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WHY (JURY-LESS) JUVENILE COURTS ARE UNCONSTITUTIONAL

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ABSTRACT

Juveniles should hold the right to a jury trial under the U.S. Constitution, but they do not. In most states, when a trial occurs, a single judge determines whether a youth loses their liberty, and that imprisonment can last for years. The United States Supreme Court has decided that the Sixth Amendment right to a jury is irrelevant; prosecution in juvenile court is not a criminal prosecution within the meaning of the Sixth Amendment because the purpose of the juvenile courts is a good one—to rehabilitate youth. The Court has also held that the right to a jury trial is not required under the due process clause because juries are not essential to factfinding. By exploring the unexamined meaning of criminal prosecution in the Sixth Amendment, rejecting the Supreme Court's use of the state's good purpose, and probing the neglected historical right to a jury trial for juveniles, this Article challenges the common assumption that juveniles do not hold the right to a jury trial.

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INTRODUCTION

Currently, juveniles accused of crimes in this country have fewer constitutional rights than adults. Perhaps most significantly, in nearly all juvenile proceedings where there is a trial, only one person—a judge—not a jury—decides if the minor whom the state has accused of wrongdoing is guilty of a crime.[1] If the judge convicts, the child could be incarcerated for several years.[2] This conviction of a minor by a judge could result in a sentence that is longer than the one served by an adult convicted of the same crime.[3] Also, the conviction by the judge could adversely contribute to the length of any future incarcerations of the individual both as a child and as an adult.

In spite of these problems, there is no movement to change this entrenched system. But constitutional reasons exist to do so. The Sixth Amendment, which sets forth the right to a jury trial, states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury."[4] The Supreme Court has held that the Sixth Amendment, along with the Fourteenth Amendment, guarantees the right to a jury trial in criminal prosecutions under state law.[5] In deciding that criminal defendants have a right to a jury trial, the Court has emphasized that the trial by jury is a right "fundamental to the American scheme of justice."[6]

Notwithstanding this sentiment, the Supreme Court has held that minors do not hold the constitutional right to a jury trial during juvenile proceedings.[7] In other words, minors tried in juvenile courts for the same crimes as adults cannot demand a jury trial under the U.S. Constitution like their adult counterparts. Without significant analysis, the Court has reasoned in part that juvenile proceedings are rehabilitative in nature and thus are not "criminal prosecutions" within the Sixth Amendment.[8] Many scholars have disagreed, arguing that any

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[1] The general caseload of the juvenile courts is hundreds of thousands of cases. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2015 7 (2018).

[2] This Article does not always adopt the preferred nomenclature for juvenile proceedings. For example, instead of adjudicated delinquent, conviction may be used. Instead of detained, incarcerated may be used. As explained in this Article, the preferred characterizations do not change the actual circumstances faced by juveniles accused of committing crimes.

[3] *See* RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 394–398 (2018).

[4] U.S. CONST. amend VI.

[5] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Bloom v. Illinois, 391 U.S. 194, 211 (1968).

[6] *See Duncan*, 391 U.S. at 149.

[7] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[8] *See id.* at 539, 541.

compelling distinctions between the juvenile system and the adult system do not continue to exist; because the separate system for juveniles has strayed from its original rehabilitative focus and towards a more punitive function similar to the adult system, juveniles should possess the same right to a jury trial as adults.[9]

The debate over whether the juvenile system is rehabilitative is misplaced, however, because, regardless of its current rehabilitative or penological purpose, juveniles have a right to a jury trial. The Supreme Court has previously held that the right to a jury trial is based on history.[10] To determine whether a jury trial right exists, the historical divisions of authority between judges and juries in England and America at the time of the ratification of the Sixth Amendment are examined.[11] Under these systems, judges and juries balanced one another.[12] Judges instructed the jury on the law, and juries decided facts. Judges—who were selected by the king or royal governor—were not given fact-finding authority because, for example, they could be corrupt or could disfavor certain people whom the government had prosecuted.[13]

At the time of the adoption of the Sixth Amendment, under these English and American systems, adults and juveniles who were accused of crimes were treated in the same manner.[14] They possessed the right to a jury trial.[15] Subsequent proposed English legislative reform to lessen or eliminate the right to a jury trial for minors confirms that English juveniles possessed the right to a jury trial, and later legislation in the states also fortifies that American minors held the right to a jury trial at the founding.[16] Moreover, specifically at the time of the adoption of the Fourteenth Amendment, American juveniles held the right to a jury trial.[17]

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[9] *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988); Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1 (2012) [hereinafter *Public Trials*]; Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129 (1987) [hereinafter *Observations*]; Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503 (1984).

[10] *See* Patton v. United States, 281 U.S. 276, 288–89 (1930).

[11] *Id.*

[12] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (Univ. Chi. Press 1979) (1769).

[13] *Id.*

[14] *See* discussion *infra* Section II.

[15] *See* discussion *infra* Section II.

[16] *See infra* Section II.B.1.c.

[17] *See* discussion *infra* Section II B.2.

Although the Supreme Court has exhibited some smattering of awareness of juveniles' historical right to a jury trial,[18] it has denied the right to a jury trial based on three concepts related to the rehabilitation of children. First, because of states' rehabilitative purposes in creating juvenile courts, it has concluded that juvenile proceedings are not criminal prosecutions within the meaning of the Sixth Amendment, and therefore the right to a jury trial is irrelevant.[19] This conclusion has been reached without any analysis of the meaning of criminal prosecution. Further, the Supreme Court's emphasis on the rehabilitative purpose of the state in creating juvenile courts suggests that juvenile courts cannot be criminal prosecutions if they are for purposes of rehabilitation. But, as described in this Article, there is no support for denying or precluding the jury trial right based on a state's good purpose. The relevant issue is the meaning of criminal prosecution. An examination of this meaning shows that juvenile proceedings are in fact, criminal prosecutions.

Second, related to its conclusion that juvenile proceedings are not criminal proceedings, at times the Court has cited *parens patriae* or the historical authority of the state to take custody of children.[20] In the past, however, the state did not have the power to take custody of a child who was accused of a crime. In England and in America, before the state could take custody, a jury would need to convict a child of a crime in the same manner as a jury would convict an adult of a crime.[21]

Finally, the Court has also rejected any right to a jury trial for juveniles based on the Due Process Clause of the Fourteenth Amendment. For several reasons but particularly focused on the purported equal ability of judges to find facts, the Court has stated the right to a jury trial is not required for fundamental fairness to minors in juvenile proceedings.[22] Again, history defies this conclusion. The jury was integral to fairness for several reasons including, that through its decisions, it could check the power of the judiciary, which could be subject to corruption or bias. This is illustrated by the Kids for Cash scandal. In exchange for bribes, two Pennsylvania judges improperly sent scores of children to a private youth detention center.[23] Although upon the discovery of this bribery scheme, the Pennsylvania Supreme Court dismissed thousands of cases against juveniles, the judges' actions caused the scarring detention of many children for

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18 *In re* Gault, 387 U.S. 1, 16 (1967).

