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# WHAT'S IN A NAME? THE WORRISOME INTERCHANGE OF JUVENILE "ADJUDICATIONS" WITH CRIMINAL "CONVICTIONS"

**Abstract:** Juvenile delinquency adjudications are increasingly considered to be criminal convictions for purposes of sentencing enhancement in subsequent adult proceedings, leading to a renewed call for extension of the right to jury trial in the juvenile court so as to legitimize the use of adjudications. Such an extension is troubling, however, because regardless of the factfinder, it is improper to equate juvenile delinquency adjudications with criminal convictions for several reasons. First, the juvenile court remains distinct from the criminal court in its purpose and procedure. Second, the prevalence of juvenile pleas raises questions about whether juveniles defend against delinquency charges with the same vigor as they would against criminal charges. Finally, the necessity for a system of transfer into adult criminal court is questionable if adjudications can *ex post facto* be considered convictions. Although fairness dictates that juvenile adjudications should not be considered convictions, if they are consistently used as such, the infancy defense should be available in the juvenile court.

## INTRODUCTION

In 2000, in *Apprendi v. New Jersey*, the U.S. Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments,<sup>1</sup> and the notice and jury trial guarantees of the Sixth Amendment,<sup>2</sup> required any fact that increased the penalty for a crime beyond the prescribed statutory maximum, other than that of a prior conviction, be submitted to a jury and proven beyond a reasonable doubt.<sup>3</sup> In carving

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<sup>1</sup> U.S. CONST. amends. V, XIV, § 1.

<sup>2</sup> *Id.* amend. VI.

<sup>3</sup> 530 U.S. 466, 490 (2000). The Court noted that its holding was foreshadowed by its 1999 opinion in *Jones v. United States*, where it stated that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, and proven to a jury beyond a reasonable doubt. *Id.* at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). In *Jones*, the Court distinguished prior convictions from other factors requiring presentation to the jury, noting that prior

out an exception for prior convictions, the Court noted that a court could accept the validity of a prior conviction because the defendant had a right to a jury trial, and the prosecutor proved the defendant's guilt beyond a reasonable doubt.<sup>4</sup> It is unclear if this exception for prior convictions encompasses juvenile court delinquency adjudications because in holding that prior convictions are sufficiently reliable, the Court relied on the availability of the jury trial for the predecessor offense and, unlike in criminal court, there is no constitutional right to a jury trial in juvenile court.<sup>5</sup>

Due to this uncertainty, there is a split among the federal circuits as to whether delinquency adjudications can properly be considered convictions under *Apprendi*.<sup>6</sup> The U.S. Courts of Appeals for the Third, Sixth, Eighth, and Eleventh Circuits, and some state courts, have held that it is proper to consider adjudications to be convictions for *Apprendi* purposes if the juvenile was afforded all of the due process to which he or she was constitutionally entitled.<sup>7</sup> The U.S. Court of Appeals for the Ninth Circuit and some state courts have held that a juvenile delin-

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convictions must have been established through procedures which satisfied the guarantees of fair notice, reasonable doubt, and the jury trial. 526 U.S. at 249.

<sup>4</sup> *Apprendi*, 530 U.S. at 496. The Court noted the difference in legitimacy between a situation where there is presentment of evidence to a jury under a standard of proof beyond a reasonable doubt and one where a judge might find guilt under a lesser standard of proof. *Id.* The presence of a jury thus gives legitimacy to a finding of guilt. *See id.*

The Court subsequently affirmed *Apprendi* and, specifically, the significant role of the jury in sentencing. *United States v. Booker*, 543 U.S. 220, 244 (2005) (reaffirming the holding in *Apprendi* that any fact other than a prior conviction must be proven to the jury, noting that the fairness and reliability guaranteed by the right to jury trial outweighed any interest in speedy trials); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (holding that under the Sixth Amendment right to jury trial, a judge's enhancement of sentence beyond the standard maximum based on determination that defendant acted with deliberate cruelty was unconstitutional and noting that the rule in *Apprendi* gives meaning to the right to jury trial, which is more than a mere procedural formality); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that a judge could not impose the death penalty based solely on judicial factfinding because capital defendants, like the noncapital defendant in *Apprendi*, are entitled to a jury determination of any fact that increases their maximum punishment).

<sup>5</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion). In its holding, the Court did not address the constitutional differences between adult convictions and juvenile delinquency adjudications, specifically what significance the lack of a right to jury trial in most juvenile courts might have in considering adjudications as convictions for the purpose of subsequent sentence enhancement beyond the statutory maximum. *See United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir. 2001).

<sup>6</sup> *See infra* 130–156 and accompanying text.

<sup>7</sup> *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *State v. Hiitt*, 42 P.3d 732, 740 (Kan. 2002); *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006); *State v. Weber*, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005).

quency adjudication cannot be considered a conviction if the juvenile did not have the right to trial by jury because such an adjudication lacks the procedural soundness of a criminal conviction.<sup>8</sup> Finally, the U.S. Courts of Appeals for the First and Seventh Circuits have noted that the use of a juvenile delinquency adjudication as a criminal conviction is presumptively proper where there is a state right to jury trial in juvenile court, without further addressing the broader substantive issue of whether the adjudications at issue would be sufficiently reliable to be considered convictions if there had not been a state right to trial by jury at the juvenile delinquency adjudication.<sup>9</sup>

In response to the use of juvenile adjudications as criminal convictions for purposes of sentence enhancements beyond the statutory maximum, there has been a renewed call for an extension of the right to trial by jury in the juvenile court.<sup>10</sup> A right to trial by jury is seen as a means to ensure the integrity of a juvenile adjudication in light of its potential use as a criminal conviction in a subsequent sentence enhancement.<sup>11</sup>

Part I of this Note traces the development of the juvenile court, its goal of rehabilitation, and its designation as a noncriminal court.<sup>12</sup> Part II discusses the increased blurring of the juvenile and criminal courts, and presents new questions about the use of juvenile court adjudications following the Supreme Court's holding in *Apprendi*.<sup>13</sup> Part III re-

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<sup>8</sup> *Tighe*, 266 F.3d at 1194-95; *Pinkston v. State*, 836 N.E.2d 453, 463 (Ind. Ct. App. 2005); *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004); *State v. Chatman*, No. M2003-00806-CCA-R3-CD, 2005 WL 901138, at \*6 (Tenn. Crim. App. Oct. 24, 2005).

<sup>9</sup> *United States v. Matthews*, 498 F.3d 25, 35-36 (1st Cir. 2007); *United States v. Wilburn*, 473 F.3d 742, 746 (7th Cir. 2007) (recognizing the split among the circuits but noting that the court need not take a position on the split because the defendant had a right to jury trial at his delinquency adjudication under Wisconsin law). In *United States v. Matthews* the First Circuit similarly noted that it need not decide whether the availability of trial by jury was necessary to assure reliability for *Apprendi* purposes because the defendant had a right to trial by jury in his juvenile court proceeding under Massachusetts law and so his adjudication presumptively qualified as a conviction. *Matthews*, 498 F.3d at 35-36. The court noted that the primary concern in determining whether adjudications should properly be considered convictions for *Apprendi* purposes should be with the reliability of the adjudication and where the adjudication is reliable, it should not be distinguished from a criminal conviction, but because defendant had a right to trial by jury as a juvenile, it need not determine whether the availability of a right to trial by jury was necessary to determining reliability. *Id.*

<sup>10</sup> See generally Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003).

<sup>11</sup> See *id.* at 1224.

<sup>12</sup> See *infra* notes 18-73 and accompanying text.

<sup>13</sup> See *infra* notes 74-156 and accompanying text.

sponds to the renewed call for the right to trial by jury in juvenile court for the purpose of assuring the accuracy of juvenile delinquencies given their potential consideration as criminal convictions.<sup>14</sup> This Note argues that it is improper to treat juvenile delinquency adjudications as equivalent to criminal convictions in enhancing a subsequent adult sentence because the juvenile court is not a criminal court, and so juveniles may not be motivated to defend against a delinquency charge as vigorously as they would against a criminal charge.<sup>15</sup> Further, such use undermines the necessity for a system of transfer of juveniles to adult court for the purpose of facing criminal penalties.<sup>16</sup> Finally, this Note argues that if juvenile delinquency adjudications are to be considered equivalent to criminal convictions, the infancy defense should be available in the juvenile court.<sup>17</sup>

## I. THE EARLY JUVENILE COURT AND THE AMBITIOUS GOAL OF REHABILITATION

### A. *The Establishment of the Juvenile Court*

The juvenile court was established in 1899 with the idea that children are neither innately prone to criminal behavior nor do they choose to act as criminals.<sup>18</sup> Instead, the belief was that the criminality of children was determined by extrinsic forces beyond their control, such as poverty and parental neglect, and children therefore should not be held to the same standard of criminal liability as adults.<sup>19</sup>

Prior to the progressive reforms of the late nineteenth century that led to the first juvenile court, children were tried in adult criminal court.<sup>20</sup> The availability of the common law infancy defense served as the only protection for juveniles charged with crimes.<sup>21</sup> This defense presumed that children younger than seven lacked criminal capacity, children aged fourteen and older were fully responsible for their criminal actions, and children between seven and fourteen lacked criminal

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<sup>14</sup> See *infra* notes 157-229 and accompanying text.

<sup>15</sup> See *infra* notes 175-210 and accompanying text.

<sup>16</sup> See *infra* notes 211-221 and accompanying text.

<sup>17</sup> See *infra* notes 222-229 and accompanying text.

<sup>18</sup> See Feld, *supra* note 10, at 1137.

<sup>19</sup> See *id.*

<sup>20</sup> BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 47 (1999).

<sup>21</sup> *Id.*

capacity, although this last presumption was rebuttable.<sup>22</sup> As the recognition of adolescence as a stage of development distinct from childhood and adulthood became more prevalent, progressive reformers pushed for the creation of distinct courts for adolescents where juveniles could avoid the harshness of adult sentencing while still facing some legal control.<sup>23</sup> These progressive reforms culminated in 1899 with the creation of the nation's first juvenile court in Cook County, Illinois.<sup>24</sup> By the early twentieth century, nearly every state had established a juvenile justice system distinct from the adult criminal court.<sup>25</sup>

Guided by the doctrine of *parens patriae*,<sup>26</sup> the juvenile court assumed a benevolent role in the lives of misguided youths.<sup>27</sup> Juveniles who committed crimes were not viewed as acting of their own free will but rather were considered victims of their environment.<sup>28</sup> Rather than focus on the nature of the offense with a goal of punishment, the juvenile court focused on the needs of the offender with a goal of rehabilitation.<sup>29</sup> The juvenile court was a civil court, which allowed for flexibility in treatment and assistance to children instead of punishment.<sup>30</sup> The objective of the juvenile court was to rehabilitate the child and protect society rather than to adjudge guilt, and the state was to act as *parens patriae* rather than as prosecuting attorney.<sup>31</sup>

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<sup>22</sup> See *In re Gault*, 387 U.S. 1, 16–17 (1967) (tracing the historical development of the juvenile court).

<sup>23</sup> FELD, *supra* note 20, at 48.

