *Apprendi* and concluded that the predicate for treating recidivism as a "sentencing factor," rather than as an "element" of the offense, hinged on its being "cloaked in substantial procedural safeguards."[308]

> *Apprendi* created an exception allowing the use of a prior conviction to increase a defendant's sentence, based on the historical role of recidivism in the sentencing decision and on the procedural safeguards attached to a prior conviction. Juvenile adjudications are included within the historical cloak of recidivism and *enjoy ample procedural safeguards*; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications. Juvenile adjudications need not be charged in an indictment or proven to a jury beyond a reasonable doubt before they can be used in calculating a defendant's criminal history score . . . .[309]

Kansas, like most states, denies delinquents the right to a jury trial.[310] *Hitt* reasoned that because juveniles received all the

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306. In *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001), Kansas adopted the *Apprendi* principle where the defendant "received a sentence beyond the statutory maximum based upon a court finding of certain aggravating factors found by a preponderance of the evidence." The trial court in *Hitt*, by contrast, sentenced him within the presumptive sentencing range.

307. *Hitt*, 42 P.3d at 734.

> He reasons that under Apprendi, juvenile adjudications must be charged in the indictment and proven to a jury beyond a reasonable doubt . . . . [J]uvenile adjudications are not prior convictions, and, more importantly, unlike adult convictions, juvenile adjudications do not result from proceedings in which the defendant has a right to a jury trial. Thus, *Hitt* asserts that juvenile adjudications do not come within the 'prior conviction' exception to *Apprendi's* general rule.

Id. at 734-35.

308. *Id.* at 736 ("The question becomes whether the absence of the jury trial safeguard in juvenile adjudications is enough to remove it from the narrow exception for prior convictions built into the *Apprendi* rule.").

309. *Id.* at 740 (emphasis added). *Accord* State v. Kemp, 46 P.3d 31, 36 (Kan. App. 2002) (holding the defendant's "juvenile adjudications were properly included in his criminal history determination"); *see also,* State v. Cameron, 56 P.3d 309, 314 (Kan. App. 2002) ("[P]rior juvenile adjudications fall under the *Apprendi* prior conviction exception." The trial court properly used prior juvenile adjudications to enhance sentence.).

310. A juvenile court judge has unreviewable discretion whether or not to empanel a jury in a felony delinquency matter. *See* KAN. STAT. ANN. § 38-1656 (2000) ("[T]he judge may order that the juvenile be afforded a trial by jury.").

procedural safeguards to which the constitution entitled them, their adjudications were valid "prior convictions" which courts could use to enhance subsequent sentences.[311] "The *Apprendi* Court spoke in general terms of the procedural safeguards attached to a prior conviction. It did not specify *all* procedural safeguards nor did it require certain *crucial* procedural safeguards."[312] The procedures that juveniles did receive were constitutionally adequate to support their delinquency adjudication. Apart from its constitutional analysis, the *Hitt* court feared that disallowing the use of non-jury delinquency adjudications would have a substantial negative impact on the sentences already imposed on many criminal defendants.[313]

As the court noted in *Hitt*, however,

> We have held that there is no federal or state constitutional right to jury trial in juvenile proceedings. Further K.S.A. 38-1656 does not grant a juvenile the right to request or demand a jury trial. The decisions to grant a trial is entirely up to the court. The court is not required to state a reason for its decision, and the decision is not appealable.

Hitt, 42 P.3d at 738 (citations omitted).

311. *Id.* at 740 ("If juvenile adjudications are constitutionally sound according to the more limited set of rights afforded in juvenile proceedings, they may be used to increase a defendant's sentence for a later crime."). *Id.* at 739.

In *Baldasar v. Illinois*, 446 U.S. 222, 224, 229 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994), a plurality of the Supreme Court prohibited enhancement of the defendant's sentence based on a prior uncounseled misdemeanor conviction that had not resulted in incarceration. *See supra* notes 220-223 and accompanying text (discussing *Baldasar* and *Nichols*). In *Nichols v. United States*, 511 U.S. 738, 746-48 (1994), the Court overruled *Baldasar*, and held that the government could use an uncounseled misdemeanor conviction to enhance a subsequent sentence, because his initial conviction resulted only in a fine and probation. *Nichols* reasoned that uncounseled convictions that are constitutionally valid under *Scott v. Illinois*, 440 U.S. 367 (1979), because the sentencing court did not order imprisonment, also could be used to enhance subsequent sentences. *Nichols*, 511 U.S. at 748-49. "[A]n uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes . . . do not change the penalty imposed for the earlier conviction." *Id.* at 746-47. *Hitt* relied, by analogy, on *Nichols* to uphold the use of non-jury delinquency adjudications for sentence enhancements:

> [W]e likened a nonjury juvenile adjudication to an uncounseled adult misdemeanor conviction—both obtained absent rights that did not attach to the particular type of offense . . . . Here, the defendant's juvenile adjudications were constitutional even if he had no right to a jury trial in those proceedings. Because the juvenile adjudications were not constitutionally infirm, they may be used in calculating the defendant's criminal history score under the KSGA.

Hitt, 42 P.3d at 739 (citations omitted).

312. *Hitt*, 42 P.3d at 740.

313. *Id.* at 740.

> A decision to exclude nonjury juvenile adjudications from the criminal history score, even limited to a prospective application, would have an

To further bolster its position, *Hitt* invoked the rationale of *Nichols* which held that courts could use uncounseled misdemeanor convictions to enhance subsequent sentences, because the conviction was constitutionally valid at the time it was obtained.[314] In *State v. LaMunyon*,[315] the defendant challenged the use of a prior delinquency conviction to enhance his adult sentence because he was denied the right to a jury trial as a juvenile. However, the Kansas supreme court drew on *McKeiver* and *Nichols* to hold that courts could use a jury-less delinquency conviction, valid at the time obtained, to increase a subsequent penalty.[316] "[T]he defendant's juvenile adjudications were constitutional even if he had no right to

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> unprecedented effect on the sentences of an untold number of criminal defendants .... [I]t would appear that far more defendants have a criminal history score bolstered by juvenile adjudications. To remove juvenile adjudications from the KSGA calculation would require the resentencing of many and result in lighter sentences for them and future defendants.

Id.

314. *Id.* at 739.

> We recognized that *Nichols v. United States* held that an uncounseled misdemeanor conviction could be used to enhance the sentence of a subsequent offense .... [W]e used *Nichols* to justify our conclusion that the use of an uncounseled but constitutionally sound misdemeanor conviction could be used in determining a criminal history score under the KSGA.