19 *Id.* at 16–17.

20 *See infra* notes 72–99 and accompanying text.

21 *See* discussion *infra* Section II.B.1.c.

22 McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

23 KIDS FOR CASH (Senart Films 2013).

significant periods of time—including for years.[24] More recently, judicial corruption or bias is shown by what has been described as a "pay-to-play system." Judges have been accused of improperly appointing juvenile clients to lawyers who made significant contributions to the judges' campaigns. Apparently, these lawyers have benefitted greatly from the appointments—some receiving over $500,000 a year from the state for the representation of these juveniles.[25]

Although, as this Article will demonstrate, juveniles possessed the historical right to a jury trial, many will say that history is irrelevant today and claim that the jury trial is inefficient and in the context of juveniles, inhibitive of rehabilitation. These statements have missed the value that the jury can play that may exceed any efficiency gains from judicial trials. Additionally, no evidence has been presented to show that the trial of juveniles by jury would hamper the rehabilitation of youth. Most importantly, the historical division of authority between judges and juries that provided motivation for the establishment of the constitutional right to a jury trial has been ignored.

Several issues derive from the unconstitutional shift of decision-making to judges in juvenile courts. Because judges do not reflect the overall diversity of the juvenile population, their singular decision-making at minimum may give the appearance of being unfair.[26] And their determinations may actually be unfair. For example, reports show that black youth have been disproportionately confined; blacks were more likely to be detained than whites who were similarly situated and blacks who comprise only a small fraction of the population constituted around 40% of those in confinement, while whites were only 33.8%.[27] After a child is adjudicated guilty by a judge, other consequences for the minor can follow. For instance, black children received worse sentences and were sent to inferior facilities—more blacks to public facilities and whites to residential ones.[28] And whether involving bias, corruption or otherwise, the

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[24] *Id.*; *see* Jon Schuppe, *Pennsylvania Seeks to Close the Books on "Kids for Cash" Scandal*, NBC NEWS (Aug. 12, 2015, 4:45 PM), https://www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666.

[25] Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism: "Everybody Wins but the Kids,"* TEX. TRIB. & REVEAL (Nov. 1, 2018, 12:00 AM), https://www.texastribune.org/2018/11/01/harris-county-texas-juvenile-judges-private-attorneys/ (Rodney Ellis, a former senator in the Texas Senate said: "That is just an inherent conflict of interest. It's sleazy, it's old school, and it should have changed a long time ago.").

[26] *See* CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CENT. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 49 app. D (2010).

[27] *See* Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, 47 CRIME & JUST. 417, 422, 424, 426 (2018).

[28] *See id.* at 426.

problem of wrongful convictions that exists in the adult courts also can be found in juvenile courts.[29]

This Article is the first to fully explore whether juveniles have been improperly denied a constitutional right to a jury trial.[30] It takes a particularly unique view by exploring the meaning of criminal prosecutions, discussing the propriety of the use of purpose in constitutional analysis, and analyzing the historical right to a jury trial for juveniles. Part I first describes the juvenile court system in the United States and elsewhere and explains why juvenile courts were established. It then explores the rights that the Supreme Court has held juveniles possess in these proceedings. These include many rights, including proof beyond a reasonable doubt but do not include the right to a jury trial. Subsequent decisions of state supreme courts, including a recent case where a juvenile was accused of murder, have explored the proper reach of the holding denying the right to a jury trial.[31] States have also recognized the significance of the lack of the right to a jury trial and imposed other protections for juveniles. Part II argues that juveniles hold the right to a jury trial. It shows that juvenile proceedings are indeed criminal prosecutions under the meaning of the Sixth Amendment—eliminating the argument that the Amendment is irrelevant to juvenile proceedings. It also describes how the Court has inappropriately justified its denial of the right to a jury trial to juveniles based on the good purpose of states to rehabilitate juveniles. This Part then examines juvenile rights in the English and American courts at the time of the adoption of the Sixth Amendment. It illustrates that juveniles were afforded the unequivocal right to a jury trial in these courts in the late eighteenth century. Juveniles in the United States

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[29] *See* Laura Nirider, Megan Crane and Steven Drizin, *Gerald Gault meet Brendan Dassey*: *Preventing Juvenile False and Coerced Confessions in the Twenty-First Century*, in RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 217– 26 (Kristin Henning, et al. eds 2018) (describing interrogation practices that may lead to false confessions by juveniles); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007).

[30] Other articles on juveniles have not studied the term criminal prosecution and the historical rights of minors. *See, e.g.*, Tina Chen, Comment, *The Sixth Amendment Right to a Jury Trial: Why is it a Fundamental Right for Adults and Not Juveniles?*, 28 J. JUV. L. 1 (2007); *Public Trials*, *supra* note 9; Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143 (2008); Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835 (1994); Carl Rixey, Note, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 CATH. U. L. REV. 885 (2009); Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230 (1993).

[31] Judge Jeffrey Sutton has written about the importance of constitutional law decisions by state courts. JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018). This juvenile issue is an example of how the interpretation of the states could differ from the interpretation of the United States Supreme Court.

continued to hold this right until some time after the ratification of the Fourteenth Amendment when state legislation made trial by judge possible. This Part also concludes that even if the right to a jury trial is analyzed without reference to the Sixth Amendment and only with respect to the Fifth and Fourteenth Amendments, juveniles possess the right to a jury trial because it was integral to the historic protection provided to the accused. Importantly, the jury trial is necessary to fundamental fairness because judicial decision-making cannot be equated with jury decision-making. Finally, Part III responds to justifications for holding juvenile proceedings without a jury trial.

I. JUVENILE COURTS AND THE CASELAW ON THE RIGHT TO A JURY TRIAL

A. Juvenile Courts

Juvenile courts are a modern creation. Initially, in the United States, the same court system processed all people, including children.[32] Historically, minors had some advantages. Children under seven were not prosecuted, and juveniles under fourteen were given a rebuttable presumption of innocence.[33] Outside of these exceptions, juveniles accused of crimes were treated in the same manner as adults.

In the nineteenth century, there were efforts to establish a system to rehabilitate juveniles who committed crimes. A judge discussed some of the problems that children faced if their treatment was the same as adults. Placing children into facilities with adults "permitted them to become the outlaws and outcasts of society; it criminalized them by the very methods that it used in dealing with them."[34] A scholar criticized that past system under which "a child of eight or nine could be marred for life by conviction of crime and subsequent imprisonment with hardened criminals. Execution of the very young was not unknown to the stern criminal law practices of the eighteenth century."[35]

Recognizing these problems, in 1899, Cook County, Illinois established the first special court for children accused of wrongdoing.[36] In this court, only a judge and the child were to appear in a nonadversarial proceeding.[37] These

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[32] *In re* Gault, 387 U.S. 1, 16–17 (1967).