<sup>24</sup> *Id.* at 55.

<sup>25</sup> HOWARD M. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 94 (2006), available at <http://cjjdp.ncjrs.org/ojstadb/nr2006/downloads/chapter4.pdf>.

<sup>26</sup> Under the doctrine of *parens patriae*, the state acts as the provider of protection for those unable to protect themselves. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

<sup>27</sup> FELD, *supra* note 20, at 62.

<sup>28</sup> *Id.* ("The social construction of childhood characterized children as innocent and free from vice, responsible neither for acting out their innate biological imperatives nor for failing to develop into responsible adults.")

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 63 ("Progressives regarded the interests of young people and society as congruent; intervention to aid the child served the 'best interests' of both the youth and the community. As a result, juvenile courts' architects envisioned the juvenile court as a welfare system rather than just a children's criminal court."). The Supreme Court noted in 1966, in *Kent v. United States*, that the juvenile court considered the child's needs instead of punishment for his or her criminal conduct. 383 U.S. 541, 554 (1966).

<sup>31</sup> FELD, *supra* note 20, at 62. In 1967, in *In re Gault*, the Supreme Court distinguished the rehabilitative purpose of the juvenile court from the criminal court, noting that children were to be treated, not punished, and the justification for any procedures against the child, from arrest to confinement, was to be clinical, not punitive. 387 U.S. at 15–16.

In characterizing itself as civil, the juvenile court rejected much of the terminology, procedure, and substance of the adult criminal court.<sup>32</sup> Due process rights granted to all adults in criminal court were routinely withheld from children in the juvenile court.<sup>33</sup> Adversary truth-finding and the resolution of factual issues were shunned as the judge, probation officer, parents, and child worked together toward the minor's rehabilitation.<sup>34</sup> Dispositional options were discretionary and treatment lasted for indeterminate years until a child either reached the age of majority or was deemed to no longer be a child at risk.<sup>35</sup>

Early juvenile court proceedings were closed to the public in order to protect the identity of children and their families.<sup>36</sup> Initially reformers believed that the hearings should be open to the public to ensure that the court activities and the disposition of cases were consistent with community standards.<sup>37</sup> By 1952, however, most states excluded the general public from the hearings.<sup>38</sup> This exclusion was motivated by the belief that private hearings would shield the children from any public humiliation and stigmatization that might otherwise hamper rehabilitation.<sup>39</sup>

Despite the noble intentions of those involved in the early movement to create a distinct juvenile court geared toward rehabilitation, the informality and private nature of the proceedings resulted in little public oversight and led to arbitrary dispositions with indeterminate and punitive sentences.<sup>40</sup> Throughout the 1950s and 1960s, as increasing numbers of children were institutionalized under the guise of treatment, advocates for children in the juvenile justice system began to question whether the juvenile court was succeeding in its mission to rehabilitate youth.<sup>41</sup>

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<sup>32</sup> See *Gault*, 387 U.S. at 15–16 (noting that the ideas of crime and punishment were abandoned and the focus was on rehabilitation and not punishment); JOHN C. WATKINS, JR., *THE JUVENILE JUSTICE CENTURY: A SOCIOLOGICAL COMMENTARY ON AMERICAN JUVENILE COURTS* 47 (1998).

<sup>33</sup> SNYDER & SICKMUND, *supra* note 25, at 96.

<sup>34</sup> See *Gault*, 387 U.S. at 15 (noting that the early reformers who established the juvenile court were not concerned with guilt or innocence, but rather with the best interest of the child); WATKINS, *supra* note 32, at 142.

<sup>35</sup> SNYDER & SICKMUND, *supra* note 25, at 96.

<sup>36</sup> 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, 61 (Margaret K. Rosensheim et al. eds., 2002).

<sup>37</sup> SNYDER & SICKMUND, *supra* note 25, at 108.

<sup>38</sup> *Id.*

<sup>39</sup> Tanenhaus, *supra* note 36, at 61.

<sup>40</sup> See *Gault*, 387 U.S. at 18–19; Feld, *supra* note 10, at 1140.

<sup>41</sup> See SNYDER & SICKMUND, *supra* note 25, at 96.

### B. *The Extension of Procedural Due Process to the Juvenile Court*

In the 1960s, advocates who feared that children were facing a significant loss of personal liberty without being afforded basic constitutional protections began to challenge the conventional bargain in the juvenile court whereby children exchanged formal procedure for treatment.<sup>42</sup> In 1966, the U.S. Supreme Court in *Kent v. United States*, the first of several cases that would bring increased procedural due process to the juvenile court, held that an opportunity for hearing and appointment of counsel must be afforded to juveniles facing the possibility of transfer into adult court, that counsel must be granted access to all relevant records, and that the judge's decision to transfer should be memorialized in a written statement that would allow for meaningful review.<sup>43</sup> The Court noted that the reality of the juvenile court was such that "the child received the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>44</sup> Although still preserving the juvenile court's goal of rehabilitation and designation as a civil court, the Court recognized that juveniles should be afforded some of the basic procedural due process protections characteristic of the adult criminal court because they faced a potential loss of liberty.<sup>45</sup>

Although the Court's holding in *Kent* was narrowly limited only to those juveniles facing transfer into the adult criminal court, the Court suggested in dicta that due process rights should be granted to juveniles in all delinquency proceedings.<sup>46</sup> The opportunity to extend due process rights to all children arose in 1967, in *In re Gault*, where the Court held that the Due Process Clause of the Fourteenth Amendment required that a juvenile in a delinquency adjudication proceeding be given notice of the charges against him,<sup>47</sup> a right to counsel,<sup>48</sup> and the

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<sup>42</sup> See *Breed v. Jones*, 421 U.S. 519, 541 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion); *In re Winship*, 397 U.S. 358, 368 (1970); *Gault*, 387 U.S. at 33, 41, 55, 57; *Kent*, 383 U.S. at 561. The Court elaborated on this bargain in *Gault*, noting that the guiding wisdom prior to the imposition of due process requirements was that the disadvantages to the juveniles resulting from a lack of due process were more than offset by the benefits of treatment and rehabilitation available only in the juvenile court. 387 U.S. at 21.

<sup>43</sup> See 383 U.S. at 561.

<sup>44</sup> *Id.* at 556.

<sup>45</sup> *Breed*, 421 U.S. at 541; *Winship*, 397 U.S. at 367; *Gault*, 387 U.S. at 33, 41, 55, 57; *Kent*, 383 U.S. at 554.

<sup>46</sup> 383 U.S. at 555-56.

<sup>47</sup> 387 U.S. at 33.

<sup>48</sup> *Id.* at 41.



right to confront and cross-examine witnesses.<sup>49</sup> Further, under the Fifth Amendment, the juvenile must be granted the privilege against self-incrimination.<sup>50</sup> The Court's holding affirmed that some due process guarantees could no longer be withheld from juveniles under the guise of offering juveniles rehabilitation instead of punishment.<sup>51</sup>

The Court declared that these basic due process requirements would not destroy the uniqueness of the juvenile court.<sup>52</sup> The Court stated that there was no place for procedural arbitrariness where the consequence for the juvenile was a potential loss of liberty.<sup>53</sup> Juveniles, therefore, must be afforded some procedural regularity in delinquency proceedings.<sup>54</sup> Still, the Court narrowly limited its holding to only the adjudicatory phase of the juvenile court proceeding.<sup>55</sup> The Court believed that the possible loss of liberty through commitment to a state institution at this phase warranted enhanced procedural formality that was not necessary in the pre-judicial or post-adjudicative phases.<sup>56</sup>

Further, the Court explicitly stated that not all due process protections available to adults in criminal court should be extended to juveniles.<sup>57</sup> The standard by which it would be determined if due process would be applicable to juvenile delinquency proceedings was one of fundamental fairness.<sup>58</sup> The granting of procedural rights was necessary only to guarantee that the adjudicatory hearing was marked by due process and fair treatment.<sup>59</sup>

In 1970, in *In re Winship*, the Supreme Court held that fundamental fairness required a standard of proof beyond a reasonable doubt in the adjudicatory stage of a delinquency proceeding.<sup>60</sup> Before addressing whether such a standard was required in the juvenile court, the Court explicitly held that the standard of proof beyond a reasonable doubt was required by the Due Process Clause for adults in criminal court.<sup>61</sup> The Court stated that this standard of proof was warranted to protect innocent adults against wrongful prosecution and noted that

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<sup>49</sup> *Id.* at 57.

<sup>50</sup> *Id.* at 55.

<sup>51</sup> *See id.* at 27-28.

<sup>52</sup> *Gault*, 387 U.S. at 27.

<sup>53</sup> *See id.* at 30-31 (citing *Kent*, 383 U.S. at 554, 555).

<sup>54</sup> *Id.* at 27-28.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.*

<sup>57</sup> *Gault*, 387 U.S. at 30-31.

<sup>58</sup> *See id.* at 30.

<sup>59</sup> *Id.*

<sup>60</sup> 397 U.S. at 368.

<sup>61</sup> *Id.* at 364.

there was no reason not to similarly protect children.<sup>62</sup> The Court stated that a standard of proof beyond a reasonable doubt would not undermine the rehabilitative nature of the juvenile court because such a standard would not affect the confidentiality, formality, flexibility, or speed of the proceedings.<sup>63</sup> Further, a beyond a reasonable doubt standard would not hamper the opportunity to consider the child's social history or establish an individualized treatment plan during the post-adjudicatory phase of the proceeding.<sup>64</sup>

### C. *McKeiver v. Pennsylvania: No Constitutional Right to a Jury Trial*

The Supreme Court's extension of due process rights to juveniles was not without limitation.<sup>65</sup> In 1971, in *McKeiver v. Pennsylvania*, the Supreme Court held by plurality opinion that juveniles do not have a constitutional right to a jury trial in the adjudicative phase of a delinquency proceeding.<sup>66</sup> The plurality noted that the historical application of the fundamental fairness due process standard focused on fact-finding procedures, and because juries are not more capable in making factual determinations than judges, the jury is not a necessary component to accurate factfinding.<sup>67</sup> The plurality feared that requiring a jury trial in juvenile delinquency proceedings would turn the proceedings into adversary processes, effectively ending the informal, private, and nonpunitive nature of juvenile delinquency proceedings.<sup>68</sup> The plurality cited the petitioners' arguments equating the adjudicative phase of the juvenile delinquency proceeding with the adult criminal trial as cause for concern.<sup>69</sup> The Court noted that although the juvenile court had not been categorically successful in realizing its goal of rehabilitation, the states should be allowed to continue identifying ways to rehabilitate, rather than punish, juvenile offenders.<sup>70</sup>

Although juveniles do not have a right to jury trial under the U.S. Constitution,<sup>71</sup> some states give juveniles a state statutory or constitu-

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<sup>62</sup> *Id.* at 365.

<sup>63</sup> *Id.* at 366.

<sup>64</sup> *Id.* at 366-67.

<sup>65</sup> See *McKeiver*, 403 U.S. at 545 (plurality opinion).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 543, 547.

<sup>68</sup> *Id.* at 545.

<sup>69</sup> *Id.* at 550.