Id. *See supra* notes 222-225, 311 and accompanying text (analyzing *Nichols'* interpretation of *Scott v. Illinois* which approved denial of counsel where the state did not order defendant confined). Reubner, Berner, and Herbert, *supra* note 223 at 551-52, strongly criticized the Court's reasoning in Nichols and its implications for sentence enhancements:

> The Supreme Court wanted to ensure that proceedings resulting in the loss of an individual's liberty would be reliable and fair. In keeping with this goal, it has long been an accepted notion that sentencing judges may use only reliable evidence when determining a sentence. Since *Nichols* allows judges to consider uncounseled, and therefore unreliable, convictions in fashioning a prison sentence ... the Court's previous emphasis on fairness of proceedings and reliability of convictions is defeated.

315. 911 P.2d 151 (Kan. 1996).

316. *But see* Kropf, *supra* note 149, at 2157-58, who notes that Court's concern about compounding the impact of denials of constitutional rights.

> [A]lthough the previous cases had dealt with uncounseled prior convictions, the basic prohibition against the use of unconstitutional prior convictions might extend to "other defects." The denial of a jury would likely fall into this category of constitutional defects. The Court has stated that sentence enhancements cannot be triggered by either a prior conviction that violates a "specific federal right' or 'upon misinformation of constitutional magnitude." Clearly, the right to a jury is a "specific federal right" as it is explicitly described by the Constitution .... [T]he Court would erode the constitutional principle of trial by jury if it were to allow sentencing enhancement based on a prior conviction obtained by denying the defendant a right to jury.

a jury trial in those proceedings. Because the juvenile adjudications were not constitutionally infirm, they may be used in calculating the defendant's criminal history score . . . ."[317] However, the right to counsel and the right to a jury trial serve different protective functions, and criminal defendants enjoy a right to a jury trial even in cases in which the state might convict them without a right to appointed counsel.[318] Because *Apprendi* emphasized the jury's role

317. *LaMunyon*, 911 P.2d at 158. *See* Addington v. Texas, 441 U.S. 418, 432-33 (1979) (upholding lower standard of proof in involuntary civil commitment proceedings); *see also* State v. Hatt, 38 P.2d 738, 741 (Kan. App. 2002) ("[J]uvenile adjudications are constitutional even though no right to jury trial attaches to the proceedings and, therefore, they may be used to calculate the defendant's criminal history score under the sentencing guidelines."); Forquer, *supra* note 241, at 1331 (arguing that enhancement provisions using juvenile adjudications "violate due process because the use of juvenile adjudications to enlarge sentences permits an adjudication to be used for a non-treatment purpose and allows the adjudication to have a significant and onerous impact on an adult," but would likely pass constitutional muster under *Nichols*). Following these courts' logic would suggest that courts could enhance criminal sentences on the basis of mental health involuntary civil commitments for "dangerousness" cum criminality because those commitments were constitutionally valid at the time obtained.

318. Although all constitutional safeguards serve to assure accurate fact-finding, to prevent governmental oppression, and to secure respect for individual dignity and autonomy, the Sixth Amendment rights to counsel and to a jury secure these interests in somewhat different ways. *See e.g.*, LAFAVE, ET AL., *supra note* 127. *Compare, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (counsel necessary to preserve proper functioning of adversary process), *with* Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968) (jury of peers as check on judiciary and executive branches).

Significantly, defendants enjoy a constitutional right to a jury trial even under circumstances in which the state may deny them the right to counsel. In *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970), the Court held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months *is authorized*." For Baldwin, the legislature determined the "seriousness" of the offense by the maximum penalty which it authorized, rather than by the sentence the judge actually imposed. *Id.* By contrast, Scott v. Illinois, 440 U.S. 367, 373 (1979), declined to extend the right to counsel in all "non-petty" misdemeanor cases, but only required it for those in which the court ordered *actual imprisonment*. In *Nichols v. United States*, 511 U.S. 738, 746-47 (1994), the Court held that the state could use an uncounseled misdemeanor conviction that was valid under *Scott*, because no term of imprisonment had been imposed, to enhance the sentence for a later subsequent offense even though the offense would be deemed "non-petty" under *Baldwin*.

On the other hand, the Court may view the reliability of an uncounseled conviction as more problematic than a delinquency conviction obtained without the right to a jury. The Supreme Court gave retroactive effect to its ruling in Gideon which recognized the right to counsel in state criminal trials, but declined to give retroactive effect to the right to a jury trial recognized in Duncan. *Compare, e.g.*, Pickelsmimer v. Wainwright, 375 U.S. 2, 3 (1963) (vacating judgment and remanding for further consideration in light of Gideon

to establish the validity and reliability of prior convictions, *Hitt*'s reliance on *Nichols* to include jury-less delinquency convictions for purposes of enhancements is questionable authority at best.

The defendant in *People v. Bowden*,[319] raised the *Apprendi* issue when the state used a prior delinquency adjudication as a "strike" under California's "Three Strikes" law to increase his maximum adult sentence. Although the state pleaded and proved the existence of the qualifying delinquency conviction in the present case as required under the "Three Strikes" law, the defendant challenged the validity of that prior conviction under *Apprendi* because the state obtained it without a right to jury trial in juvenile court.[320]

Prior to *Apprendi*, the California court of appeals in *People v. Fowler*[321] approved the inclusion of prior delinquency convictions as "strikes" even without the right to a jury trial.[322]

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v. Wainwright, 372 U.S. 335 (1963)), *with* DeStefano v. Woods, 392 U.S. 631, 633 (1968) (refusing to give retroactive effect to Duncan v. Louisiana, 391 U.S. 145 (1967)).

319. 102 Cal. App. 4th 387 (2002).

320. *Id.* Defendant, relying on Apprendi and Tighe, "makes the broader contention that because a person previously tried as a juvenile had no right to a jury trial in juvenile court, the prior juvenile adjudication cannot constitutionally be treated as a prior conviction for purpose of the Three Strikes law." *Id.* The California Supreme Court in *In re* Daedler, 194 Cal. 320, 331 (Cal. 1924), held that juveniles do not have a right to a jury trial in juvenile court under the state constitution. The court of appeals in *In re* Javier A., 206 Cal. Rptr. 386, 417-23 (Cal. Ct. App. 1984), urged the California Supreme Court to reconsider Daedler in light of the ensuing changes in juvenile justice administration:

> Those same 60 years have brought dramatic changes in the procedures followed in juvenile courts causing them to become trials in the full sense of the word – formal, adversarial and public. Finally, the consequences of a finding the accused juvenile committed the charged crime now closely resemble what would follow conviction in adult criminal court . . . . [A] juvenile delinquency proceeding in 1984 asks a court to decide whether a child has violated a specified criminal law and whether this violation is a felony or misdemeanor. If the court decides beyond a reasonable doubt the child did commit the crime, it can, in order to 'protect the public from criminal conduct,' deprive the child of his liberty for the same period of time an adult would lose his liberty for violating the same criminal law.