[33] *See* 4 BLACKSTONE, *supra* note 12, at 23.

[34] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[35] *See* Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 548 (1957).

[36] SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 1 (2d ed. 2011).

[37] *Id.*

special courts for minors as well as separate facilities for confining them grew across the United States and Europe.[38] The creators of these separate courts and detention centers believed that they could care for juveniles in a way that could rehabilitate them.[39]

Organizers of the juvenile system wanted it to be very different from the adult system because they thought the juvenile system could not be rehabilitative otherwise.[40] As mentioned, one of the main purposes of juvenile court was to prevent children from being tried and treated as criminals like adults were.[41] To establish this system, they avoided some of the traditional aspects of criminal proceedings.[42] For example, a so-called "civil" system was established to avoid the stigma attached to the criminal justice system.[43] The judge had much discretion and was to focus on the child, not the act allegedly committed by the child.[44] With this system came extremely informal proceedings that were not public and that did not use jury trials, defense lawyers, and some of the rules of evidence governing criminal cases.[45] These ordinary protections for adults who were accused of crimes were seen as hindrances to the rehabilitative goals of the juvenile court system.[46] The juvenile justice system even adopted a set of terms designed to distance itself from the criminal law:

> Juvenile proceedings were thus triggered by "petitions" rather than "indictments" or "informations;" juveniles committed acts of "delinquency" rather than "crimes;" they were subject to "adjudications" rather than "trials;" and if adjudicated a delinquent, they discovered their fate in "disposition" rather than "sentencing" proceedings, which could lead to commitment to a "training school" rather than a "prison" or "penitentiary."[47]

Despite the purported rehabilitative focus of juvenile proceedings with the

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[38] *See* ELIZABETH S. SCOTT & LAWRENCE STEINBERG, RETHINKING JUVENILE JUSTICE 88 (2008) (all states had juvenile courts by 1925); Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

[39] *See* SCOTT & STEINBERG, *supra* note 38, at 84–88.

[40] *See id.* at 86, 88; Janet Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1098 (1991).

[41] *See* Thomas & Bilchik, *supra* note 38, at 451–52; Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 282–83 (1967).

[42] *See* Monrad G. Paulsen, Kent v. United States*: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 170–71 (1966).

[43] *In re* Gault, 387 U.S. 1, 17 (1967).

[44] JUVENILE CRIME JUVENILE JUSTICE 154 (Joan McCord, Cathy Spatz Widom, & Nancy A. Crowell, eds., 2001).

[45] *Id*.

[46] *Id.*

[47] *Public Trials*, *supra* note 9, at 10.

apparently understanding judge at the helm, effectively judges do not decide the fate of the children before them in many of the cases. Instead similar to criminal proceedings for adults, in juvenile court, prosecutors regularly engage in forms of plea bargaining.[48] One report stated, "[s]tate studies of juvenile access to counsel indicate that most juvenile cases—often as many as 90 percent—result in a plea bargain"[49] The justifications for the prevalent use of plea bargaining parallel those in the adult courts—that is, that the system would overload without pleas.[50]

When they engage in plea bargaining, prosecutors have significant authority, and judges generally accept the pleas.[51] Where prosecutors have such authoritative control over juvenile proceedings,[52] these settings look similar to criminal proceedings that involve adults.

The adult-like treatment of juveniles by prosecutors is illustrated by the National District Attorneys Association prosecution standard for the role of prosecutors in plea bargaining with juveniles. It is "'governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the public interest as determined in the exercise of traditional prosecutorial discretion.'"[53]

Many jurisdictions permit a prosecutor to bargain away the trial for a

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[48] *See* Joseph B. Sanborn, Jr., *Philosophical, Legal, and Systemic Aspects of Juvenile Court Plea Bargaining*, 39 CRIM. & DELINQ. 509, 510 (1993); Joseph B. Sanborn, Jr., *Pleading Guilty in Juvenile Court: Minimal Ado About Something Very Important to Young Defendants*, 9 JUST. Q. 127, 133 (1992) (in 1992, describing Mississippi as only jurisdiction to prohibit plea bargaining and discussing charge and sentencing bargaining in the juvenile courts); Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, 23 CRIM. JUST. 61, 61–62 (2008) ("[P]lea bargaining has become ever more important. The growth in caseloads for juvenile public defenders and prosecutors has also contributed to the increasing number of plea bargains … The lawyer may need to remind the prosecutor of the rehabilitative nature of the juvenile court and the underlying goals of the juvenile justice system").

[49] *See* JUDITH B. JONES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, NCJ 204063, JUVENILE JUSTICE BULLETIN: ACCESS TO COUNSEL 5 (2004).

[50] RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 398 (2018). In juvenile proceedings, either the term admission or disposition is used at times instead of the term guilty plea. *See id* at 381.

[51] For example, if a prosecutor agrees to the sentence, the juvenile is more likely to receive this sentence. *See id*. at 394–98. Prosecutors can agree to a variety of conditions as a part of a guilty plea including the facts and the release of the juvenile. *See id*.

[52] *See id*. at 397.

[53] *See* Shepherd, *supra* note 48, at 62 (quoting James Shine & Dwight Price, *Prosecutors and Juvenile Justice: New Roles and Perspectives*, *in* JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 129–30 (Ira M. Schwartz, ed., 1992)). Innocent juveniles may falsely plead guilty more than adults. *See* Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead*: *A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611, 611 (2016).

juvenile for "probation without verdict (with the eventual outcome of dismissal of the case and expungement of arrest records)."[54] Even where the prosecutor has made no commitment regarding the sentence upon a plea, juveniles likely will benefit from pleading guilty.

> [J]udges tend generally to give lighter sentences to juvenile respondents who plead guilty, either because the judge regards the plea as a sign of contrition and a first step toward rehabilitation or because the judge wants, consciously or unconsciously, to express appreciation for the respondent's contribution to alleviating the problem of docket congestion.[55]

Juveniles also can benefit collaterally as a result of pleading guilty. As one example, because judges may decide where the juvenile is detained, a guilty plea could influence this determination.[56] Additionally, even where a plea offer is not put forth as a benefit in exchange for forfeiting trial, in some jurisdictions, defense attorneys know that judges will not consider certain valid defenses such as the stand your ground defense in Georgia so, the attorneys recommend that a minor takes a plea.[57]

In addition to this dark shadow of plea bargaining in juvenile courts, minors have faced other similarities to adults that temper the stated rehabilitative goal of juvenile courts. Many have been incarcerated for significant periods of time—including for periods longer than adults convicted of the same crimes.[58] Several states can incarcerate juveniles for two-to-five year sentences, and some others may impose twenty-to-thirty year sentences.[59] Indeterminate sentencing can also occur. In fact, "[i]n virtually all jurisdictions a sentence of incarceration (called "commitment" in some jurisdictions and "placement" in others) is an indeterminate sentence that, in theory, can extend to the minor's age of

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[54] HERTZ ET AL., *supra* note 50, at 381. Also, diversion may require a plea of guilty. *See id*. at 392. And as for the sentence, "[u]sually, the sole choice [for the judge] is between probation and a uniform indeterminate sentence." *See id*. at 405. Where sentencing is indeterminate, judges cannot exercise much control. *See id*. at 392.