<sup>70</sup> *McKeiver*, 403 U.S. at 547 (plurality opinion).

<sup>71</sup> *Id.* at 545.

tional right to jury trial in all proceedings.<sup>72</sup> Other states allow for a jury trial in limited, offense-specific circumstances.<sup>73</sup>

## II. THE JUVENILE COURT TODAY

A child facing adjudication in juvenile court today has the rights to notice of the charges against him or her,<sup>74</sup> the assistance of counsel,<sup>75</sup> and confrontation of witnesses.<sup>76</sup> Further, he or she has the privilege against self-incrimination.<sup>77</sup> The act of delinquency must be proven beyond a reasonable doubt,<sup>78</sup> but there is no constitutional right to trial by jury.<sup>79</sup> Although these fundamental due process rights cannot be eviscerated by state legislatures, the jurisdiction and purpose of the court is at the mercy of legislative will and can be changed to address problematic social issues.<sup>80</sup> In response to concerns about increases in the rates of youth violence and a toothless rehabilitation system, legislatures have amended state statutes to make the juvenile court more punitive.<sup>81</sup> Such changes include limiting the jurisdiction of the juvenile court by providing for mandatory waiver into adult court, diluting the respect for privacy historically given to children in the juvenile court, and shifting the goal of disposition from one of rehabilitation to one of punishment.<sup>82</sup> Between 1992 and 1997, state laws in forty-five states made it easier to transfer juveniles into the adult system, thirty-one states increased the sentencing options for juveniles, and forty-seven states removed juvenile court confidentiality protections, resulting in more public proceedings and greater access to juvenile records.<sup>83</sup> Further, although in most states the juvenile court has original jurisdiction

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<sup>72</sup> *E.g.*, MASS. GEN. LAWS ch. 119, § 55A (2006); TEX. FAM. CODE ANN. § 54.03(b)(6) (Vernon 2002 & Supp. 2007).

<sup>73</sup> *E.g.*, COLO. REV. STAT. § 19-2-107(1) to -107(2) (2006); KAN. STAT. ANN. § 38-1656 (2000); W. VA. CODE ANN. § 49-5-6(a) (LexisNexis 2004 & Supp. 2007) (allowing juveniles a jury trial for any delinquency where there is a possibility of incarceration).

<sup>74</sup> *In re Gault*, 387 U.S. 1, 33 (1967).

<sup>75</sup> *Id.* at 41.

<sup>76</sup> *Id.* at 57.

<sup>77</sup> *Id.* at 55.

<sup>78</sup> *In re Winship*, 397 U.S. 358, 368 (1970).

<sup>79</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion).

<sup>80</sup> See WATKINS, *supra* note 32, at 88.

<sup>81</sup> SNYDER & SICKMUND, *supra* note 25, at 96-97 (noting that many state legislatures have made it easier to transfer juvenile offenders into the adult criminal justice system, sentencing options have been increased and expanded to include punitive aspects, and confidentiality laws have been relaxed).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

for all persons under the age of eighteen, in some states the juvenile court jurisdiction ends at ages fifteen or sixteen; juveniles in these states have not yet reached the age of majority but are categorically considered adults for the purpose of assessing criminal responsibility.<sup>84</sup>

### A. *Transfer into Adult Court*

The U.S. Supreme Court has explicitly maintained that rehabilitation is a legitimate goal of the juvenile court and delinquency adjudications are not criminal convictions.<sup>85</sup> From the earliest days of the juvenile court, however, judges have recognized that some children should not be afforded the protections of a nonpunitive, rehabilitative court and have transferred them to criminal court.<sup>86</sup> The Supreme Court established the minimum procedural due process necessary in a juvenile court transfer proceeding in 1966, in *Kent v. United States*, holding that an opportunity for hearing and appointment of counsel must be afforded to juveniles facing the possibility of transfer, that counsel must be granted access to all relevant records, and that the judge's decision should be memorialized in a written statement that would allow for meaningful review.<sup>87</sup>

A system of judicial waiver allowed for discretion in the transfer of a juvenile into adult court when a judge determined that the child was not amenable to treatment or was a danger to society.<sup>88</sup> This system was viewed as consistent with the goal of the juvenile court because the focus remained on the offender and not the offense; the decision to waive a juvenile into adult court thus reflected an individualized, of-

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<sup>84</sup> *Id.* at 103.

<sup>85</sup> See *Winship*, 397 U.S. at 366 (noting that affording juveniles the protection of proof beyond a reasonable doubt would not risk destruction of the beneficial aspects of juvenile court and would not disturb policies that delinquency adjudication recognizing a violation of criminal law are not equivalent to criminal convictions); see also *McKeiver*, 403 U.S. at 547 (plurality opinion) (stating that the Court is reluctant to say that juvenile court is not capable of accomplishing the rehabilitation of juveniles); *id.* at 551-52 (White, J., concurring) (noting that juveniles are presumptively neither mature nor malevolent in their choices and actions and so state legislatures are reluctant to deem them to be criminals); *Gault*, 387 U.S. at 22-23 (noting that the availability of some due process rights should not undermine the unique rehabilitative nature of the juvenile court or result in juveniles being deemed criminals).

<sup>86</sup> WATKINS, *supra* note 32, at 89.

<sup>87</sup> *Kent v. United States*, 383 U.S. 541, 561 (1966).

<sup>88</sup> Feld, *supra* note 10, at 1215.

fender-oriented sentencing decision.<sup>89</sup> As the Supreme Court noted in 1975, in *Breed v. Jones*, which held that jeopardy attached to delinquency adjudications in juvenile court, transfer allows flexibility for the court system to deal with juvenile offenders who cannot benefit from the rehabilitation and treatment offered in the juvenile court.<sup>90</sup>

Today, transfer to adult court continues to provide a means to punish those juveniles deemed ill-suited for the juvenile court—usually violent offenders, chronic offenders, or both.<sup>91</sup>

### 1. Methods of Transfer into Criminal Court

Traditionally, judicial waiver was the sole method of determining if a juvenile should be transferred into adult court because he or she was no longer amenable to treatment.<sup>92</sup> In many jurisdictions, however, legislatures have created alternatives or supplements to pure judicial waiver.<sup>93</sup> Transfer statutes make it easier to remove juveniles from juvenile court for trial in the criminal court.<sup>94</sup>

Beginning in the 1970s, legislatures enacted statutes that moved away from the individualized determinations made in judicial waiver in favor of statutorily required removal of juveniles to adult criminal court based on the age of the child, the seriousness of the offense, or some combination of both, without any consideration of the juvenile's amenability to treatment.<sup>95</sup> As a result of this legislative shift, there are now three general methods of transfer: 1) judicial waiver (also known as "certification," "remand," or "transfer"), 2) concurrent jurisdiction (also known as "legislative waiver," "prosecutorial discretion," or "direct file,"), and 3) statutory exclusion (also known as "legislative exclusion").<sup>96</sup>

In a jurisdiction that maintains traditional judicial waiver, the judge has the authority to transfer the juvenile into adult court after determining that the child is not amenable to treatment due to his or

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<sup>89</sup> Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 83, 87 (Jeffrey Fagan & Franklin Zimring eds., 2000).

<sup>90</sup> *Breed v. Jones*, 421 U.S. 519, 535 (1975).

<sup>91</sup> Donna Bishop & Charles Frazier, *Consequences of Waiver*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 89, at 227, 227.

<sup>92</sup> Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 89, at 45, 45.

<sup>93</sup> *Id.*

<sup>94</sup> See SNYDER & SICKMUND, *supra* note 25, at 96.

<sup>95</sup> See *id.* at 113.

<sup>96</sup> See *id.* at 110.

her nature or the seriousness of the crime.<sup>97</sup> The standard of whether the juvenile is "amenable to treatment" involves consideration of such factors as the juvenile's offense history and previous dispositions, the availability of dispositional alternatives, the time available for sanctions, the threat to public safety, and the best interests of the child.<sup>98</sup> Judicial waiver remains the most common transfer provision but it is often supplemented by statutory exclusion for certain offenses, limiting the extent to which judges have complete discretion in determining a juvenile's amenability to treatment.<sup>99</sup> Judicial waiver into adult court is constitutionally valid only where there is a transfer hearing, the juvenile is afforded the right to counsel, counsel has complete access to all records that the court may consider in making the waiver decision, and the judge makes a written statement as to the reasons for waiver.<sup>100</sup> Although some states still allow for pure judicial discretion, many state statutes create a rebuttable presumption in favor of waiver or mandatory waiver if a judge finds that certain statutory criteria have been met.<sup>101</sup>

In a state with a system of concurrent jurisdiction, original jurisdiction for specific offenses or over juveniles of a certain age (defined by statute) is shared by both the juvenile and adult criminal courts, and the prosecutor has discretion to file in either court.<sup>102</sup> In a jurisdiction with statutory exclusion, statutes mandate that juveniles accused of certain offenses (such as rape or murder) cannot be adjudicated in the juvenile court, and so they are automatically charged in the criminal court.<sup>103</sup>

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<sup>97</sup> *Id.*; see, e.g., ARIZ. REV. STAT. ANN. § 8-327(C) to -327(D) (2007); FLA. STAT. ANN. § 985.556(4)(c) (West 2007); HAW. REV. STAT. ANN. § 571-22(c) (LexisNexis 2005); 42 PA. CONS. STAT. ANN. § 6355(a) (West 2000).

<sup>98</sup> See *Kent*, 383 U.S. app. at 566-68. The Supreme Court appended a Policy Memorandum to their opinion in *Kent*, suggesting the following factors be considered by a judge where he or she has discretion to waive a juvenile to adult court: 1) the seriousness of the offense; 2) the level of aggression, violence, or premeditation in the offense; 3) whether personal injury resulted from the offense; 4) the merit of the complaint; 5) whether the juvenile has adult codefendants; 6) the maturity and sophistication of the juvenile, given his home situation; 7) the juvenile's delinquency record; and 8) the likelihood of reasonable rehabilitation. *Id.*

<sup>99</sup> See *Feld*, *supra* note 89, at 84-85.

<sup>100</sup> *Kent*, 383 U.S. at 557.

<sup>101</sup> SNYDER & SICKMUND, *supra* note 25, at 112.

<sup>102</sup> *Id.* at 110; see, e.g., ARIZ. REV. STAT. ANN. § 13-501(B) (2001 & Supp. 2006); FLA. STAT. ANN. § 985.556(1); LA. CHILD. CODE ANN. art. 857 (2004).

<sup>103</sup> SNYDER & SICKMUND, *supra* note 25, at 110; see, e.g., ARIZ. REV. STAT. ANN. § 13-501(A); FLA. STAT. ANN. § 985.556(3); IND. CODE ANN. § 31-30-1-4 (LexisNexis 2003 & Supp. 2007); MASS. GEN. LAWS ch. 119, § 74 (2006).