321. 84 Cal. Rptr. 2d 874 (Cal. Ct. App. 1999).

322. *Id.* at 876-77 ("[J]uveniles enjoy no state or federal due process or equal protection right to a jury trial in delinquency proceedings. It is well established that the trial court may consider a defendant's juvenile adjudication as evidence of past criminal conduct for the purpose of increasing an adult defendant's sentence."). Prior to the passage of the Three Strikes law, California courts did not use delinquency adjudications to enhance criminal sentences because they were not properly "felony convictions." People v. West, 201 Cal. Rptr. 63, 65-71 (Cal. Ct. App. 1984); *see also* Lise Forquer, *California's Three Strikes Law—Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 SAN DIEGO L. REV.

> By enacting the three strikes law, the Legislature has not transformed juvenile adjudications into criminal convictions; it simply has said that under specified circumstances, a prior juvenile adjudication may be used as evidence of past criminal conduct for the purpose of increasing an adult defendant's sentence. The three strikes law's use of juvenile adjudications affects only the length of the sentence imposed on an adult offender, not the finding of guilt in the adult court nor the adjudication process in the juvenile court. Since a juvenile constitutionally – and reliably (*McKeiver v. Pennsylvania*) – can be adjudicated a delinquent without being afforded a jury trial, there is no constitutional impediment to using that juvenile adjudication to increase a defendant's sentence following a later adult conviction.[323]

Even though juveniles have no right to a jury trial, the court in *Bowden* held that *Apprendi* did not change the result because, "when a juvenile receives all the process constitutionally due at the juvenile stage, there is no constitutional problem (on which *Apprendi* focused) in using that adjudication to support a later sentencing enhancement."[324] Thus, courts' rejection of *Apprendi* claims hinge crucially on *McKeiver* and the ability of juvenile court judges to make reliable determinations of guilt beyond a reasonable doubt.

In a second, post-*Apprendi* California case, the defendant in *People v. Smith*[325] acquired both of his two prior "strikes" from a single, jury-less delinquency adjudication for multiple counts arising out of the same transaction.[326] As a result, upon his first adult conviction for burglary at age 19, the trial court sentenced him as three-strike offender to a term of 30 years to life in prison.[327] The majority in *Smith* relied on *Bowden* and *Fowler* and approved the use of prior delinquency adjudications to increase the adult defendant's sentence well above the statutory maximum for the burglary alone.[328] Despite the substantial convergence between the

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1297, 1310-15 (1995) (reviewing appellate cases holding that delinquency adjudications are not criminal convictions for purposes of sentence enhancements).

323. *Fowler*, 84 Cal. Rptr. 2d at 876-877.

324. *Bowden*, 125 Cal. Rptr. 2d at 518.

325. 1 Cal. Rptr. 3d 901 (Cal. Ct. App. 2003).

326. *Id.* at 908 (noting that both prior strikes "resulted from a single juvenile court proceeding where the juvenile judge found the defendant, then age 16, committed two offenses on a single occasion").

327. *Id.* at 902.

328. *Id.* at 905 ("Since a juvenile constitutionally—and reliably—can be adjudicated a delinquent without being afforded a jury trial, there is no constitutional impediment to using that juvenile adjudication to increase a defendant's sentence following a later adult conviction.").

juvenile and adult justice systems, it insisted that sufficient differences remained between a finding of criminal guilt and a delinquency adjudication to justify the procedural differences notwithstanding the subsequent collateral consequences.[329] Ultimately, the court concluded that it was bound by *Daedler* and *McKeiver* to deny juveniles a jury trial and that unless the California or United States supreme courts overruled those decisions, the legislature was the proper body to address any unfairness from the use of prior delinquency adjudications.[330]

A strong dissent in *Smith* characterized the use of delinquency convictions obtained without the right to a jury trial for sentence enhancements and as "strikes" as an "injustice [that] rises to the level of a constitutional violation and, as such, can and must be remedied by the courts."[331] Judge Johnson argued that the California Supreme Court probably erred in 1924 when it originally denied delinquents a state constitutional right to a jury trial in juvenile court[332] and that, in any event, "the legal and social environment have changed so much that the rationale undergirding *In re Daedler*'s holding has eroded completely away."[333] In the

329. *Id.* at 906 (noting "significant differences between a finding of criminal guilt in an adult criminal court and a declaration of wardship by a juvenile court"). The differences in consequences of criminal convictions and delinquency adjudications include: the possibility of imprisonment for life or capital punishment versus a term of confinement that cannot extend beyond the age of twenty-five; public criminal records versus sealed juvenile records that may affect future employability; and collateral consequences including the right to serve on a jury, to vote, to possess firearms, and to engage in certain professions. *Id.*

330. The Courts in *McKeiver*, 403 U.S. 528, 528-29 (1971), and *In re Daedler*, 194 Cal. 320, 332 (Cal. 1924), denied juveniles a federal and state constitutional right to a jury trial, and the *Smith* majority regarded those decisions as controlling. In the absence of judicial action, "[a]ny meaningful response . . . must come from the political branches of our state government." *Id.* at 907.

331. *Id.* at 908. Judge Johnson objected that when a trial judge "counts a juvenile court 'true finding' as a prior 'strike,' despite the absence of a right to jury trial in delinquency proceedings where he was found to have committed that offense . . . the statute authorizing this practice violates both the California and United States Constitutions . . . ." *Id.* at 909.

332. Judge Johnson referred to the court of appeal's earlier decision in *In re* Javier A., 206 Cal. Rptr. 386 (Cal. Ct. App. 1984), which concluded that Daedler erroneously misread the law at the time when it found that it was permissible to deny delinquents a right to a jury trial. *Smith*, 1 Cal. Rptr. 3d at 911. "[W]e concluded our Supreme Court had erred some 60 years earlier when it held juvenile courts could try alleged juvenile offenders without juries." *Id.*

333. *Id.* at 910. California courts regularly asserted that juvenile proceedings differed from criminal prosecutions, that the purpose of delinquency intervention was "not to punish the child but to redirect him to the right path," and that juvenile court judges give "more consideration for their

alternative, if delinquency proceedings truly are non-criminal equity proceedings, then they cannot be reclassified as "criminal convictions" for later use to enhance a "three strike" sentence.[334] In addition, changes in California's waiver law grant prosecutors the discretionary authority to decide whether to charge a youth in criminal court as an adult, where he has the right to a jury, or as a juvenile, where he has no right to a jury, and to use either conviction as a "strike" regardless of the forum in which it is obtained.[335] This

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future development than for their past shortcomings." *Id.* at 913. However, the court in *In re* Javier A., 206 Cal. Rptr. 386, 416 (Cal. Ct. App. 1984), and Judge Johnson emphasized that those differences in proceedings and purposes had not survived the Twentieth Century. "[T]he goals are too punitive, the process too adversarial, and the consequences too much like punishment to qualify as anything other than criminal." *Id.* at 915. Indeed, to claim that a delinquency prosecution is anything other than a criminal proceeding is "pure fiction." *Id.* at 914.