[55] *See id*. at 398.

[56] *See id*. at 393.

[57] E-mail from Michael Tafelski, Attorney, S. Poverty Law Ctr., to author (Aug. 29, 2018, 11:26 AM) (on file with author).

[58] *Juveniles in Corrections: Time in Placement*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, https://www.ojjdp.gov/ojstatbb/corrections/qa08405.asp?qaDate=2015 (last visited Jan. 25, 2019).

[59] *See In re* Javier A., 159 Cal. App. 3d 913 (Dist. Ct. App. 1984) (15-year sentence); Sanborn, *supra* note 30, at 235. However, the "typical term of incarceration for a juvenile in most jurisdictions is no longer than 18 months." HERTZ ET AL., supra note 50, at 392. "[A]lmost all … [are] released … within 12 to 18 months."

majority."[60] They have also been housed in detention facilities that look similar to prison cells.[61] Further, children have been locked in cells for days, improperly isolated, wrongfully restrained, been subject to excessive force, been subject to sexual abuse, and been incarcerated with adults.[62] A Serial podcast illustrated some of these issues.[63]

The rehabilitative purpose of juvenile proceedings is also belied by the lasting effect of a conviction. After a judge tries and sentences a minor, this conviction can be considered to enhance a future sentence if the individual is convicted of another crime as a juvenile or as an adult;[64] a judge can use this past conviction by another judge to increase a sentence despite the Supreme Court's decisions that preclude judicial determination of facts that enhance an adult's sentence.[65]

The goal of rehabilitation also appears to be faltering based on changes that states have made to their laws. Over the years, especially after political pressure to combat crime in the 1980s, several states amended the purpose of the juvenile courts "to emphasize public safety, certainty of sanctions, and offender accountability."[66] The policy became "more concerned with social control and punishment than with its historic mission of prevention and rehabilitation," and, not surprisingly, the rate of detention of juveniles increased.[67] The rise of victims' rights and the opportunity to introduce statements at sentencing or disposition also has the potential to conflict with the juvenile court's purported goal of rehabilitation.[68]

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[60] See HERTZ ET AL., supra note 50, at 392.

[61] *See* Mike Fritz, *Photo Essay: Life Inside a Juvenile Detention Center for Girls*, PBS NEWS HOUR (Mar. 17, 2015, 11:26 AM), https://www.pbs.org/newshour/nation/girls-justice; RICHARD ROSS, JUVENILE IN JUSTICE 28–29 (Don Kennison, ed., 2012); Carmen Winant, *Inside America's Juvenile-Detention System*, TIME (May 26, 2015), https://time.com/3864814/juveniles-in-justice-richard-ross.

[62] *See* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE 6, 22 (2015); Sanborn, *supra* note 30, at 238.

[63] Set in Cleveland, it showed that there, juveniles had adult sentences hanging over them if they were deemed to have not behaved in detention, that violence occurred regularly in detention, and that gang membership was present. *See A Madman's Vacation*, SERIAL (2018), https://serialpodcast.org/season-three/8/a-madmans-vacation.

[64] *See* Sanborn, *supra* note 30, at 235.

[65] Feld, *supra* note 27, at 449–50; 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, 1195–22 (2003).

[66] *See* JUVENILE CRIME JUVENILE JUSTICE, *supra* note 44, at 155.

[67] Ira M. Schwartz, Martha Wade Steketee, & Jeffrey A. Butts, *Business as Usual: Juvenile Justice During the 1980s*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 382, 384 (2012).

[68] Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court*?: *Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1108 (2009).

B. Constitutional Protections for Juveniles Accused of Wrongdoing

In the mid-1960s, the Supreme Court began to question the ability of the juvenile court systems in the states to adequately protect children accused of crimes. Recognizing that minors had rights to due process, the Supreme Court began to extend constitutional principles to juvenile delinquency adjudications. The proliferation of protections abruptly ended in *McKeiver v. Pennsylvania* when the Court decided that juveniles did not possess the right to a jury trial under the Sixth Amendment or the Due Process Clause.[69] Recently, some state courts have reinvigorated this constitutional issue. In *In re L.M.*, the Kansas Supreme Court questioned *McKeiver* and extended the right to a jury trial to juveniles.[70] However, in *In re Destiny P.*, the Illinois Supreme Court refused to follow the Kansas Supreme Court and denied the right to a jury trial to a teenager accused of committing murder.[71] Recognizing the importance of the lack of the right to a jury trial, some states have imposed other requirements in attempts to protect youth.

1. Due Process Rights

In the 1960s, in *Kent v. U.S.*,[72] *In re Gault*,[73] and *In re Winship*,[74] the Supreme Court first extended procedural protections to juvenile proceedings. In these cases, the Court emphasized the rehabilitative purposes of the states and the role of the state as *parens patriae* or in a parental relationship with the

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[69] 403 U.S. 528 (1971) (plurality opinion).

[70] *See* 186 P.3d 164, 170 (Kan. 2008).

[71] *See* 102 N.E.3d 149, 161 (Ill. 2017).

[72] 383 U.S. 541 (1966). There, the Court decided that waiver to adult criminal court required certain procedures. *Id.* at 552.

[73] 387 U.S. 1 (1967). The parents of fifteen-year-old Gerald Gault petitioned for a writ of habeas corpus after Gerald was placed in an Arizona state facility following a judicial decision that Gerald had placed an obscene phone call to their neighbor. *Id.* at 4. There were several issues with the proceedings. Officers had taken Gerald into custody and transported him to a juvenile detention facility without contacting Gerald's parents. *Id.* at 5. Then, neither Gerald nor his parents were given a copy of the charges. *Id.* The subsequent proceeding regarding Gerald's guilt occurred in the judge's chambers where no record was created, no person was placed under oath, and the neighbor who complained about the phone call was not present. *Id.* Shortly afterward, in another proceeding, the judge committed Gerald to a detention facility for over five years—until he would reach the age of twenty-one. *Id.* at 7–8. Because Gerald was adjudicated in a juvenile court, the judge was able to commit Gerald for over five years, instead of the two-month maximum time to which an adult would be sentenced for the same offense. *Id*. at 29. In his dissent, Justice Stewart argued that juveniles should not receive the due process rights that adults possess. *Id.* at 78 (Stewart, J., dissenting). He feared a return to the system in the nineteenth century where juveniles received the same protections as adults but also received the same treatment, for example, execution for a crime. *Id*. at 79–80.