Judicial waiver, concurrent jurisdiction, statutory exclusion, or some combination of all three, is provided for by statute in every state.<sup>104</sup> Additionally, some states allow "reverse waiver," whereby judges sitting in the criminal court can transfer waived juveniles back to the juvenile court for adjudication.<sup>105</sup> Further, some states allow blended sentencing where the juvenile court has the authority to impose adult criminal sanctions to compliment the juvenile disposition or the adult court has the authority to impose some rehabilitative dispositions (which are generally available only in the juvenile court) to criminal sentences.<sup>106</sup>

## 2. Transfer into Criminal Court and Heightened Procedure

Where there is judicial waiver, the transfer hearing must occur prior to the adjudicatory hearing.<sup>107</sup> Under the Double Jeopardy Clause of the Fifth Amendment, a child adjudicated delinquent in juvenile court cannot subsequently be transferred to adult court for disposition.<sup>108</sup> Jeopardy attaches to a juvenile adjudicatory proceeding once the evidence is presented to the trier of fact.<sup>109</sup>

The decision to transfer a child from juvenile court to adult criminal court has significant consequences for the child, including exposure to an adult criminal sentence.<sup>110</sup> Additionally, in the majority of states, once a juvenile has been transferred and convicted in adult court, he or she is considered an adult for any subsequent offense.<sup>111</sup> Due to the consequences of transfer, waived juveniles receive all of the procedural due process rights afforded to adults in the criminal court, including a right to trial by jury.<sup>112</sup>

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<sup>104</sup> See *supra* notes 32, 102, 103 and accompanying text.

<sup>105</sup> SNYDER & SICKMUND, *supra* note 25, at 110; see, e.g., 42 PA. CONS. STAT. ANN. § 6322(e) (West 2000).

<sup>106</sup> SNYDER & SICKMUND, *supra* note 25, at 110; see, e.g., MASS. GEN. LAWS ch. 119, § 58 (stating that a child determined to be a youthful offender can be sentenced to a combination sentence consisting of commitment to the Department of Youth Services until age twenty-one followed by an adult sentence in the Department of Corrections).

<sup>107</sup> *Breed*, 421 U.S. at 536.

<sup>108</sup> *Id.* at 541.

<sup>109</sup> *Id.* at 532.

<sup>110</sup> See *id.* at 535.

<sup>111</sup> SNYDER & SICKMUND, *supra* note 25, at 110; see, e.g., HAW. REV. STAT. ANN. § 571-22(e) (LexisNexis 2005).

<sup>112</sup> See WATKINS, *supra* note 32, at 151.

## B. *Use of Delinquency Adjudications in Criminal Court*

In addition to making the transfer of children from juvenile to criminal court procedurally less burdensome, state legislatures have altered the juvenile court by increasing judicial access to juvenile records for consideration in sentencing in subsequent adult proceedings.<sup>113</sup>

### 1. Historical Use of Juvenile Records by Criminal Courts

Consistent with the goal of rehabilitation and the nonpunitive nature of the juvenile court, children with delinquency adjudications historically entered adulthood with a clean slate.<sup>114</sup> In the earliest years of the juvenile court, adult criminals who had delinquency records were not treated as recidivists in their sentencing; although the judge might have known that the person had a juvenile record, he or she could not use that information to treat a first-time adult criminal as a repeat offender.<sup>115</sup>

The initial reluctance on the part of the adult court to use delinquency adjudications as evidence of recidivism stemmed from concerns about adequate factfinding in the juvenile court, but the granting of due process rights to ensure fair adjudication hearings lessened this concern.<sup>116</sup> Nevertheless, even where adult criminal court judges had access to juvenile records, delinquency adjudications were rarely viewed as equivalent to criminal convictions.<sup>117</sup> Increasingly, however, allowing adult criminal courts access to juvenile delinquency records is justified by the argument that society has a reasonable interest in identifying and punishing recidivist offenders.<sup>118</sup>

### 2. Use of Delinquency Adjudications as Criminal Convictions in the Late Twentieth Century

Since the 1980s, legislatures across the country amended or created sentencing guidelines to mandate that delinquency adjudications

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<sup>113</sup> SNYDER & SICKMUND, *supra* note 25, at 108–09.

<sup>114</sup> Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 207 (1998).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 208.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; see Feld, *supra* note 10, at 1182–83 (“A 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.”).



put first-time adult criminal offenders in recidivist status.<sup>119</sup> As of 1998, juvenile court statutes in forty-five states contained provisions that allowed disclosure of at least some juvenile court records (generally those for felony adjudications) for sentencing purposes following a criminal conviction.<sup>120</sup> The impact that a juvenile adjudication may have on sentence enhancement varies across jurisdictions.<sup>121</sup> Although some states allow a minimal increase in sentencing time, other states' sentencing guidelines, as well as certain provisions of the U.S. Sentencing Guidelines, consider adjudications for certain offenses to be equal to adult crimes in a criminal history score.<sup>122</sup> For example, in California, some juvenile delinquency adjudications constitute "strikes" under the California "Three-Strikes" law.<sup>123</sup> Under the U.S. Sentencing Guidelines, juvenile adjudications and adult convictions that result in at least sixty days of confinement are equal in the number of points that they add to an adult's criminal history score.<sup>124</sup>

Courts have consistently upheld the statutorily sanctioned use of juvenile delinquency adjudications as factors to be considered in determining the sentence of an adult.<sup>125</sup> In 1994, in *United States v. John-*

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<sup>119</sup> Sanborn, *supra* note 114, at 208.

<sup>120</sup> *Id.* at 209.

<sup>121</sup> *Id.*

<sup>122</sup> See Feld, *supra* note 10, at 1187.

<sup>123</sup> CAL. PENAL CODE § 667(d)(3) (West 1999). This is an exception to the general rule that delinquency adjudications should not be considered convictions under California law. CAL. WEL.F. & INST. CODE § 203 (West 1998). Section 667 says that a juvenile delinquency adjudication can be used as a prior conviction for enhancement purposes under Three Strikes when: (A) the juvenile was sixteen or older when the prior offense was committed; (B) the prior offense otherwise qualified under section 707(b), as a violent felony under section 667.5, or as a serious felony under section 1192.7; (C) the juvenile had been found to be a fit and proper subject for the juvenile court; and (D) the juvenile has been adjudged a ward of the court. CAL. PENAL CODE § 667(d)(3). In 2007, in *People v. Nguyen*, the Court of Appeals for the Sixth District of California held that a juvenile adjudication is not a prior conviction under *Apprendi* where there is no right to trial by jury and therefore that an adjudication by a judge cannot be used to enhance an adult sentence beyond the statutory maximum under the Three Strikes Law. 62 Cal. Rptr. 3d 255, 281 (Ct. App. 2007), *reh'g granted*, *People v. Nguyen*, 169 P.3d 882, 882 (Cal. 2007). It should be noted that *Nguyen* is only the most recent decision in California and a petition for review has been granted. *Nguyen*, 169 P.3d at 882. Further other California District Courts of Appeals have concluded that nonjury delinquency adjudications can be used as convictions under the California Three Strikes Law. See, e.g., *People v. Smith*, 1 Cal. Rptr. 3d 901, 904 (Ct. App. 2003); *People v. Bowden*, 125 Cal. Rptr. 2d 513, 518 (Ct. App. 2002).

<sup>124</sup> U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(b), 4A1.2(d)(2) (2007).

<sup>125</sup> See *United States v. Davis*, 48 F.3d 277, 280 (7th Cir. 1995); *United States v. Johnson*, 28 F.3d 151, 155 (D.C. Cir. 1994); *United States v. McDonald*, 991 F.2d 866, 873 (D.C. Cir. 1993); *United States v. Mackbee*, 894 F.2d 1057, 1058 (9th Cir. 1990); *United States v. Williams*, 891 F.2d 212, 215 (9th Cir. 1989).

son, the U.S. Court of Appeals for the District of Columbia Circuit expressed support for punishing recidivist offenders, noting that the rehabilitative rationale of the juvenile court disappears when one who has been adjudicated delinquent in the past becomes an adult criminal, because the person has proven that he or she cannot be deterred by serving a minimum of sixty days in a prison-like facility.<sup>126</sup> In 1995, in *United States v. Davis*, the U.S. Court of Appeals for the Seventh Circuit noted that it considered it imperative that a defendant's sentence reflect his or her entire criminal history, including juvenile delinquency adjudications.<sup>127</sup> The court stated that the transgressions of a juvenile, when considered in light of his or her subsequent adult offense, helped the judge determine whether the defendant was a criminal recidivist.<sup>128</sup> In *Davis*, the court noted that ultimately the judge had within his discretion the ability to disregard the juvenile record.<sup>129</sup>

### 3. *Apprendi v. New Jersey* and the Subsequent Circuit Split

In 2000, in *Apprendi v. New Jersey*, the U.S. Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>130</sup> The precise issue before the Court in *Apprendi* was whether due process required that a factual determination that petitioner Charles Apprendi committed a hate crime could be made by the judge or whether it must be offered to the jury and proven beyond a reasonable doubt because such a finding would increase his sentence beyond the statutory maximum sentencing range.<sup>131</sup>

The Court exempted any "fact of prior conviction" because the defendant was presumptively afforded due process in the trial that culminated in the conviction, therefore making it accurate and reliable.<sup>132</sup> The Court specifically noted that prior convictions are valid in part because of the defendant's right to jury trial and the prosecutor's

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<sup>126</sup> 28 F.3d at 155; see also *Williams*, 891 F.2d at 215 (rejecting petitioner's claim that the use of his nonjury delinquency adjudication in calculating his criminal score under the U.S. Sentencing Guidelines violated due process because petitioner had all the due process to which he was constitutionally entitled).

<sup>127</sup> 48 F.3d at 280.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 530 U.S. 466, 490 (2000).

<sup>131</sup> *Id.* at 469.

<sup>132</sup> See *id.* at 496.

burden of proving guilt beyond a reasonable doubt.<sup>133</sup> This reasoning has resulted in a circuit split as to whether juvenile delinquency adjudications can properly be considered "prior convictions" in enhancing adult criminal sentences under *Apprendi* because juveniles do not have a constitutional right to jury trial.<sup>134</sup>

In 2001, in *United States v. Tighe*, the U.S. Court of Appeals for the Ninth Circuit held that the prior conviction exception to *Apprendi*'s general rule is limited to prior convictions that were obtained through proceedings that included the right to a jury trial and a standard of proof of beyond a reasonable doubt.<sup>135</sup> In *Tighe*, petitioner Shannon Tighe appealed his sentence under the Armed Career Criminal Act, which mandated a minimum fifteen-year sentence for a person who violates a felon-in-possession of a weapon statute and has three previous convictions for either violent felonies or serious drug offenses, arguing in part that it was improper for the district court to consider a prior juvenile delinquency adjudication as a prior conviction under *Ap-*

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<sup>133</sup> *Id.* at 490. The Court's 1999 opinion in *Jones v. United States*, stating that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment and proven to a jury beyond a reasonable doubt, foreshadowed its holding in *Apprendi*. *Id.* at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). In *Jones*, the Court distinguished prior convictions from other factors, noting that prior convictions must have been established through procedures which satisfied the guarantees of fair notice, reasonable doubt, and the jury trial. 526 U.S. at 249.