334. *Id.* at 918-19.

> [T]he constitutionality of denying juveniles a right to jury trial is predicated on classifying juvenile delinquency proceedings as something other than 'criminal proceedings.' . . . [O]nly because there was no right to trial by jury in English courts of equity as of 1850, and only because our juvenile courts are courts of equity rather than criminal courts, do juveniles lack a constitutional right to jury trial in these courts in 21st century California . . . . [I]f we instead admit what is happening in juvenile court is now the equivalent of criminal proceedings and the resulting outcomes the equivalent of criminal convictions, we can no longer constitutionally deny juveniles a right to jury trial in delinquency proceedings before the juvenile court.

335. As a result of California's adoption of Proposition 21, the prosecutor has discretion to charge directly in criminal court youths sixteen years of age or older and accused of committing certain violent offenses enumerated in Cal. Welf. & Inst. §707(b), and juveniles fourteen years of age or older charged with committing certain serious offenses under specified circumstances, *id.* at 707(d). In *Manduley v. Superior Court of San Diego County*, 117 Cal. Rptr. 2d 168 (Cal. 2002), the California Supreme Court upheld the constitutionality of the law. The court characterized the decision to charge a youth in criminal court or in juvenile court as an exercise of traditional prosecutorial charging discretion which was not subject to judicial review. *Id.* at 175.

> Inasmuch as petitioners concede that the Legislature possesses the authority to eliminate entirely the jurisdiction of the juvenile court and preclude juvenile court dispositions with regard to *all* minors who come within the scope of section 707(d), a statute conferring upon the prosecutor the discretion, before a judicial proceeding has been commended, to charge *some* of these minors in criminal court does not usurp an exclusively judicial authority.

Id. at 180. The court summarily rejected Manduley's claim that the lack of standards or criteria to guide the prosecutor's exercise of discretion violated due process "because minors who commit crimes under the circumstances set forth in section 707(d) do not possess any statutory right to be subject to the jurisdiction of the juvenile court." *Id.* at 188. Unlike a judicial waiver hearing which requires procedural due process, *Manduley* concluded that

enables the prosecutor to control and to deny juveniles access to a jury trial in those cases in which it would be most essential.[336] Finally, Judge Johnson argued that *Apprendi* and *Jones* barred the use of delinquency adjudications as "prior convictions" because the state obtained them without a right to a jury trial.[337] The constitutional impediment occurs because it is a judge, rather than a jury, who initially decided whether the juvenile committed the underlying offense subsequently to be used for sentence enhancement.[338]

> [T]he *Apprendi* line of cases interpreting the Constitution, forecloses the use of prior juvenile adjudications as 'felony convictions' in California's three strikes sentencing scheme .... [T]o tolerate such a punishment with two of the three qualifying offenses decided in proceedings where appellant lacked the right to jury trial offends both the United States and California Constitutions and several hundred years of Anglo-American legal tradition as well.[339]

> [a] statute that authorizes discretionary direct filing in criminal court by the prosecution . . . does not require similar procedural protections, because it does not involve a judicial determination but rather constitutes an executive charging function, which does not implicate the right to procedural due process and a hearing.

Id. at 191. Similarly, prosecutorial selection of some youths for adult prosecution and others for delinquency adjudication does not violate Equal Protection unless the youth can show that "she has been singled out deliberately for prosecution on the basis of some invidious criterion, and that the prosecution would not have been pursued except for the discriminatory purpose of the prosecuting authorities." *Id.* at 193. Regardless of the forum in which the state obtains a conviction, a "strike" is a "strike." People v. Smith, 1 Cal. Rptr. 3d at 920 ("whichever route the prosecutor elects, if successful the conviction or juvenile adjudication inflicts a 'strike' on the accused ordinarily by far the most significant consequence attaching to a finding of guilt.").

336. *Id.* at 920. The prosecutor could deny a juvenile access to a jury trial where

> the prosecution's case is weak, or this particular juvenile would be especially sympathetic to a jury, or for some other reason the jury would be more likely to acquit than a judge. Or, it is even possible to imagine a prosecutor choosing a juvenile court trial without jury in order to gain the advantage of trial before a judicial officer . . . known to render decisions favorable to the prosecution—in other words, the very sort of judge the right to jury trial is designed to allow an accused to avoid.

Id.

337. *Id.* at 922.

338. *Id.* at 924 ("[I]n the instant case as in Tighe, the underlying facts—whether the defendant actually committed the offense charged in the juvenile court proceeding are being decided by a judge rather than a jury because the defendant was denied the option of jury trial.").

339. *Id.* at 929.

In contrast with *Hitt*, *Bowden*, and the majority in *Smith*, the Louisiana court of appeals in *State v. Brown*[340] recognized the validity of the defendant's *Apprendi* objection to the use of his prior delinquency conviction to enhance his criminal sentence.[341] Although Louisiana continues to deny juveniles a statutory or state constitutional right to a jury trial, the Louisiana Supreme Court in *In re D.J.* recognized that the differences between delinquency and criminal trial procedures might require exclusion of delinquency adjudications for sentence enhancements.[342] The court in *Brown* reviewed the reasoning of *Tighe* and *Smalley* and the minimal guidance provided by *In re D.J.* and held that "prior juvenile adjudications that resulted absent a jury trial are constitutionally inadequate under the *Apprendi* exception for purposes of subsequent sentence enhancement."[343]

Significantly, the court in *Brown* reviewed the facts of the prior delinquency conviction obtained in a delinquency bench trial as illustrative of the *Apprendi* problem. The juvenile court judge had convicted Brown despite the absence of *any* evidence that he participated in the crime *and* a jury had acquitted his alleged adult co-defendant charged with the same offense.[344] "To use such a defective juvenile adjudication to constitute a 'prior conviction' for purposes of the *Apprendi* exception, and allow such prior conviction to be used to enhance the statutory penalty . . . is constitutionally improper."[345] Thus, *Brown* vividly demonstrates the procedural deficiencies of juvenile courts and the reasons to exclude

340. No. 2002-KA-1217, 2003 WL 21299836 (La. Ct. App. May 28, 2003).

341. *Id.* at *7.