[74] 397 U.S. 358 (1970). There, the Court decided that a juvenile must be proven guilty beyond a reasonable doubt. *Id.* at 368.

child.[75] At the same time, it expressed skepticism about the success of the states in achieving their goals for their juvenile courts, noting that:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts … lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[76]

The Court decided that juvenile proceedings must comply with due process under the Fifth and Fourteenth Amendments of the Constitution.[77] The set of essential rights established in the three cases included notice of the charges, assistance of counsel, rights of confrontation and cross-examination, protection from self-incrimination, and proof beyond a reasonable doubt.[78] The Supreme Court had found that juvenile dispositions were not "criminal prosecutions" under the Sixth Amendment, and thus, various procedural safeguards could be imposed without requiring that the juvenile justice system complies with the full slate of constitutional protections of criminal cases.[79] And various characteristics of juvenile proceedings that could be protective of minors could continue including private proceedings.[80]

In 1971, this wave of the Court's extension of constitutional rights to juveniles ended.[81] In *McKeiver v. Pennsylvania*, a consolidated appeal of three

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[75] *See Gault*, 387 U.S. at 17. Describing the historical constitutional justification for the different treatment of juveniles, the Court explained that a child had been deemed to be entitled only to "custody," not "liberty," and the state had the power to intervene as *parens patriae* to take custody when parents failed to perform the custodial role. *Id.*

[76] *Kent*, 383 U.S. at 555–56; *see also Gault*, 387 U.S. at 21–22 ("neither sentiment nor folklore" prevented the Court from seeing that the juvenile justice system does not always meet its rehabilitative premises).

[77] *Gault*, 387 U.S. at 28 ("Under our Constitution, the condition of being a boy does not justify a kangaroo court.").

[78] *See id.* at 33, 41, 55, 57; *Kent*, 383 U.S. at 561; *Winship*, 397 U.S. at 368.

[79] *Gault*, 387 U.S. at 21–30.

[80] *Id*. at 24–25; *Winship*, 397 U.S. at 366–67. It pointed out, however, that many jurisdictions permitted the disclosure of juvenile records—effectively making the nature of juvenile proceedings public. *Gault*, 387 U.S. at 24–25.

[81] *See McKeiver*, 403 U.S. 528. Interestingly, this could have occurred as a result of the change in the

cases, two from Pennsylvania and one from North Carolina, the Court declared that the right to a jury trial was not a required protection for minors under the Due Process Clause.[82] In the first case, McKeiver was charged with robbery, larceny, and receiving stolen goods.[83] In the second case, Terry was charged with assault and battery on a police officer and conspiracy.[84] The final case involved several black children, including many who were engaged in a protest and charged with traffic violations.[85] The defendants argued they had a right to a jury trial because of the substantial similarity between criminal trials and juvenile proceedings.[86] These included the initiation of proceedings through a criminal charge in an indictment and in a petition, the placement in prison facilities and in detention, and the stigma attached to those criminally convicted and adjudicated delinquent.[87] Moreover, defendants asserted that a jury trial would not alter the character of juvenile adjudications and actually provided "healthy public scrutiny."[88]

While juvenile proceedings had been labeled civil in the past, the plurality stated "[l]ittle, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.'"[89] With that said, because *Kent*, *Gault*, and *Winship* did not conclude juvenile delinquency proceedings were "criminal prosecutions" under the Sixth Amendment, this Amendment was deemed irrelevant.[90] Continuing to examine the issue of the right to a jury trial from the perspective of due process as opposed to the Sixth Amendment right to a jury trial, the plurality determined that denying juveniles jury trials did not violate the fundamental fairness required by the Due Process Clause.[91] It discussed how the concept of fundamental fairness in juvenile court developed in the *Winship* and *Gault* decisions. Specifically, whether fundamental fairness was satisfied was based on the factfinding procedures.[92] "[N]otice, counsel,

composition of the Court. *See* Zawadi Baharanyi & Randy Hertz, *The Many Stories of* In re Gault, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 3, 11 (Kristin Henning, Laura Cohen & Ellen Marrus eds., 2018) (explaining that both Chief Justice Earl Warren and Justice Abe Fortas had left and were replaced by appointments by President Nixon). Since then, there have been other constitutional protections extended to juveniles. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010).

82 *See McKeiver*, 403 U.S. at 535–38.

83 *See id.* at 534–35.

84 *See id.* at 535.

85 *See id.* at 536–37.

86 *See id.* at 541.

87 *See id.* at 541–42.

88 *Id.* at 542–43.

89 *Id.* at 541.

90 *See id.* at 541 (noting cases that discuss rehabilitative or civil nature of proceedings).

91 *See id.* at 543.

92 *See id.*

confrontation, cross-examination, and standard of proof" were required given this emphasis on factfinding.[93] But the plurality asserted that the jury was not important: "[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding."[94] When it described the ability of judges to substitute adequately for juries, the plurality emphasized that other proceedings lacked jury trials such as those that involved equity, workmen's compensation, probate, deportation, and the military.[95] Further, past decisions had not held that judges were unfair or could never be as trustworthy as a jury.[96] The plurality pointed out that the jury system itself had been altered to less than twelve required jurors, and thus flexibility had been permitted.[97]

The Court concluded with a list of reasons that the Constitution did not require trial by jury for juvenile courts.[98] None of the advanced reasons were based in constitutional text or history, and many of them related to irrelevant information such as the past actions of states and commissions not to require jury trials for juveniles and the continuing ability of states to use juries if they so choose.[99]

In concurring with the judgment that juries were not required in juvenile court proceedings, Justice White agreed with the plurality about factfinding by judges versus juries. He said that the jury was "not necessarily or even probably better at the job than the conscientious judge."[100] He also stated that juvenile proceedings had not been deemed criminal prosecutions so only due process was required.[101] Concluding, he stated that due process did not require jury trials in juvenile court because there were "differences of substance between criminal and juvenile courts."[102]

Concurring and dissenting in part, Justice Brennan also agreed that only the Due Process Clause could be violated because juvenile proceedings were not criminal prosecutions.[103] However, whether a proceeding complied with the fundamental fairness that is required under the Due Process Clause had to be examined on an individual basis, including evaluation of whether the interests

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93 *Id*.
94 *Id.*
95 *See id*.
96 *See id*.
97 *See id*.
98 *See id*. at 545–50.
99 *See id*.
100 *Id*. at 551 (White, J., concurring).
101 *See id*.
102 *Id*. at 553.
103 *See id*. at 553 (Brennan, J., concurring in part and dissenting in part).

underlying jury trials were satisfied.[104] These included protection against government oppression and a biased judge.[105] He concluded that in Pennsylvania, the public, which was not barred from juvenile proceedings, could be a check on the government and thus due process was satisfied, while in North Carolina such a protection did not exist, and as a result, due process was not satisfied.[106]

In dissent, Justices Douglas, Black, and Marshall stated that the youth defendants should have had a right to a jury trial under the Due Process Clause or the Sixth Amendment as applied to the states by the Fourteenth Amendment.[107] One child was subject to ten years of confinement, and the others were subject to at least five years of confinement.[108] In these circumstances, an adult would have had a right to a jury trial.[109] The relevant question here was not whether states should engage in juvenile court endeavors, but rather whether a juvenile was entitled to a jury trial if prosecuted for a crime and subject to confinement.[110] There was no plausible distinction between the rights already required by the Court under due process and the right to a jury trial, which the plurality had deemed not fundamental to fairness. In fact, the right to a jury trial was "surely one of the fundamental aspects of criminal justice in the English-speaking world."[111] Moreover, the Sixth Amendment guaranteed juveniles a right to a jury trial for a crime for which an adult would hold a right to a jury trial.[112] The dissenting Justices also emphasized that the rehabilitative process for a child begins with fair treatment, including the right to a jury trial.[113]

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104 *See id*. at 554.