<sup>134</sup> *McKeiver*, 403 U.S. at 545 (plurality opinion). Compare *United States v. Tighe*, 266 F.3d 1187, 1194-95 (9th Cir. 2001) (holding that the prior conviction exception under *Apprendi* is narrow and limited to prior convictions that were obtained through proceedings that included the procedural necessities of a jury trial and proof beyond a reasonable doubt and therefore nonjury juvenile adjudications are not included under the exception), with *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (holding that juvenile adjudications where the juvenile has the right to notice, the right to counsel, the privilege against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of guilt beyond a reasonable doubt, satisfy the reliability requirements under *Apprendi*, even where there is no right to trial by jury), *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) (holding that a prior nonjury delinquency adjudication can properly be considered under the Armed Criminal Career Act), *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (holding that a prior nonjury juvenile adjudication can be considered a valid prior conviction for purposes of a sentencing enhancement under the Armed Criminal Career Act as long as the juvenile was afforded all of the constitutionally required procedural safeguards to which he was entitled), and *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (holding that the *Apprendi* decision was not so narrow as the *Tighe* court concluded and that the inclusion of a juvenile delinquency adjudication with the *Apprendi* exception should turn not on whether there was a jury but instead on whether the adjudication is "so reliable that due process is not offended").

<sup>135</sup> 266 F.3d at 1194.

*prendi*.<sup>136</sup> Tighe argued that *Apprendi* required that the fact of his non-jury juvenile adjudication be charged in an indictment and proven to the jury beyond a reasonable doubt.<sup>137</sup> In holding that the “fact of prior conviction” exception was available only where there was the right to a jury trial, the Ninth Circuit specifically noted that there were significant constitutional differences between adult convictions and juvenile adjudications, including the denial of the right to jury trial for juveniles.<sup>138</sup>

Despite similar underlying facts, in 2002, the U.S. Court of Appeals for the Eighth Circuit rejected *Tighe’s* narrow reading of *Apprendi* in *United States v. Smalley*, holding that the standard for exempting juvenile adjudications should not turn on the identity of the factfinder, but rather on whether the juvenile adjudication is so reliable that due process of law is not offended by its use as a conviction.<sup>139</sup> Like the petitioner in *Tighe*, petitioner Anthony Smalley was subject to sentencing enhancement under the Armed Career Criminal Act based in part on his prior delinquency adjudications.<sup>140</sup> The court noted that the safeguards that exist in juvenile court, including a standard of proof beyond a reasonable doubt, are sufficient to guarantee the accuracy required for an *Apprendi* exception.<sup>141</sup>

Similarly, in 2003, in *United States v. Jones*, the U.S. Court of Appeals for the Third Circuit held that juvenile delinquency adjudications could be used as prior convictions if the juvenile was afforded all of the procedural safeguards to which he was constitutionally entitled.<sup>142</sup> In *Jones*, petitioner Lester Jones challenged his sentencing enhancement under the Armed Criminal Career Act in part because his nonjury juvenile delinquency adjudications were qualified as prior convictions.<sup>143</sup> The court considered both *Tighe* and *Smalley* in ultimately reaching its conclusion that Jones’s adjudication was properly considered in calculating his criminal score.<sup>144</sup>

In 2005, in *United States v. Burge*, the U.S. Court of Appeals for the Eleventh Circuit agreed with the Third Circuit’s approach in *Jones* and

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<sup>136</sup> *Id.* at 1189; see Armed Criminal Career Act, 18 U.S.C. § 924(e)(1) (2000 & Supp. IV 2004). The Armed Criminal Career Act specifically provides that convictions include juvenile delinquency adjudications involving violent felonies. 18 U.S.C. § 924(e)(2)(C).

<sup>137</sup> *Tighe*, 266 F.3d at 1191.

<sup>138</sup> *Id.* at 1192–93.

<sup>139</sup> *Smalley*, 294 F.3d at 1032–33; see *Apprendi*, 530 U.S. at 490; *Tighe*, 266 F.3d at 1194.

<sup>140</sup> *Smalley*, 294 F.3d at 1031.

<sup>141</sup> *Id.* at 1033.

<sup>142</sup> 332 F.3d at 696.

<sup>143</sup> *Id.* at 689, 690.

<sup>144</sup> *Id.* at 696.

held that juvenile delinquency adjudications could properly be considered convictions in calculating a person's criminal score under the Armed Criminal Career Act.<sup>145</sup> The court specifically noted that most courts had rejected the Ninth Circuit's reasoning in *Tighe* and instead found that consideration of delinquency adjudications was proper if the juvenile had received all of the due process to which he was constitutionally entitled.<sup>146</sup>

In 2007, the U.S. Court of Appeals for the Sixth Circuit, in *United States v. Crowell*, similarly held that the use of juvenile adjudications in sentencing enhancements under the Armed Criminal Career Act does not violate due process where the juvenile was afforded all of the due process to which he or she was constitutionally entitled at the adjudicatory phase of the delinquency proceeding.<sup>147</sup> The court noted that the focus should be on the overall reliability of the adjudication and not with a "bright-line rule" requiring proof beyond a reasonable doubt, fair notice, and a right to trial by jury in order for an adjudication to qualify for the *Apprendi* exception.<sup>148</sup>

The U.S. Courts of Appeals for the First and Seventh Circuits have held that the use of a juvenile delinquency adjudication as a criminal conviction is presumptively proper where there is a state right to jury trial in juvenile court, without further addressing the broader question of whether the adjudications at issue would be sufficiently reliable in the absence of such a right.<sup>149</sup> In *United States v. Wilburn*, the Seventh Circuit affirmed the use of defendant's juvenile delinquency adjudication in calculating his criminal score under the Armed Criminal Career Act.<sup>150</sup> The court recognized that there was a split among the circuits as to the application of *Apprendi* to nonjury delinquency adjudications, but noted that it need not take a position on the split because the defendant had a right to jury trial at his delinquency adjudication under Wisconsin law.<sup>151</sup> In 2007, in *United States v. Matthews*, the First Circuit held that where the reliability of a juvenile adjudication is as sound as that of a criminal conviction, the adjudication could be considered for purposes of the *Apprendi* exception for prior convictions.<sup>152</sup> Because the

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<sup>145</sup> 407 F.3d at 1190.

<sup>146</sup> *Id.*

<sup>147</sup> 493 F.3d at 750.

<sup>148</sup> *Id.*

<sup>149</sup> *United States v. Matthews*, 498 F.3d 25, 35–36 (1st Cir. 2007); *United States v. Wilburn*, 473 F.3d 742, 746 (7th Cir. 2007).

<sup>150</sup> *Wilburn*, 473 F.3d at 746.

<sup>151</sup> *Id.*

<sup>152</sup> *Matthews*, 498 F.3d at 35.

defendant, however, had a right to trial by jury at his delinquency adjudication under Massachusetts law, the court held that it need not resolve whether a jury trial was mandated under *Apprendi*, noting that the adjudication could be properly considered a conviction for *Apprendi* purposes even under the Ninth Circuit's more restrictive holding in *Tighe*.<sup>153</sup>

In addition to the split among the circuits, state courts are also divided on the issue of how to properly treat juvenile delinquency adjudications in sentencing enhancement.<sup>154</sup> The Ninth Circuit's decision in *Tighe*—limiting the *Apprendi* exception for prior convictions to those obtained through proceedings that included the right to a jury trial—has been accepted by state courts in Indiana, Louisiana, and Tennessee.<sup>155</sup> It has been rejected by state courts in Kansas, Minnesota, and Washington, which have held that convictions properly include juvenile delinquency adjudications for *Apprendi* purposes where the juvenile received all of the due process to which he or she was constitutionally entitled.<sup>156</sup>

### III. THE MISGUIDED RESPONSE TO THE APPLICATION OF APPRENDI

The Supreme Court's 2000 holding, in *Apprendi v. New Jersey*, and the subsequent split among courts as to whether adjudications qualify as convictions, has led to a renewed call for the right to trial by jury in

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<sup>153</sup> *Id.* at 35–36; *Tighe*, 266 F.3d at 1194.

<sup>154</sup> See *infra* notes 155–156 and accompanying text.

<sup>155</sup> *Apprendi*, 530 U.S. at 490; *Tighe*, 266 F.3d at 1194–95; *Pinkston v. State*, 836 N.E.2d 453, 463 (Ind. Ct. App. 2005) (holding that a juvenile adjudication is not a criminal conviction, in part because there is no right to trial by jury, and so an adjudication cannot be used for *Apprendi* purposes); *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004) (holding that because juveniles do not have a right to a jury trial in juvenile delinquency proceedings, delinquency adjudications cannot be used to enhance adult felony convictions); *State v. Chauman*, No. M2003-00806-CCA-R3-CD, 2005 WL 901138, at \*6 (Tenn. Crim. App. Oct. 24, 2005) (holding that juvenile adjudications do not qualify as criminal convictions under *Apprendi*).

<sup>156</sup> *Apprendi*, 530 U.S. at 490; *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) (holding that juvenile delinquency adjudications need not be proven to a jury before they can be included in calculating a defendant's criminal history score); *State v. McFee*, 721 N.W.2d 607, 613, 615 (Minn. 2006) (holding that it is not inconsistent with the legislative intent behind the juvenile justice system, which recognizes the need to promote accountability among juveniles, to consider adjudications in calculating a defendant's criminal history score); *State v. Weber*, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005) (holding that delinquency adjudications that meet all of the constitutional safeguards to which juveniles are constitutionally entitled are properly considered in the calculation of a criminal history score, even where there is no right to jury trial).

the juvenile court.<sup>157</sup> Specifically, there is a call to revisit the Supreme Court's 1971 decision in *McKeiver v. Pennsylvania*, where the Court held that juveniles do not have a constitutional right to a jury trial in the adjudicatory phase of a delinquency proceeding.<sup>158</sup> The underlying rationale for granting juveniles a right to trial by jury is that it would make delinquency adjudications more reliable for use in a subsequent adult sentencing enhancement.<sup>159</sup> The argument is that it is inconsistent and unfair to deny juveniles a right to a jury trial precisely because adjudications are not criminal proceedings but later use those adjudications as criminal convictions.<sup>160</sup>

This call for revisiting *McKeiver* or otherwise granting juveniles a statutory right to jury trial in a delinquency proceeding is powerful in light of the Court's recent discussions of the role of the jury in the criminal justice system.<sup>161</sup> In *McKeiver*, the Court reasoned that a jury would not significantly strengthen factfinding in the juvenile court and therefore was not a necessary part of a fair or equitable criminal proc-

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<sup>157</sup> See generally Feld, *supra* note 10.

<sup>158</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion). Professor Feld argues that *McKeiver* is ripe for overruling and that until *McKeiver* is overruled, states should grant either a state constitutional or statutory right to a jury in the adjudicatory phase of a delinquency proceeding in order to legitimize the criminal courts' use of such adjudications as "facts of prior conviction." Feld, *supra* note 10, at 1116. Feld concedes that it is sound policy to consider juvenile delinquency adjudications in adult sentencing enhancements and argues that because of this fact, the necessity for accurate factfinding at adjudication is critical. See *id.* at 1194. The crux of Feld's arguments is that although it is rational to use juvenile delinquency adjudications as factors in subsequent adult sentencing, it is an anomaly to use treatment-based dispositions for sentencing enhancements when juveniles are denied some procedural safeguards, such as the right to trial by jury, at adjudication. See *id.* at 1190. A constitutional or statutory right to a jury trial for juveniles would mitigate unfairness in juvenile courts and the injustice that results when adjudications couched as treatment are used for extending adult sentences. See *id.* at 1224.