342. The Louisiana Supreme Court denied juveniles a constitutional right to a jury trial in State in *Interests of Dino*, 359 So. 2d 586, 598 (La. 1978), *cert. denied*, 439 U.S. 1047 (1978), *rev'd on other grounds*, State v. Fernandez, 712 So. 2d 485 (La. 1998). The court reaffirmed its holding denying a right to jury trial in delinquency proceedings in *In re C.B.*, 708 So. 2d 391 (La. 1998). In *In re DJ*, 817 So. 2d 26 (La. 2002), the court again reaffirmed its holding denying juveniles a constitutional right to a jury. "[W]e find that fundamental fairness does not require us to overrule Dino's holding that due process does not afford a juvenile the right to a jury trial during the adjudication of a charge of delinquency in juvenile court." *Id.* at 32. However, the court suggested that the differences in trial procedures might affect the ability of the state to use juvenile convictions for sentence enhancements.

> In *United States v. Tucker* and *Burgett v. Texas*, the Supreme Court prohibited the use of prior convictions that were entered without the advice of counsel to enhance later sentences. In a related vein, some commentators suggest that the practice of using juvenile convictions obtained without the option to be tried by a jury to enhance adult sentences renders the juvenile system unconstitutional."

Id. at 31 n.6.

343. *Brown*, 2003 WL 21299836, at *12.

344. Id. at *13.

345. *Id.*

delinquency convictions from the *Apprendi* exception.

2. Waiver to Criminal Court: Judicial Fact-Finding that Increases the Maximum Sentence

Waiver of juveniles to criminal court for adult prosecution represents the single most important sentencing decision that juvenile court judges make.[346] In *Kent v. United States*,[347] the Supreme Court held that due process requires some procedural protections in judicial waiver hearings.[348] Subsequently, in *Breed v. Jones*[349] the Court applied the Constitution's Double Jeopardy provisions to delinquency adjudications and required states to decide whether to prosecute a youth as a juvenile or adult before holding a trial on the merits of the charge.[350]

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346. *See generally* Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (analyzing legislation shifting waiver discretion from judges to prosecutors) [hereinafter, Feld, *Legislative Exclusion*]; HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 102-108 (1999) (summarizing types of waiver legislation); PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-9 (1996) (analyzing changes in waiver legislation in mid-1990s in response to upsurge in youth violence); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) (analyzing types of waiver legislation—judicial waiver, prosecutorial direct file, legislative offense exclusion—and recent statutory changes) [hereinafter Feld, *Juvenile Waiver*]; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUSTICE 189 (1998) (analyzing statutory changes designed to increase number of youths tried as adults in criminal court).

347. 383 U.S. 541, 554 (1966).

348. *Id.* at 554. The Court concluded that the loss of the special protections of the juvenile court—private proceedings, confidential records, and protection from the stigma of a criminal conviction—was a "critically important" decision that required a hearing, assistance of counsel, access to social investigations and other records, and written findings and conclusions capable of review by a higher court. *Id.* at 556-57.

349. 421 U.S. 519, 541 (1975).

350. *Id.* Breed posed the issue of whether the Double Jeopardy Clause of the Fifth Amendment prohibited adult criminal re-prosecution of a youth after a prior conviction in juvenile court. *Id.* at 541. The Court resolved the question by establishing a functional equivalence between an adult criminal trial and a delinquency proceeding. *Id.* at 531. The Court described the virtually identical interests implicated in a delinquency hearing and a traditional criminal prosecution, "anxiety and insecurity," a "heavy personal strain," and the increased burdens as the juvenile system became more procedurally formalized. *Id.* at 530-31 (quoting Green v. United States, 355 U.S. 184, 187 (1955) and United States v. Jorn, 400 U.S. 470, 479 (1979)).

Although *Kent* and *Breed* provide the procedural framework for judicial waiver-sentencing decisions, the substantive bases of waiver pose the principal difficulty. Traditionally, most states allowed judges to waive jurisdiction based on a discretionary assessment of a youth's "amenability to treatment" or "dangerousness." Judges decided whether to order transfer based on the juvenile's age, treatment prognosis and clinical evaluations, and threat to others as indicated by the seriousness of the present offense and prior record.[351] Legislatures specify waiver factors with varying degrees of precision, and often incorporate the substantive criteria the Court appended to *Kent*.[352]

Because judicial waiver is a form of sentencing decision that represents a choice between the punitive sentences in criminal courts and the shorter, nominally rehabilitative dispositions available to juvenile courts, it increases the maximum penalties juveniles face. Moreover, changes in waiver laws in recent decades reflect the same changes in sentencing jurisprudence that have occurred in the criminal justice system, from an emphasis on characteristics of the offender to the seriousness of the offense, and from a highly discretionary indeterminate process to a more determinate framework using explicit offense criteria.[353]

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351. *See generally* SNYDER & SICKMUND, *supra* note 346, at 103 (continuing importance of determination of "amenability to treatment"); Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative To Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 529-537 (1978) (analyzing judicial construction of "amenability to treatment");; Marcy Podkopacz and Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996) (analyzing age, offense, and clinical factors affecting judicial waiver decisions).

352. Although the Supreme Court decided *Kent* on procedural grounds, in an Appendix to the opinion, it listed substantive factors that a juvenile court might consider in waiving jurisdiction:

> 1. The seriousness of the alleged offense . . .;
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
> 3. Whether the alleged offense was against persons or against property . . . ;
> 4. The prosecutive merit of the complaint . . . ;
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates . . . are adults . . . ;
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
> 7. The record and previous history of the juvenile . . . ; and
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . .

Kent, 383 U.S. at 566-67.

353. *See* Feld, *Legislative Exclusion*, *supra* note 346, at 91-98; *see generally* Feld, *Juvenile Waiver*, *supra* note 346.

Legislatures use the seriousness of the present offense and the prior record to guide judicial discretion, to create a rebuttable or mandatory presumption for waiver to criminal court, or to create more severe "blended sentencing" options for delinquents retained in juvenile court such as an "Extended Jurisdiction Juvenile Prosecution" or a "Youthful Offender" status.[354] Because judges base their waiver-sentencing decisions, *inter alia*, on a juvenile's prior record of delinquency convictions, youths have raised *Apprendi* challenges to proceedings that remove their juvenile status.

A juvenile successfully asserted an *Apprendi* claim in *Commonwealth v. Quincy Q.*[355] In *Quincy Q.*, the prosecutor either could file a complaint alleging the juvenile was a delinquent or could file an indictment seeking a "youthful offender" designation for which, if convicted, the court could punish the youth as an adult.[356] In an indictment seeking "youthful offender" status, the prosecutor must allege and present evidence to the grand jury that the juvenile threatened or inflicted "serious bodily harm."[357] Because the prosecutor failed to present evidence to the grand jury that the youth threatened or inflicted serious bodily harm, the

354. *See, e.g.*, TORBET ET AL, *supra* note 346, at 11-13 (analyzing "blended sentencing" provisions); Feld, *Juvenile Waiver*, *supra* note 346, at 504-11; Feld, *Legislative Exclusion*, supra note 346, at 87 (analyzing legislation mandating adult prosecution based on present offense and prior record); Feld, *Violent Youth*, *supra* note 124, at 1024-37 (analysis of presumptive certification using offense criteria to shift burden of proof to juvenile to demonstrate why juvenile court should retain jurisdiction); Marcy Rasmussen Podkopacz and Barry C. Feld, *The Back-Door To Prison: Waiver Reform, Blended Sentencing, and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1061-71 (2001) (analyzing "net-widening" effect of blended sentencing that places more youths in prison).