105 *Id*. (first quoting Singer v. United States, 380 U.S. 24, 31 (1964) and then quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

106 *See id*. at 555–57. Justice Harlan concurred due to his belief that jury trials are not required in states based on the Due Process Clause or the Sixth Amendment. *See id*. at 557 (Harlan, J., concurring).

107 *See id*. at 558, 561 (Douglas, J., dissenting).

108 *See id*. at 560.

109 *See id*. (citing *Duncan*, 391 U.S. at 162).

110 *See id*. at 559.

111 *Id.* at 561 (quoting DeBacker v. Brainard, 396 U.S. 28, 34 (1969)).

112 *See id*. at 561 (quoting *DeBacker*, 396 U.S. at 35).

113 *See id*. at 562. In 1969, in *DeBacker v. Brainard*, the Supreme Court considered a case where a seventeen-year-old charged with forging a check was denied a jury trial. 396 U.S. at 28, 30. Although the majority did not decide whether juveniles had a right to a jury trial, in dissent, Justices Black and Douglas discussed this issue. Douglas emphasized that the purpose of the juvenile courts and state custody had not been fulfilled: "This new agency—which stood in the shoes of the parent or guardian—was to draw on all the medical, psychological, and psychiatric knowledge of the day and transform the delinquent. These experts motivated by love were to transform troubled children into normal ones, saving them from criminal careers." *Id*. at 36 (Douglas, J., dissenting). But Douglas pointed out many problems including that the "correctional institutions designed to care for these delinquents often became miniature prisons with many of the same vicious aspects as the adult models [and] the secrecy of the juvenile proceedings led to some overreaching and arbitrary actions."

2. *State Court Decisions on the Right to a Jury Trial Under the U.S. Constitution*

Despite the lack of a federal constitutional right to a jury trial for minors, states can grant juveniles the right by their own interpretation of the federal Constitution, by statute, or by their own constitutions. But most states deny juveniles an absolute right to a jury trial in every criminal case.[114] According to the National Juvenile Defender Center, only nine states grant juveniles this right.[115] And just nine others provide the right in specific circumstances, including when the offense is violent, would have been a felony if committed by an adult, or involves a repeat offender.[116]

As mentioned in *McKeiver*, some states previously decided that the U.S. Constitution does not grant juveniles the right to a jury trial.[117] Some courts that previously held minors had no right to a jury trial have recently re-examined the issue. In 2008, for example, in *In re L.M.*, the Kansas Supreme Court considered whether a juvenile accused of aggravated sexual battery and possession of alcohol had a right to a jury trial under the U.S. Constitution via the Sixth and Fourteenth Amendments.[118] There, a judge denied the sixteen-year-old minor's request for a jury trial and found the youth guilty.[119] A sentence of eighteen months was imposed, but it was stayed in favor of probation until the minor was twenty.[120] Among other obligations, the juvenile was required to register as a sex offender.[121] Although the Kansas Supreme Court had previously denied the federal constitutional right to a jury trial to juveniles in a 1984 decision, it recognized that the Kansas juvenile justice system had dramatically changed in subsequent years.[122] Since then, Kansas had changed key language in its

Id. at 37 (Douglas, J., dissenting). Regardless of the purported purpose of juvenile courts, Douglas stressed that a juvenile possessed the right to a jury trial under the Sixth and Fourteenth Amendments when he was accused of a crime that would entitle an adult to a jury trial. *See id*. at 35 (Douglas, J., dissenting). He proclaimed "[w]hether a jury trial is in conflict with the juvenile court's underlying philosophy is irrelevant for the Constitution is the Supreme Law of the land." *Id*. at 38 (Douglas, J., dissenting).

114 *See McKeiver*, 403 U.S. at 548–49.

115 *See Juvenile Right to Jury Trial Chart*, NAT'L JUV. DEFENDER CTR. (2014), http://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf (last visited Jan. 25, 2019). These states are: Alaska, Kansas, Massachusetts, Michigan, Montana, New Mexico, Oklahoma, Texas, and Wyoming. *See id*.

116 *See id.* These include: Arkansas, Colorado, Idaho, Illinois, Minnesota, New Hampshire, Ohio, Virginia, and West Virginia. *See id*.

117 *See* 403 U.S. at 548.

118 *In re* L.M., 186 P.3d 164 (Kan. 2008).

119 *See id*. at 165.

120 *See id*.

121 *See id*.

122 *See* Findlay v. State, 681 P.2d 20 (Kan. 1984), *abrogated by L.M.*, 186 P.3d 164; *see also* KAN. STAT. ANN. § 38-2301 et seq. (Supp. 2019) (asserting a more punitive goal for the juvenile justice system,

Juvenile Justice Code. Although the original wording of the statute referred to juvenile proceedings as "juvenile adjudications," this was altered to portray the proceedings as "prosecutions" instead.[123] Further, prosecutions were based on allegations that juveniles had violated the criminal laws of the state,[124] and judges began to apply adult criminal procedure and sentencing standards in the proceedings.[125] The Kansas Supreme Court noted that the United States Supreme Court had relied heavily on the juvenile justice system's characteristics of fairness, concern, and paternal attention to determine that juveniles had no right to a jury trial.[126] Because the Kansas juvenile justice system did not have these attributes—but instead was patterned after the adult criminal system—the Court concluded that *McKeiver's* reasoning did not apply as binding precedent[127] and found that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments.[128] Also worth mentioning, although there is no right to a jury trial for juveniles in California, in 1984 a court of appeals in California extensively analyzed why juveniles possessed the right to a jury trial.[129]

In contrast to Kansas, Illinois, the state with the oldest juvenile court, recently refused to recognize that juveniles possess the right to a jury trial under the U.S. Constitution. Under Illinois law, only juvenile defendants with repeated or violent criminal histories are eligible for jury trials.[130] This law was challenged in *In re Destiny, P.* There, a fourteen-year-old girl was charged with killing a fellow fourteen-year-old following a fight regarding a romantic dispute.[131] The accused girl's request for a jury trial was denied because she had no previous criminal history.[132] If convicted of the crime, the minor would be

adopting a sentencing matrix, and stripping away many of the *parens patriae* protective measures originally put in place).

123 *See L.M.*, 186 P.3d at 167.