<sup>159</sup> See Feld, *supra* note 10, at 1224.

<sup>160</sup> See *State v. Brown*, 879 So. 2d 1276, 1289 (La. 2004). In 2004, in *State v. Brown*, the Supreme Court of Louisiana held that juvenile adjudications could not be considered predicate offenses where the adjudication was obtained without the right to trial by jury. *Id.* at 1290. The court noted that it would be incongruous and illogical to use noncriminal adjudications as criminal sentencing enhancers because the right to jury was denied precisely because of the noncriminal nature of the juvenile court. *Id.* at 1289; see also *Pinkston v. State*, 836 N.E.2d 453, 463 (Ind. Ct. App. 2005) (noting that the procedural differences between juvenile and criminal proceedings, specifically the lack of jury trial, make juvenile delinquency adjudications inappropriate for consideration as convictions); *State v. Chatman*, No. M2003-00806-CCA-R3-CD, 2005 WL 901138, at \*6 (Tenn. Crim. App. Oct. 24, 2005) (noting that juvenile delinquency adjudications are fundamentally different than criminal convictions and therefore it is inappropriate to consider them in sentence enhancement).

<sup>161</sup> See *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004); *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000); *Jones v. United States*, 526 U.S. 227, 249 (1999).

ess.<sup>162</sup> Recent holdings indicate, however, that the Court does in fact view the right to jury trial as essential to accurate factfinding and fair process.<sup>163</sup>

In 2002, in *Ring v. Arizona*, the Court held that an Arizona judge could not sentence a defendant to death row based on his determination of the presence or absence of aggravating factors.<sup>164</sup> The Court noted that the Sixth Amendment right to trial by jury would be diminished if the rule in *Apprendi* applied to noncapital defendants but not to those who may be sentenced to death based on judicial factfinding.<sup>165</sup> The Court recognized that the guarantee of the jury trial was essential to the administration of justice.<sup>166</sup> In 2004, in *Blakely v. Washington*, the Court held that petitioner's Sixth Amendment right to trial by jury was violated when he was sentenced to ninety months (thirty-seven months more than the standard maximum) based on a judicial finding that he acted with deliberate cruelty.<sup>167</sup> The Court noted that petitioner Ralph Blakely was entitled to a determination by a jury that he had acted with deliberate cruelty, and explicitly stated that the right of jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."<sup>168</sup> In 2005, in *United States v. Booker*, the Court affirmed *Apprendi*, noting that although the jury may impair expedient factfinding, the fairness and reliability protected by the right to a jury trial outweigh any interest in speedy trials.<sup>169</sup>

Clearly the role of the jury as a factfinder is recognized as more significant today than it was in *McKeiver*.<sup>170</sup> This alone, however, does not justify the decision to extend the right of jury trial to juveniles given the significant consequences of doing so.<sup>171</sup> The extension of the right to jury trial to the juvenile court will serve primarily to strengthen the

<sup>162</sup> 403 U.S. at 547 (plurality opinion).

<sup>163</sup> See *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 305-06; *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 496; *Jones*, 526 U.S. at 249.

<sup>164</sup> 536 U.S. at 609.

<sup>165</sup> *Id.*

<sup>166</sup> See *id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

<sup>167</sup> 542 U.S. at 300, 305.

<sup>168</sup> *Id.* at 305-06.

<sup>169</sup> *Booker*, 543 U.S. at 244.

<sup>170</sup> See *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 305-06; *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 496; *Jones*, 526 U.S. at 249; *McKeiver*, 403 U.S. at 547 (plurality opinion).

<sup>171</sup> See *Apprendi*, 530 U.S. at 496; *United States v. Matthews*, 498 F.3d 25, 35-36 (1st Cir. 2007); *United States v. Wilburn*, 473 F.3d 742, 746 (7th Cir. 2007); *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001). Adjudications determined by juries are presumptively proper for consideration as a conviction in a subsequent adult sentence enhancement, given their validity as accurate. See *Apprendi*, 530 U.S. at 496; *Matthews*, 498 F.3d at 35-36; *Wilburn*, 473 F.3d at 746; *Tighe*, 266 F.3d at 1194.



legitimacy of using delinquency adjudications as convictions for the purposes of enhanced sentencing in a subsequent adult criminal proceeding.<sup>172</sup> Such use<sup>173</sup> is improper, however, because, irrespective of the factfinder, the juvenile court remains distinct from the criminal court.<sup>174</sup>

### A. *The Juvenile Court Is Not a Criminal Court*

A delinquency adjudication should not be considered a conviction for purposes of enhancing a subsequent adult sentence because the juvenile court maintains rehabilitation as its goal and is not a criminal court.<sup>175</sup> Calling for the recognition of a state or federal constitutional or statutory right to a jury trial in juvenile court under the reasoning that a delinquency adjudication could then be used as a conviction for purposes of sentence enhancement improperly concedes that juvenile delinquency adjudications are equivalent to criminal convictions.<sup>176</sup>

Although the reality of the juvenile court is that it is increasingly punitive,<sup>177</sup> the Supreme Court has consistently maintained that the juvenile court is not a criminal court and rehabilitation remains an important goal.<sup>178</sup> Further, many state statutes explicitly state that the ju-

<sup>172</sup> See *Apprendi*, 530 U.S. at 496; *Matthews*, 498 F.3d at 35-36; *Wilburn*, 473 F.3d at 746; *Tighe*, 266 F.3d at 1194.

<sup>173</sup> *Apprendi* specifically addressed the use of convictions as factors to enhance the sentence of a defendant beyond the maximum authorized by statute, and not the proper use within a sentencing range. 530 U.S. at 469. This Note argues, however, that any use, either within a sentencing range or to extend it beyond the standard allowable maximum, is improper.

<sup>174</sup> See *Schall v. Martin*, 467 U.S. 253, 263 (1984); *Breed v. Jones*, 421 U.S. 519, 529 (1970); *McKeiver*, 403 U.S. at 550 (plurality opinion); *In re Gault*, 387 U.S. 1, 22-23 (1967).

<sup>175</sup> Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. DAVIS L. REV. 973, 1017 (2004).

<sup>176</sup> See generally Feld, *supra* note 10. Feld consistently interchanges "conviction" and "adjudication," which ignores the significant constitutional differences between the two. See *Tighe*, 266 F.3d at 1192-93.

<sup>177</sup> See *supra* notes 74-156 and accompanying text.

<sup>178</sup> See *Schall*, 467 U.S. at 263 (noting that the state's *parens patriae* interest in protecting the child makes juvenile proceedings fundamentally different than criminal proceedings); *Breed*, 421 U.S. at 529 (noting that the fact that the juvenile court has not lived up to its rehabilitative ideals in all cases should not detract from its goal); *McKeiver*, 403 U.S. at 547 (plurality opinion) (stating that the Court is reluctant to say that the juvenile court is incapable of accomplishing its goal of rehabilitation); *In re Winship*, 397 U.S. 358, 366 (1970) (noting that affording juveniles the protections of proof beyond a reasonable doubt would not disturb the policy that finding a child has violated a criminal law in a delinquency adjudication does not constitute a criminal conviction); *Gault*, 387 U.S. at 22-23 (noting that the imposition of some procedural due process would not mean that juvenile court proceedings would be criminal proceedings).

venile court's purpose is to rehabilitate and treat juveniles.<sup>179</sup> Indeed, it is precisely because juvenile court proceedings are considered non-criminal in nature that juveniles have historically not been granted the full procedural due process to which they would be entitled in criminal court.<sup>180</sup>

Legitimizing the use of delinquency adjudications as equivalent to criminal convictions through the extension of the right to jury trial is particularly troublesome because it is not clear that juveniles who have a state statutory right to a jury trial exercise their right in a meaningful way that allows them to benefit from the enhanced procedural safeguard.<sup>181</sup> Additionally, considering delinquency adjudications to be

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<sup>179</sup> See, e.g., MASS. GEN. LAWS ch. 119, § 53 (2006) (stating that delinquent children should not be treated as criminals but rather as children in need of aid, encouragement, and guidance); MINN. STAT. ANN. § 260B.001 (West 2003) (explaining that the purposes of the delinquency statute is to promote public safety and reduce juvenile delinquency through means that are fair and just and recognize the unique needs of children and give them opportunities for growth); N.J. STAT. ANN. § 2A:4A-21(b) (West 1997 & Supp. 2006) (stating that the act should be construed to effectuate the purpose of removing children from delinquent behavior and providing supervision, care, and rehabilitation and some sanctions to promote accountability); WIS. STAT. ANN. § 938.01(2)(c) (West 2006) (explaining that included among the purposes and intents of the juvenile justice act is equipping juvenile offenders with the competencies necessary to live responsibly and productively).

California recognizes that punishment is a legitimate goal for the juvenile court that can be balanced with rehabilitation. CAL. WELF. & INST. CODE § 202(b) (West 1998 & Supp. 2007) (noting that juveniles in court because of delinquent conduct shall receive care and treatment that is consistent with their best interests but also holding them appropriately accountable for their behavior). Further, even though the juvenile court is engaging in punishment, an adjudication is not a criminal conviction. *Id.* § 203 (West 1998) (stating that a juvenile adjudication should not be considered a criminal conviction and an adjudication proceeding should not be considered a criminal proceeding).

<sup>180</sup> *McKeiver*, 403 U.S. at 550, 551 (plurality opinion); *Kent v. United States*, 383 U.S. 541, 555 (1966).

<sup>181</sup> See, e.g., COMMONWEALTH OF MASS., JUVENILE COURT DEPARTMENT STATISTICS FISCAL YEAR 2005, <http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/2005stats.html> (last visited Feb. 4, 2008) [hereinafter MASSACHUSETTS STATISTICS]; TEX. APPLESEED FAIR DEF. PROJECT ON INDIGENT DEF. PRACTICES IN TEX.—JUVENILE CHAPTER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 14 (2000) [hereinafter TEXAS REPORT], available at <http://www.njdc.info/pdf/TexasAssess.pdf>. There is evidence that most juveniles, even where they have the right to trial by jury, plead delinquent. MASSACHUSETTS STATISTICS, *supra*; TEXAS REPORT, *supra*, at 14.

Massachusetts specifically designates that juvenile court proceedings are not criminal. MASS. GEN. LAWS ch. 119, § 53. However, juveniles are afforded a statutory right to a jury trial in the adjudicatory phase of a delinquency proceeding. *Id.* § 55A. The juvenile court statistics for Massachusetts are illustrative of the virtual non-use of the jury by juveniles; in 2005 there were 5066 jury-appropriate cases and only 82 jury trials. See MASSACHUSETTS STATISTICS, *supra*.