355. 753, N.E.2d 781 (Mass. 2001).

356. Chapter 119 of the General Laws of Massachusetts permits the prosecutor to indict a juvenile as a "youthful offender" if: the youth was between fourteen and seventeen years of age at the time of the offense; the offense is a felony; and the youth previously was committed to the department of youth services, or the alleged offense involved a firearm, or it involved *"the infliction or threat of serious bodily harm."* MASS. GEN. LAWS ch. 119 § 58 (2003) (emphasis added). The court may punish a youth adjudicated as a "youthful offender" as an adult, whereas the court only may commit a juvenile adjudicated delinquent to the Department of Youth Services for rehabilitation. MASS. GEN. LAWS ch. 119, § 58 (2003).

357. *Quincy Q.*, 753 N.E.2d at 787 ("The label '[y]outhful offender' refers not to a status necessary before an indictment may be brought by a prosecutor, but to a status that is an outcome of indictment and adjudication .... [W]here a prosecutor seeks a youthful offender indictment relying on 'the infliction or threat of serious bodily harm' component of the statute, the conduct constituting the offense must involve the infliction or threat of serious bodily harm.").

Massachusetts supreme court held that the trial court should have dismissed *Quincy Q.*'s "youthful offender" indictment which required such a factual showing. *Quincy Q.* relied on *Apprendi* because "the youthful offender statute authorizes judges to increase the punishment for juvenile convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles" if the statutory requirements are satisfied.[358] As a matter of legislative grace, youths normally enjoy the shorter sentences and benefits of a juvenile court system.

> However, once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services (department) for a defined time period, any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt. Accordingly, if the Commonwealth determines to proceed against a juvenile by indictment, it must present at the grand jury stage sufficient evidence of the underlying offense to warrant a finding of probable cause that the underlying crime has been committed, as well as sufficient evidence that the [statutory] requirements . . . have been met.[359]

Thus, where the law presumptively classifies a youth as delinquent and the more severe "youthful offender" hinges on the presence of certain aggravating facts, such as "serious bodily harm," those elements become part of the prosecution's burden to allege in the indictment and to prove to a jury.

New Mexico's waiver law also created a "youthful offender" status for juveniles charged with serious crimes. Following conviction of one of twelve enumerated felonies, the court conducts a waiver-sentencing hearing to determine a youth's "amenability to treatment" and to decide whether to sentence the youth as an adult or as a "youthful offender" over whom jurisdiction terminates at age twenty-one.[360] In *State v. Gonzales*,[361] the youth argued that

358. *Id.* at 864-65; *see also* Commonwealth v. Dale D., 431 Mass. 757, 759, ("A juvenile indicted as a youthful offender faces substantially greater penalties than a juvenile proceeded against by complaint as a delinquent.").

359. *Quincy Q.*, 753 N.E.2d at 789.

360. N.M. STAT. ANN. §§ 32A-2-3-(I), 32A-2-20 (Michie 2000). For youths fourteen years of age or older and convicted of any of twelve enumerated felonies or convicted of any felony who have three prior felony adjudications, the court conducts a waiver-sentencing hearing to determine "amenability to treatment or rehabilitation" and the trial judge has discretion whether to sentence the juvenile as a "youthful offender" or as an adult. The statutory criteria mirror those used in *Kent*, 383 U.S. at 547. New Mexico also gives delinquents a statutory right to a jury trial, to enable the court to sentence the

Apprendi's requirement of a jury finding beyond a reasonable doubt applied to the "amenability" determination because of the seriousness of the consequences.[362] The court distinguished a jurisdictional or "amenability" determination from a finding of criminal liability and rejected the defendant's *Apprendi* argument for three reasons.

> First, while findings of guilt are measures of the degree of an individual's criminal culpability, the finding that a child is or is not amenable to treatment is a measure of a child's prospects for rehabilitation. Second, while findings of guilt are based on historical facts susceptible of proof beyond a reasonable doubt, a finding that a child is not amenable to rehabilitation requires a prediction of future conduct based on complex considerations of the child, the child's crime, and the child's history and environment. Third, a determination of amenability or eligibility for commitment requires some foreknowledge of available facilities and the programs in them that trial judges who make sentencing decisions ever day have, while juries do not.[363]

The court concluded that determining a youth's "amenability to treatment" focused on the youth's prospects for rehabilitation rather than her degree of criminal culpability and thus was properly a "sentencing factor" to be decided by a judge, rather than an "element of the offense" to be found by a jury.[364] One judge concurred on the grounds that because youths have no constitutional right to be

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youth as an adult, if it determines he is not "amenable to treatment." N.M. STAT. ANN. § 32A-2-16 (Michie 2000).

361. 24 P.3d 776, 783 (N.M. Ct. App. 2001).

362. *Id.* at 783. ("Defendant argues that the consequences of sentencing as an adult in terms of both the length of incarceration and removal of the protections of the juvenile system render the amenability determinations more like elements of a crime than sentencing factors.").

363. *Id.* at 783-84. The court also emphasized the special expertise of judges in making sentencing decisions.

> [A] court, which has regular exposure to both the criminal and juvenile systems, is in a much better position to determine an individual child's amenability to treatment within existing programs. In their day-to-day interactions with sentencing decisions, presentence reports, probation violations, and the whole range of criminal and juvenile justice issues, trial courts become knowledgeable about the basic considerations governing appropriate dispositions for offenders.

Id. at 785.

364. *Id.* at 785. Unlike *Apprendi*, the court also emphasized that the sentence for which the court convicted the "youthful offender" set the maximum sentence and a finding of "non-amenability" did not increase the sentence beyond the statutory range. "[A]t the time the child pleads or is adjudicated guilty of an offense, the range of possible sentences is fixed." *Id.*

sentenced in the juvenile system, the "youthful offender" statute did not increase the maximum sentence to which they otherwise would be exposed.[365]

A number of states use age and offense criteria to create a presumption for waiver.[366] In Illinois, for example, the filing of a delinquency petition exposes a convicted youth to the maximum sanction of commitment to the Department of Correction's juvenile division until age twenty-one.[367] However, if a prosecutor files a transfer motion with the petition, alleges that the juvenile is fifteen years of age or older and committed a Class X felony, and the judge finds probable cause, then the statute creates a rebuttable presumption for criminal prosecution and shifts to the juvenile the burden to demonstrate by "clear and convincing" evidence that the minor would be "amenable to . . . treatment" through the juvenile court.[368] In *People v. Beltran*,[369] the juvenile raised an *Apprendi* objection to the presumptive transfer provision which exposed him to criminal prosecution and a much longer sentence as an adult.[370]

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365. *See id.* at 792 (Bustmante, J., concurring).