124 *L.M.*, 186 P.3d at 165.

125 *See id*. at 172.

126 *See id*. at 170.

127 *See id*.

128 *See id*. Because the Kansas court had abandoned its *parens patriae* character and transformed into a system for prosecuting juveniles, the court also concluded that this now fit within Section 10 of the Kansas Constitution's Bill of Rights and its jury trial right in "all prosecutions." *Id.* at 172; *see also* KAN. CONST. Bill of Rights § 10.

129 *In re* Javier A., 159 Cal. App. 3d 913 (Dist. Ct. App. 1984).

130 *See* 705 ILL. COMP. STAT. ANN. 405/5-620 (Supp. 1999).

131 Megan Crepeau, *State Supreme Court Rules Teen Cannot Be Tried by Jury in Endia Martin's Killing*, CHI. TRIB. (Oct. 19, 2017, 4:00 PM), http://www.chicagotribune.com/news/local/breaking/ct-met-supreme-court-jury-trial-20171018-story.html.

132 *See In re* Destiny, P., 103 N.E.3d 149 (Ill. 2017).

incarcerated for at least five years before being eligible for parole.[133] The teen raised a due process argument under the U.S. Constitution to argue that she had a right to a jury trial, but the Illinois Supreme Court—with citations to previous state authority and *McKeiver*—held that jury trials for juveniles were not required as a matter of due process.[134]

While many states do not recognize the right to a jury trial for minors, some states have acknowledged that they must try to compensate for this lack of a potential shield with other protections. More extensive appellate review is one avenue.[135] Other states have held that a juvenile cannot be held in adult correctional facilities if he is denied a jury trial.[136] Still other states have precluded judges from using a conviction from a juvenile proceeding to enhance the sentence of an individual who was convicted as an adult.[137] The revisitation of the constitutional issue in the states, as well as the additional protections imposed by the states upon the denial of the right to a jury trial, demonstrate the continued importance of the issue of the right to a jury trial for juveniles.

II. THE RIGHT TO A JURY TRIAL FOR JUVENILES UNDER THE SIXTH AMENDMENT

As described previously, the Supreme Court has held that the right to a jury trial in criminal cases under the Sixth Amendment is based on the historical right. As discussed below, juveniles had such a right to a jury trial. The first Section investigates the meaning of criminal prosecution in the Sixth Amendment. Having shown the relevance of the Sixth Amendment, the second Section describes the historical role of the jury for adults and juveniles. Finally, the last Section contrasts the Supreme Court's analysis of the right to a jury trial for petty offenses to its treatment of the right to a jury trial for juveniles.

A. Criminal Prosecution Under the Sixth Amendment

Instead of relying on the prescribed examination of history to analyze the Sixth Amendment right to a jury trial for juveniles, the Supreme Court has

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133 *See id*. at 158.

134 *See id*. at 160.

135 *See In re* A.K., 825 N.W.2d 46, 51 (Iowa 2013) (stating "juvenile proceedings differ from criminal proceedings in … [the] important respect … [that] [n]either statutory nor constitutional provisions guarantee juveniles the right to a jury trial," and "[t]his important distinction between adult and juvenile proceedings favors a more in-depth appellate review of the facts supporting and opposing an adjudication").

136 *See, e.g.*, *In re* C.B., 708 So. 2d 391 (La. 1998); *In re* Jeffrey C., 781 A.2d 4, 7 (N.H. 2001); *In re* Hezzie R., 580 N.W.2d 660 (Wis. 1998).

137 *See*, *e.g*., State v. Brown, 879 So. 2d 1276 (La. 2004); State v. Hand, 73 N.E.3d 448 (Ohio 2016).

adopted the notion that they do not hold the right simply because the Sixth Amendment is irrelevant; the prosecution of youth in juvenile court cannot be criminal prosecutions under the Sixth Amendment because the state courts claim their purpose is rehabilitative. To make this conclusion, however, the Court has not analyzed the meaning of criminal prosecutions.

1. Previous Interpretations

To deny the constitutionally-mandated right to a jury trial to juveniles, there must be some basis to do so. In *McKeiver*, without analysis, a plurality of the Supreme Court said that a juvenile court proceeding "ha[d] not yet been held to be a 'criminal prosecution'" under the Sixth Amendment, and therefore the Sixth Amendment right to a jury trial in criminal prosecutions was irrelevant to the question of whether juveniles possessed the right to a jury trial.[138] The plurality cited three of its past decisions, all of which did not analyze the meaning of criminal prosecution.[139] Instead, those former decisions relied on the idea that juvenile proceedings were rehabilitative or civil.

Despite these previous characterizations, in *McKeiver*, the plurality acknowledged that a juvenile proceeding "ha[d] not yet been regarded as devoid of criminal aspects."[140] In past decisions, the Supreme Court had, in fact, recognized similarities between criminal proceedings and juvenile proceedings. For example, in *Gault*, it stated for a child to be found "delinquent and subjected to the loss of liberty for years is comparable in seriousness to felony prosecution."[141]

In *McKeiver*, while the plurality did not refer to the proceedings as "civil," it continued to reject that juvenile proceedings and criminal prosecutions could be "equated."[142] It did so with an emphasis on the best intentions of the states, including "every aspect of fairness, of concern, of sympathy, and of paternal attention" of their systems for juveniles.[143]

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

139 *See id*. (first citing Kent v. United States, 383 U.S. 541, 554 (1966), then citing *In re* Gault, 387 U.S. 1, 17, 49–50 (1967), and then citing *In re* Winship 397 U.S. 358, 365–66 (1970)).

140 *Id*.

141 *Gault*, 387 U.S. at 36; *see also* Breed v. Jones, 421 U.S. 519, 531 (1975) ("[N]o persuasive distinction … between the [juvenile] proceeding conducted in this case … and a criminal prosecution, each of which is designed 'to vindicate (the) very vital interest in enforcement of criminal laws.'" (quoting United States v. Jorn, 400 U.S. 470, 479 (1971))). With that said, protections there were based on the Due Process Clause, not the Sixth Amendment. *See* Middendorf v. Henry, 425 U.S. 25, 37 (1976).

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

143 *Id*. at 550.

States have decided somewhat similarly. In cases on whether youth possess the right to a jury trial in juvenile court, several states have relied on differences between the purported civil rehabilitative juvenile system and the adult criminal system as support for their decisions not to impose the full protections of the Sixth Amendment into juvenile proceedings including the right to a jury trial.[144] However, there have been differences of opinion. For example, some years ago, one state court judge recognized "[t]he argument that the adjudication of delinquency is not the equivalent of criminal process is spurious."[145]

Many scholars have also disputed purported differences between juvenile proceedings and criminal prosecutions.[146] They have argued that the rehabilitation-based juvenile justice system began to fade over time for a variety of reasons, including the adoption of determinate and mandatory minimum sentencing.[147] Consequently, the juvenile system has changed to one that is punitive in nature and substantially similar to the criminal justice system.