Similarly, Texas grants juveniles a right to a jury trial in the adjudicatory phase of a delinquency proceeding. TEX. FAM. CODE § 54.03(b)(6) (Vernon 2006). According to a 2000

equivalent to criminal convictions bypasses and undermines the necessity for state transfer statutes by which juveniles can be removed from the jurisdiction of the juvenile court and tried as adults.<sup>182</sup>

### B. *The Practical (In)Significance of the Right to Jury Trial in Juvenile Court*

It is necessary to first ascertain whether juveniles and their attorneys consider a delinquency charge to be as significant as a criminal charge before granting juveniles a right to jury trials.<sup>183</sup> The right to trial by jury in juvenile court will legitimize the use of delinquency adjudications as equivalent to convictions.<sup>184</sup> Such use may be unfair, however, even where there is a right to trial by jury, if there is evidence that juveniles do not have the same motive to defend fully and vigorously against a delinquency charge as they would against a criminal charge.<sup>185</sup>

#### 1. The Prevalence of Pleas in Juvenile Court

By most accounts, both in jurisdictions that extend to juveniles a right to jury trial and those that do not, the majority of juveniles waive the right to an adjudication proceeding and plead delinquent.<sup>186</sup> Cer-

report on the state of juvenile defense in Texas, it is estimated that juveniles pled delinquent in anywhere from ninety to ninety-nine percent of all adjudications (varying slightly across counties), and more than seventy-five percent of delinquent pleas were entered into at the juvenile's first court appearance. See TEXAS REPORT, *supra*, at 14.

<sup>182</sup> See *infra* notes 211–221 and accompanying text.

<sup>183</sup> See *infra* notes 184–210 and accompanying text.

<sup>184</sup> See *Apprendi*, 530 U.S. at 496; *Matthews*, 498 F.3d at 35–36; *Wilburn*, 473 F.3d at 746; *Tighe*, 266 F.3d at 1194.

<sup>185</sup> Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 323 (1979). In 1979, in *Parklane Hosiery Co. v. Shore*, the Supreme Court held that the use of a finding from a prior offensive suit against defendants in a subsequent suit was not unfair where, in part, the defendants had the incentive and motivation to fully and vigorously defend against the first claim. *Id.* In the spirit of this holding, one could argue that it may be unfair to consider a delinquency adjudication to be a criminal conviction where the juvenile may have defended more vigorously had he or she realized the delinquency adjudication could carry with it the weight of criminal conviction. See *id.*

<sup>186</sup> See KIM BROOKS & DARLENE KAMINE, JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 19, 31 (2003), available at [http://www.njdc.info/pdf/Ohio\\_Assessment.pdf](http://www.njdc.info/pdf/Ohio_Assessment.pdf) (concluding that the vast majority of Ohio cases resulted in plea bargains and noting that a survey of juvenile defense attorneys revealed that many had not brought a case to trial in years); ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 39 (2006), available at <http://www.njdc.info/pdf/Indiana%20Assessment.pdf> (estimating that in Indiana, in 2006, anywhere from just five to twenty percent of cases had full adjudicatory hearings); PATRICIA PURITZ & CATHRYN CRAWFORD, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (2006), available

tainly, a high percentage of adult defendants similarly plead guilty in criminal court and a system of plea bargaining unquestionably benefits our justice system and should be encouraged.<sup>187</sup> It is arguable, however, that the unique goal of the juvenile court raises questions not similarly raised when an adult defendant pleads guilty to a crime.<sup>188</sup>

Where the goal of the court is rehabilitation, not punishment, whether the state can meet its burden of proof may not be determinative if it is believed that the juvenile would benefit from the services he or she would have access to if adjudicated delinquent.<sup>189</sup> Further, the consequences of pleading delinquent to one delinquency charge versus a lesser delinquency charge may not be seen as significant because generally the juvenile court's jurisdiction will end at the juvenile's eighteenth birthday, and therefore, juveniles may not be concerned with the actual length of their sentence.<sup>190</sup> There may also be significant differences in bargaining power in plea negotiations for juveniles and adults.<sup>191</sup> When an adult chooses to plead delinquent to manslaughter instead of murder, he is likely making an informed

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at <http://www.njdc.info/pdf/Florida%20Assessment.pdf> (estimating that over ninety percent of youths in Florida choose to waive their right to an adjudication hearing and plead delinquent); PATRICIA PURITZ ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (2002), available at <http://www.njdc.info/pdf/Virginia%20Assessment.pdf> (estimating that the rate of pleas is eighty-five to ninety percent in Virginia); TEXAS REPORT, *supra* note 181, at 14 (estimating that, in Texas, anywhere from ninety to ninety-nine percent of all charged adjudications result in pleas). Although these numbers provide a small sample of the fifty-one juvenile court jurisdictions, the uniformity in the high frequency of plea bargaining is notable.

<sup>187</sup> See *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (noting that plea bargaining is an essential component of criminal justice, which should be encouraged, and that the benefits of plea bargaining include the prompt and effective disposition of criminal cases).

<sup>188</sup> See *infra* 189–195 and accompanying text.

<sup>189</sup> See TEXAS REPORT, *supra* note 181, at 24 (noting that many attorneys were guided in their decision to recommend a plea more by what services they believed the children needed than by whether they believed the state could meet its burden of proof at adjudication).

<sup>190</sup> See BROOKS & KAMINE, *supra* note 186, at 53. The assessment report on juvenile defense in Ohio noted that many juveniles were not aware of what charges led to their commitment because pleas resulted in charges being dropped or modified. See *id.* It is significant that children would plead delinquent and not know to what charge they were actually pleading delinquent; this fact may indicate that children do not attach much significance to being found delinquent for any particular offense, since their maximum time commitment is likely the same (not beyond their eighteenth birthday). See *id.*

<sup>191</sup> See PURITZ & CRAWFORD, *supra* note 186, at 43 (noting that prosecutors may argue that engaging in plea negotiation sends juveniles the wrong message). In a negotiated plea, the defendant may enter a guilty plea in exchange for a prosecutor's agreement to not bring any additional charges, to drop other pending charges, to allow a plea to a lesser charge, or to make specific sentencing recommendations. See LYNN S. BRANHAM, *THE LAW AND POLICY OF SENTENCING AND CORRECTIONS IN A NUTSHELL* 15 (7th ed. 2005).

choice between two distinct and determinate sentences.<sup>192</sup> In juvenile court, however, a juvenile who pleads delinquent may face an indeterminate sentence of commitment until age eighteen, regardless of the offense.<sup>193</sup> Further, the juvenile's decision to plea may also be unduly influenced by his or her parents who may want a quick resolution and fail to realize the possible repercussions of their child being adjudicated delinquent.<sup>194</sup> In addition, a juvenile's counsel, with whom the juvenile likely has had very limited contact, may pressure him or her to plead delinquent in order to receive services.<sup>195</sup>

## 2. A Framework for Analysis

The unique nature of the juvenile court gives reason to question whether juveniles vigorously defend against adjudications as they would against criminal convictions.<sup>196</sup> Similar concerns about motivation and incentive to vigorously defend or litigate arise in the offensive use of collateral estoppel.<sup>197</sup> In 1979, in *Parklane Hosiery Co. v. Shore*, the Supreme Court held that using a finding against defendants from a prior suit filed by the Securities and Exchange Commission (the "SEC") offensively against defendants in a subsequent shareholders' derivative suit was not unfair where the defendants had incentive and motivation to fully and vigorously defend against the SEC claim.<sup>198</sup> The Court noted that the offensive use of a prior judgment against a defendant in a subsequent action may be unfair if the defendant faced the possibility of only nominal damages in the first action because the defendant may

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<sup>192</sup> See *Apprendi*, 530 U.S. at 478 (noting that there is a certain linkage between a crime and punishment for violation of that crime and therefore a defendant ought to be able to predict his or her punishment from the face of the indictment).

<sup>193</sup> See BROOKS & KAMINE, *supra* note 186, at 53; see also Feld, *supra* note 10, 1185-86 (writing that the ambiguous nature of delinquency adjudications can make it difficult for criminal courts to ascertain for what offense the juvenile court adjudicated a youth). It may be difficult for a criminal court to determine the exact nature of the offense when later considering enhancing a sentence beyond the statutory maximum. See *id.*

<sup>194</sup> See PURITZ & CRAWFORD, *supra* note 186, at 28 (noting that parents were often swayed by judges who told them that the matter would be over today if their child pled delinquent). In influencing their child's decision to plead delinquent, parents might not realize the significant consequences that may result from the subsequent dispositional hearing, where the imposition of a sentence to confinement might make the adjudication eligible for consideration as a criminal conviction under sentencing guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(b), 4A1.2(d)(2) (2007).

<sup>195</sup> See TEXAS REPORT, *supra* note 181, at 24.

<sup>196</sup> See *supra* notes 189-195 and accompanying text.

<sup>197</sup> See *Parklane*, 439 U.S. at 323.

<sup>198</sup> *Id.*

not have had as much incentive to defend against the claim, especially if he did not foresee future litigation arising from the same issue.<sup>199</sup>

Clearly, the Court recognizes that the potential consequences that one foresees resulting from his or her failure to defend are key factors in the decision to defend against a charge and in choosing a strategy.<sup>200</sup> Although making what was previously an "adjudication" equivalent to a "conviction" for subsequent use in enhancing a criminal sentence is not quite the precise issue of relitigating a claim, the spirit of the law is analogous.<sup>201</sup> When a juvenile is transferred and tried in adult court, the consequences of criminal conviction are readily apparent and warrant a vigorous defense, but for a child facing a delinquency adjudication, the criminal consequences of his or her adjudication may not be clear.<sup>202</sup>

A juvenile who pleads delinquent faces a potential loss of liberty and the possibility that his or her adjudication will later be used as a criminal conviction.<sup>203</sup> Indeed, the decision to plead delinquent, as opposed to being adjudicated delinquent, may make it more likely that the adjudication will later be used as a criminal conviction.<sup>204</sup> Therefore, it could be argued that the consequences, including the potential loss of liberty, are apparent and provide juveniles with a suf-

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<sup>199</sup> *Id.* at 330.

<sup>200</sup> *See id.*

<sup>201</sup> *Cf. id.* Essentially, the argument is that a judge should not be able to turn a delinquency adjudication into a criminal conviction for purposes of sentencing in a subsequent adult criminal proceeding, where the incentive to defend in the delinquency proceeding may not have been as high because the juvenile did not foresee that the adjudication would be considered a criminal conviction. *See id.*

<sup>202</sup> *See People ex rel. Wayburn v. Schupf*, 350 N.E.2d 906, 909 (N.Y. 1976). The New York Court of Appeals noted that pretrial detention of juveniles may be warranted, even where it would not be for adults, because juveniles are more likely to commit crimes again if released, in part because they lack the experience and comprehension to view criminal acts in the same perspective as an adult. *Id.* The court noted that juveniles may not be deterred from committing a crime while awaiting adjudication because of the consequences faced if they commit another crime—treatment as opposed to punishment. *Id.* Under this reasoning, it could be argued that a juvenile likely does not foresee the criminal consequences of an adjudicatory hearing. *See id.*

<sup>203</sup> *See United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002); *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006); *State v. Weber*, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005).