> [J]uveniles have no constitutional right to be treated as a child within the juvenile system. Given that limitation, the legislature can set sentencing essentially as it pleases for juveniles. New Mexico's unique system has given the trial judge two sentencing options [as an adult or "youthful offender"]. The amenability determination helps guide which option a judge may employ, but it does not increase the maximum sentence allowed by the legislature.

Id.

366. *See generally* 705 ILL. COMP. STAT. ANN. 405/5-805 (West 1998); MINN. STAT. ANN. § 260B.125 (West 2002); Feld, *Violent Youth*, *supra* note 124, at 1027-33.

367. 705 ILL. COMP. STAT. ANN. 405/5-750 (West 1998).

368. 705 ILL. COMP. STAT. ANN. 405/5-805(2)(a) (West 1998) (providing for presumptive transfer if the prosecutor alleges the minor committed a Class X felony (other than armed violence or aggravated use of a firearm) and that the minor is fifteen years of age or older). If the juvenile judge finds "probable cause to believe that the allegations in the petition . . . are true," the statute creates "a rebuttable presumption that the minor is not a fit and proper subject to be dealt with" in the juvenile justice system and should be transferred to the criminal court. *Id.* at 405/5-805(2)(a). The court shall order transfer for criminal prosecution unless the judge makes a finding based on "clear and convincing evidence that the minor would be amenable to the care, treatment, and training programs available through the facilities of the juvenile court based on an evaluation" of enumerated statutory criteria. *Id.* at 405/5-805(2)(b).

369. 765 N.E.2d 1071 (Ill. App. Ct. 2002).

370. *See Beltran*, 765 N.E.2d at 1075. The juvenile argued that when the state filed a delinquency petition, he faced a maximum sanction of commitment until age twenty-one. *Id.*

However, after the juvenile court found (1) probable cause to believe the State's allegations and (2) a lack of clear and convincing evidence of defendant's amenability to the juvenile court's facilities, defendant faced (and ultimately

The court distinguished *Apprendi* on two grounds. First, unlike *Apprendi*, which involved a criminal prosecution, presumptive transfer is a juvenile proceeding in which juveniles do not enjoy a constitutional right to a jury under *McKeiver*.[371] Second, the court characterized the transfer hearing as dispositional, rather than adjudicatory, and thus concluded that *Apprendi* did not apply.[372] However, describing the proceeding as a sentencing hearing assumes the very question presented in *Apprendi*, whether a "fact" is properly viewed as a "sentencing factor" or as an "element" to be proven to a jury.[373]

The Kansas transfer statute also creates a rebuttable presumption for waiver for older youths charged with a serious offense and places the burden on the juvenile to demonstrate her "amenability to treatment" within the juvenile system.[374] In *State v. Jones*,[375] the juvenile argued that the presumptive waiver statute "runs afoul of *Apprendi* because the fact that he should be tried as an adult is made by a judge resulting in a penalty beyond the statutory maximum."[376] The *Jones* court relied on its analysis of

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received) a much greater sanction. Thus, in violation of *Apprendi*, the maximum penalty was increased upon facts that were not submitted to a jury and proved beyond a reasonable doubt.

Id.

371. *See id.* at 1075-76. In distinguishing *Apprendi*, the court noted that the defendant had the right to have a jury determine, beyond a reasonable doubt, the facts that established the maximum penalty. A hearing under Section 5-805(2), however, is a juvenile proceeding. Thus, whether the defendant was denied due process depends on the standards applicable to those proceedings, rather than those applicable to criminal prosecution. It is well established that, in a juvenile proceeding, due process does not require a jury.

Id. (citations omitted).

372. *Id.* at 1076.

A hearing under section 5-805(2) is dispositional, not adjudicatory. That is, the hearing determines not the minor's guilt but the forum in which his guilt may be adjudicated. Thus, although the juvenile court made findings that exposed him to a greater sanction, defendant had no due process right to have a jury make those findings beyond a reasonable doubt. Because *Apprendi* bears only on the process due in criminal proceedings, the case is simply inapplicable here.

Id. (citations omitted).

373. *See Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect.").

374. KAN. STAT. ANN. §38-1636(a)(2) (West 2000) (creating the statutory presumption for waiver based on age and allegation of a serious offense). Section 38-1636(e) enumerates the specific, *Kent*-like criteria the court must consider in making its amenability determination.

375. 47 P.3d 783 (Kan. 2002).

376. *Id.* at 793. "Implicit in Jones' argument is that the statutory maximum is the one under the juvenile system, not the Kansas criminal code. Sentencing

Apprendi in *Hitt*, in which it concluded that the Constitution does not require treatment as a juvenile and "certain rights afforded a defendant under the adult system are not constitutionally required for a respondent under the juvenile system."[377] Just as *Hitt* found the procedural safeguards of the juvenile system adequate to establish the validity of delinquency convictions to fit within the *Apprendi* exception, so too, *Jones* found the procedures for determining jurisdiction adequate without the disruptive impact that requiring a jury would entail.[378] Ultimately, a judicial transfer proceeding involves a decision whether a youth should be prosecuted as a juvenile or an adult, rather than a finding of guilt, and a youth tried "as an adult will be subjected to the statutory maximum sentence under the applicable criminal statute only after a jury has determined his or her [legal] guilt beyond a reasonable doubt."[379]

As a matter of juvenile justice policy, the courts' decisions in *Gonzales*, *Beltran*, and *Jones* to reject *Apprendi* in waiver hearings reach the correct result. However, the facile assertions in *Gonzalez* and *Jones* that juveniles do not enjoy a constitutional right to be tried in juvenile court does not adequately analyze or dispose of the *Apprendi* issues. The defendant's sentence in *Apprendi* was fixed by statute, but judicially raising his penalty beyond the statutory maximum violated his constitutional right to a jury trial. Similarly, once a legislature grants a juvenile a statutory right to be tried in juvenile court, a judicial proceeding that abrogates that statutory entitlement and exposes her to a greater criminal penalty produces the same consequences that *Apprendi* condemned. Rather than distinguishing *Apprendi* based on juveniles' lack of a constitutional right to be treated as delinquents, courts should analyze waiver-sentencing as a jurisdictional determination—juvenile or criminal justice system—to which no penalty consequences attach until the judge makes the threshold determination whether a youth should be tried as a juvenile or adult. This interpretation is consistent with the Supreme Court's Double Jeopardy analysis in *Breed v. Jones* which required juvenile courts to make the jurisdictional determination prior to any adjudication on the merits. Waiver is a quintessential sentencing decision that considers myriad individualized facts bearing on "amenability" which a jury would be

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under the Kansas criminal code does not exceed the prescribed statutory maximum." *Id.* at 794.