<sup>204</sup> *See Crowell*, 493 F.3d at 749 (interpreting *Apprendi* to hold that "a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt or else admitted by the defendant") (emphasis added).

ficient and compelling incentive to vigorously defend against a delinquency charge.<sup>205</sup> Indeed, it is in part because of the potential loss of liberty at stake in an adjudication that the Supreme Court extended procedural due process to the adjudicatory phase of the delinquency proceeding.<sup>206</sup> This potential loss of liberty, however, may not be enough to motivate a juvenile who does not foresee the criminal consequences of detainment as relevant beyond his or her eighteenth birthday.<sup>207</sup> Further, the fact that some courts have upheld the use of delinquency adjudications as convictions will not necessarily provide juveniles with notice to properly and vigorously defend against a delinquency charge because not all jurisdictions have addressed the issue, and the rules that have been established offer little guidance as to the likelihood of subsequent use, especially in light of the fact that sentencing guidelines and statutes can be changed, and adjudications may count as convictions for some offenses and not others.<sup>208</sup>

If there is a chance that a juvenile may not have the incentive to fully and vigorously defend against a delinquency adjudication, allowing that adjudication to be reframed as a criminal conviction in order to enhance a subsequent adult sentence beyond the statutory maximum raises significant questions of fairness.<sup>209</sup> If the stakes of a delinquency proceeding are fundamentally inconsistent with the stakes of a criminal proceeding, and the result of that difference is a conscious

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<sup>205</sup> Cf. *Parklane*, 439 U.S. at 323.

<sup>206</sup> See *Gault*, 387 U.S. at 27.

<sup>207</sup> See BROOKS & KAMINE, *supra* note 186, at 53; *supra* note 190.

<sup>208</sup> Compare *Jones*, 332 F.3d at 696, with *United States v. Huggins*, 467 F.3d 359, 361 (3d Cir. 2006). The Armed Criminal Career Act explicitly states that "conviction" includes juvenile delinquency adjudications for violent felonies. 18 U.S.C. § 924(e)(2)(C) (2000). The use of adjudications as convictions under the Armed Criminal Career Act was upheld by the U.S. Court of Appeals for the Third Circuit in *Jones*. 332 F.3d at 696. In *United States v. Huggins*, however, the Third Circuit held that an adjudication could not be used as a conviction under another federal statute, 21 U.S.C. § 841(b)(1)(B) (2000 & Supp. III 2003), because, unlike the Armed Criminal Career Act, Congress did not include a specific provision that a delinquency adjudication should be considered a criminal conviction. 467 F.3d at 361. The court specifically noted that under Pennsylvania law an adjudication is not the same as an adult conviction because there is not a right to trial by jury in the juvenile court. *Id.* at 361. The court distinguished *Jones* on grounds of the statutory language of the Armed Criminal Career Act, effectively making the intent behind the *Apprendi* exception irrelevant. See *id.* at 362. Such technical distinctions offer little guidance to juveniles in their decision to plead delinquent. See *id.* at 361; *Jones*, 332 F.3d at 696; see also *Matthews*, 498 F.3d at 33 (noting that the Armed Criminal Career Act did not convert all juvenile delinquency adjudications into criminal convictions, but rather "narrowly extend[ed] the statute's reach to specific juvenile conduct").

<sup>209</sup> See *Parklane*, 439 U.S. at 323.

decision not to vigorously defend against a charge of delinquency, adjudications should not be considered criminal convictions.<sup>210</sup>

### C. *Undermining the System of Transfer*

Equating juvenile delinquency adjudications with criminal convictions for the purpose of enhancing a subsequent adult sentence beyond the statutory maximum is also problematic because doing so bypasses and undermines state transfer statutes that expose juveniles to the possibility of criminal conviction.<sup>211</sup> Allowing delinquency adjudications to be considered equivalent to criminal convictions essentially allows prosecutors and judges to avoid the burden of complying with state transfer statutes or the procedural due process standard for a judicial waiver hearing as determined by the Supreme Court in 1966, in *Kent v. United States*.<sup>212</sup> Such standards were based on the very significant difference in consequences between being found guilty of a crime and adjudicated delinquent, and so bypassing these standards by an ex post facto determination that an adjudication of delinquency is the equivalent of a criminal conviction raises issues of fairness.<sup>213</sup>

In *Kent*, the Supreme Court established the due process requirements that must be met before a juvenile is transferred into adult court by means of judicial waiver, holding that an opportunity for hearing and appointment of counsel must be afforded, that counsel must be granted access to all relevant records, and that the judge's determination should be memorialized in a written statement that would allow for meaningful review.<sup>214</sup> The Court noted that such procedural requirements were necessary given the significant difference in consequences arising when a juvenile is found guilty in adult criminal court as opposed to when a juvenile is adjudicated delinquent in the juvenile court.<sup>215</sup> State legislatures have responded to the high burden for judi-

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<sup>210</sup> See *id.* at 330.

<sup>211</sup> See *supra* notes 92–106 and accompanying text.

<sup>212</sup> See *Kent*, 383 U.S. at 561.

<sup>213</sup> See *id.* 553–54.

<sup>214</sup> See *id.* at 561.

<sup>215</sup> See *id.* at 553–54. The Court noted that these consequences included indefinite incarceration with adults instead of a limited treatment-focused sentence in a juvenile facility, as well as exposure to the death penalty. See *id.* Following the 2005 decision of the Supreme Court in *Roper v. Simmons*, however, juveniles, even when transferred to adult court and found guilty of a crime, cannot be executed under the Eighth Amendment. See 543 U.S. 551, 578 (2005). Transferred juveniles still face the possibility of life imprisonment, although it could be argued that the Eighth Amendment similarly prohibits sentencing juvenile offenders to life without parole. See generally Hillary J. Massey, Note, *Disposing of*



cial waiver in *Kent* by amending their statutes to provide for alternate methods of transfer, including direct file and concurrent jurisdiction for those juveniles deemed ill-suited for the juvenile court because of their age or the nature of the charged offense, arguably with the intention of making it easier for juveniles to be transferred to, and tried in, adult criminal court.<sup>216</sup>

Still, judicial waiver is the most common transfer provision among the states.<sup>217</sup> The same underlying concerns about the significant consequences of exposure to criminal conviction that were recognized by the Court in *Kent* exist when an adjudication is *ex post facto* determined to be a criminal conviction—namely, the now-adult faces the possibility of a longer loss of liberty because of his or her juvenile delinquency adjudication.<sup>218</sup> The determination as to the weight a delinquency adjudication will carry should, in the spirit of *Kent*, be clearly defined before adjudication and not subject to a later reinterpretation that can increase the now-adult defendant's confinement.<sup>219</sup>

The existence of transfer is recognition of the fact that the juvenile court remains unique in its purpose—it is not a criminal court—and children in juvenile court should not face criminal convictions.<sup>220</sup> A system of transfer as a means for society to expose some juveniles to adult criminal conviction seems unnecessary if any delinquency adjudication can later be reframed as a criminal conviction and all juveniles, therefore, technically face the possibility of criminal conviction.<sup>221</sup>

#### D. Availability of the Infancy Defense

If juvenile delinquency adjudications are to be considered as equivalent to criminal convictions for purposes of enhanced sentencing in a subsequent adult criminal proceeding, the infancy defense should be available to juveniles in adjudicatory proceedings.<sup>222</sup> Prior to the establishment of a separate juvenile court, the availability of the common law infancy defense created a rebuttable presumption that children

*Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083 (2006).

<sup>216</sup> See SNYDER & SICKMUND, *supra* note 25, at 113.

<sup>217</sup> See *id.* at 112.

<sup>218</sup> See *Kent*, 383 U.S. at 553–54; see also U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(b), 4A1.2(d)(2) (2007).

<sup>219</sup> See *Kent*, 383 U.S. at 553–54.

<sup>220</sup> See WATKINS, *supra* note 32, at 89.

<sup>221</sup> See *Burge*, 407 F.3d at 1190; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

<sup>222</sup> See *supra* notes 21–22 and accompanying text (discussing the availability of the infancy defense to juveniles prior to the establishment of a distinct juvenile court).

under the age of fourteen were incapable of appreciating the moral dimension of their behavior and so could not be deterred by the threat of punishment.<sup>223</sup> Some courts continue to recognize the infancy defense as available to juveniles under fourteen.<sup>224</sup>

In the majority of jurisdictions, however, the common law infancy defense has been denied absent statutes that specifically allow for the defense, under the rationale that because a delinquency adjudication is not a criminal conviction, it is unnecessary to determine whether the juvenile understood the moral implications of his or her actions.<sup>225</sup> The denial of the infancy defense is also justified on grounds that recognition of the defense would frustrate the rehabilitative purpose of the juvenile court because children in need of the state's therapeutic services would be removed from the court's jurisdiction.<sup>226</sup>

The rationale that juveniles should be denied the infancy defense because adjudicatory proceedings are not criminal proceedings does not withstand scrutiny if delinquency adjudications can later be considered equivalent to criminal convictions for some purposes.<sup>227</sup> The fact that children face the possibility of criminal consequences upon being adjudicated delinquent fundamentally changes the rehabilitative purpose that is used to justify the denial of the infancy defense in the juvenile court.<sup>228</sup> It is fundamentally inconsistent to hold a child criminally responsible for an action when he or she was denied the infancy defense on the basis of there being no possible criminal penalties for the action.<sup>229</sup>

### CONCLUSION

Juvenile delinquency adjudications are increasingly considered to be the equivalent of criminal convictions for purposes of sentencing enhancement in a subsequent adult proceeding. The response to such

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<sup>223</sup> See *In re Tyvonne*, 558 A.2d 661, 664 (Conn. 1989).

<sup>224</sup> See *In re Gladys*, 464 P.2d 127, 132 (Cal. 1970).

<sup>225</sup> See *Tyvonne*, 558 A.2d at 666 (holding that because the common law infancy defense was created to protect children charged as criminals, it has no place in the juvenile court, where children are not found guilty of crimes).

<sup>226</sup> See *id.* (noting that the legislature could decide that the availability of the infancy defense might interfere with the state's efforts to help children by excluding those children most in need of guidance).

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 665-66 (noting that there was no evidence presented leading to the conclusion that the rehabilitative objectives of the juvenile justice system are contradicted in practice).

<sup>229</sup> See *id.* at 666.

use has led to a renewed call for a constitutional or statutory right to trial by jury in juvenile court adjudicatory proceedings so as to legitimize the use of such adjudications. Such an extension concedes that it is proper to equate juvenile delinquency adjudications with criminal convictions. This concession is troubling and improper for several reasons. First, the juvenile court remains distinct from the criminal court in its purpose and procedure. Second, given the prevalence of pleas in the juvenile court, there may be significant questions about fairness and whether juveniles fully and vigorously defend against delinquency charges to the same extent that they would against criminal charges. Finally, a system in which delinquency adjudications can *ex post facto* be considered criminal convictions undermines the necessity for a system of transfer from juvenile to adult court. Although fairness dictates that juvenile adjudications should not be considered convictions, if they are consistently used as such, the infancy defense should be made available in the juvenile court.

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