377. *Id.* at 795. *See supra* notes 303-308 and accompanying text.

378. *Id.* ("The procedural safeguards are deemed adequate to withstand the demands for jury determinations within the juvenile system, as well as to support other differences afforded in the adult system but not in the juvenile system.").

379. *Id.* at 798.

even less likely than a judge to apply consistently from one case to the next. The courts' fears about the disruptive impact of a jury in this sentencing context are especially well-founded. *Kent* imposed only modest procedural formality on waiver hearings and yet those minimal requirements provided a strong political impetus for more "stream-lined" waiver provisions such as offense exclusion and prosecutorial "direct file."[380] To procedurally encumber waiver hearings with a jury would provide a strong incentive to exclude more categories of offenses from juvenile court jurisdiction with all of the defects of mandatory sentencing statutes.[381]

IV. CONCLUSION

The Supreme Court in *Apprendi* held that states must submit to a jury and prove beyond a reasonable doubt any fact that increased the penalty for a crime beyond the statutory maximum. To assure congruence between culpability and consequence, the Court reasoned that a jury must find the facts upon which a court based an enhanced sentence as an "element" of the offense to be proved at trial rather than as a judicial "sentencing factor."

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which

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380. *See* Feld, *Legislative Exclusion*, *supra* note 346, at 113.

> States made relatively limited use of offense-based strategies until *Kent* provided the impetus for offense exclusion and prosecutorial direct-file laws . . . . But reflecting the influences of just deserts jurisprudence, criminal career research, and get-tough politics, two distinct legislative trends have emerged during the past quarter-century. First, more states have excluded at least some offenses from their juvenile courts' jurisdiction, lowered the ages of juveniles' eligibility for criminal prosecution, and then increased the numbers of offenses for which states may prosecute youths as adults. Second, the number of states that allow prosecutors, rather than judges, to make forum selection decisions via concurrent jurisdiction also has increased, as has the range of offenses for which they may transfer youths.

Id. (citations omitted).

381. *Id.* at 124.

> Excluded-offense and direct-file laws suffer from the rigidity, inflexibility, political vulnerability, and overinclusiveness characteristic of mandatory sentencing statutes. In practice, excluded-offense laws transfer discretion from juvenile court judges in a waiver hearing to prosecutors who determine a youth's delinquent or criminal status by manipulating their charging decisions . . . . [S]uch laws prescribe a simplistic, politically attractive sound bite solution for a complex problem, curtail judicial discretion and juvenile courts' clientele, and obscure the bases and processes of "adulthood" decisions.

Id. at 124-25 (citations omitted).

> the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.[382]

Apprendi exempted the *"fact of a prior conviction"* from its holding because defendants had the right to a jury trial and proof beyond a reasonable doubt at the time the state obtained the original conviction which assured its validity, accuracy, and reliability.

In delinquency proceedings, by contrast, *McKeiver* used a lower, "fundamental fairness" standard of procedural justice, rather than the Sixth Amendment rights it incorporated for adults, to deny a constitutional right to a jury trial. *McKeiver* used an outmoded analysis and uncritically accepted the rhetoric of juvenile justice in order to justify the result it reached. It did so because the Court envisioned delinquency proceedings as something more benevolent and therapeutic than criminal prosecutions. Although *Winship* requires States to prove delinquency beyond a reasonable doubt, the availability of a jury provides the prime checking mechanism to assure congruence of outcomes between trials and pleas. While *McKeiver* found non-jury delinquency procedures constitutionally adequate for rehabilitative dispositions, those standards clearly would *not* be adequate for an explicitly punitive disposition in the first instance.

Regardless of the unproven therapeutic character of delinquency dispositions three decades ago, juvenile courts today clearly punish young delinquents for crimes. Importantly, all of the courts that rely upon *McKeiver* to justify the use of delinquency convictions for sentence enhancements—e.g., *Williams*, *Johnson*, *Smalley*, *Hitt*—fail to acknowledge or discuss *McKeiver*'s reasons for using less stringent procedural safeguards or the anomaly of using treatment dispositions for the purpose of extending subsequent punishment.[383] Unfortunately, none of the cases that uphold the use of prior delinquency convictions for sentence enhancements

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382. *Apprendi*, 530 U.S. at 496.

383. As Judge Johnson of the California Court of Appeals noted in *People v. Smith*,

> Now nearly a third of a century later it is not altogether clear the rationale of that opinion, *McKeiver v. Pennsylvania*, remains sound given the inexorable convergence of the criminal and juvenile systems since it was issued. Furthermore, even if juvenile courts can deny jury trial rights to alleged delinquents, this does not mean the Constitution allows adult criminal courts to use adjudications these juvenile courts produce as "strikes" to enhance later adult sentences.

People v. Smith, 1 Cal. Rptr. 3d 901, 921-22 (2003) (Johnson, J., dissenting) (footnote omitted).

adequately examine the differences in purposes for which the state initially obtained those convictions but mechanically rely on the idea that a conviction that is valid for one purpose therefore must be valid for all purposes. Moreover, none of them sufficiently evaluate the reliability and quality of those prior convictions compared with those of adult defendants.

As every commentator and many courts have noted, *McKeiver*'s uncritical and out-dated plurality decision is ripe for overruling. Judicial, legislative, and administrative changes have transformed the juvenile court into a very different institution than the one that *McKeiver* considered more than three decades ago.[384] At best, the contemporary juvenile court functions as little more than a scaled-down, second-class criminal justice system for youths that provides neither therapy nor justice.[385] Notwithstanding *McKeiver*'s fond hopes, juvenile courts' adjudicative functions simply replicate those of criminal courts, albeit with fewer, less adequate procedural protections. Providing delinquents with a constitutional or statutory right to a jury trial would mitigate the unfairness of using procedurally deficient, factually unreliable convictions to enhance subsequent sentences. States which deny delinquents jury trials in the contemporary punitive juvenile justice system compound that inequity when they use those nominally rehabilitative sentences to extend terms of adult imprisonment. In addition to the procedural protections afforded by the right to a jury, the possibility of a jury trial would improve the quality of juvenile justice administration and the performance of counsel as well. Thus, *Apprendi*'s exception of "the fact of a prior conviction" carries the possibility of even more far reaching reforms in juvenile justice administration.

384. *See, e.g.*, FELD, *supra* note 227; Feld, *Race, Politics, supra* note 89.

385. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (stating that punitive reforms have transformed "the historical ideal of the juvenile court as a social welfare institution into a penal system that provides young offenders with neither therapy nor justice").