2. The Meaning of Criminal Prosecution

To determine the substance of different provisions of the Constitution, the Supreme Court has consulted the text and sources that were written at the time of the adoption of the Constitution. So, to explore the meaning of the term criminal prosecution in the Sixth Amendment, authorities at the time of the adoption of the Amendment should be examined.

First, we see the use of criminal prosecution outside of the Sixth Amendment. At the time, the constitutions of several of the fourteen states used criminal prosecution in the context of the right to a jury trial similar to the Sixth Amendment.[148] As one example, Delaware's Constitution stated,"[i]n all

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[144] *See Ex parte* Januszewski, 196 F. 123 (C.C.S.D. Ohio 1911); People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 281 (1870); Van Walters v. Bd. of Children's Guardians, 132 Ind. 567 (1892); State *ex rel.* Olson v. Brown, 50 Minn. 353 (1892); Prescott v. Ohio, 19 Ohio 184 (1869); Commonwealth v. Fisher, 213 Pa. 48 (1905); *Ex parte* Crouse, 4 Whart. 9 (Pa. 1839); Mill v. Brown, 31 Utah 473 (1907).

[145] *McKeiver*, 403 U.S. at 571 (Douglas, J., dissenting).

[146] *See supra* note 9.

[147] *See* Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 25, 31 (2007).

[148] CONN. CONST. art. I, § 9 (1818) ("In all criminal prosecutions, the accused shall have the right … and in all prosecutions, by indictment or information, a speedy public trial by an impartial jury."); DEL. CONST. art. I, § 7 (1792); GA. CONST. art. XXXIX, § 1 (1777) ("All matters of dispute, both civil and criminal, in any county where there is not a sufficient number of inhabitants to form a court."); MD. CONST. art. XIX (1776) ("[I]n all criminal prosecutions, every man hath a right … to a speedy trial by an impartial jury."); N.H. CONST. art. 1, § 17 (1792) ("In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county than that in which it is committed … except in cases of general insurrection … when it appear … that an impartial

criminal prosecutions the accused hath a right to … a speedy and public trial by an impartial jury."[149] As another example, Pennsylvania's Constitution stated, "[t]hat in all criminal prosecutions the accused hath a right to "a speedy public trial by an impartial jury …."[150]

To further determine what criminal prosecution means, we can examine other authorities at the time of the adoption of the Sixth Amendment. Samuel Johnson's Dictionary from 1785 defines the adjective criminal as "faulty; contrary to right; contrary to duty; contrary to law," "guilty; tainted with crime; not innocent," or "not civil: as a *criminal* prosecution; the *criminal* law."[151] Further, Blackstone describes a crime as "an act committed, or omitted, in violation of a public law, either forbidding or commanding it."[152] He distinguishes private wrongs or civil injuries from public wrongs or crimes.[153] The former are "an infringement or privation of the civil rights which belong to individuals" while the latter are "a breach and violation of the public rights and duties, due to the whole community."[154] In juvenile court, minors are accused of committing crimes against the law, and thus criminal in criminal prosecutions appears satisfied.[155]

In addition to defining criminal, the Johnson dictionary defines

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trial cannot be had."); N.J. CONST. art. 1, § 8 (1844) ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."); N.Y. CONST. art. I, § 8 (1846) ("[I]n all criminal prosecutions, … the truth may be given in evidence to the jury."); N.C. Declaration of Rights § 9 (1776) ("[N]o freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court …"); PENN. CONST. art. IX, § 9 (1790); R.I. CONST. art. I, § 10 (1842) ("[I]n all criminal prosecutions, … the accused shall enjoy the right to a speedy and public trial."); *see also* S.C. CONST. art. XXXIV (1776) ("[I]n lieu of all charges against the public for fees upon criminal prosecutions."); VA. Declaration of Rights § 8 (1776) ("[T]hat in all capital or criminal prosecutions a man hath a right … to a speedy trial by an impartial jury."); VT. CONST. ch. I, § X (1793) ("[I]n all prosecutions for criminal offences, a man hath a right to … a speedy public trial, by an impartial jury."). Some states use "prosecutions" in the context of the right to a jury trial, while others emphasize its use in "criminal" cases. *Compare* N.Y. CONST. art. VII, § 8 (1821) ("[I]n all prosecutions … the truth may be given in evidence to the jury."), *with* MASS. BODY OF LIBERTIES art. XXIX (1641) (granting jury trial right in "Criminal cases").

149 DEL. CONST. art. I, § 7 (1792).

150 PENN. CONST. art. IX, § 9 (1790).

151 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (emphasis added); *see also* NOAH WEBSTER, COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). *See generally* Carey M. McIntosh, *Eighteenth-Century English Dictionaries and the Enlightenment*, 28 YEARBOOK OF ENG. STUD. 3 (1998) (providing background on the intersection of lexicon and dictionaries during the Enlightenment).

152 4 BLACKSTONE, *supra* note 12, at 5.

153 *Id.*

154 *Id*.

155 When juvenile courts began, some children might be subject to the state's custody when they committed acts that were not crimes. Now, however, minors are brought into juvenile proceedings solely for accusations of committing crimes. As a result, in juvenile proceedings, the "criminal" aspect of criminal prosecutions in the Sixth Amendment appears satisfied.

"prosecution." It is defined as a "[s]uit against a man in a criminal cause."[156] In sum, a criminal prosecution would be a suit against a person accused of an act against the law. Consequently, a juvenile would be subject to "criminal prosecution" in juvenile court, because the government brings a case against the minor who is accused of committing an act that is contrary to the law.

To further investigate the meaning of criminal prosecution, we can examine related words—"punishment" in the Eighth Amendment and "conviction." Punishments can result from convictions from criminal prosecutions under the Sixth Amendment. Johnson defines conviction as "[d]etection of guilt, which is, in law, either when a man is outlawed, or appears and confesses, or else is found guilty by the inquest."[157] Johnson defines punishment as "[a]ny infliction or pain imposed in vengeance of a crime."[158] Blackstone also described punishment as that which is "consequent upon crimes."[159] These definitions also lead to the conclusion that because a youth can be punished by detention when convicted of committing an act against the law, the government is engaged in a criminal prosecution.

In summary, after a judge determines that a juvenile has committed a crime, the state can detain the minor in a facility for some period of time and take away the freedom of the minor. In other words, the state can inflict punishment outlawing or detaining the minor for the conviction of a crime by the judge. So, juveniles are prosecuted for crimes by the state's attorney of the county where they are charged, and then they are punished for convictions of those crimes within the meaning of criminal prosecutions in the Sixth Amendment and punishment in the Eighth Amendment.[160]

For a concrete example of whether a juvenile proceeding is a criminal prosecution, we can examine one of the cases in *McKeiver*. There, a child was charged with committing the crimes of robbery, larceny, and receiving stolen goods and could receive a sentence of five years. So, the child was prosecuted for crimes and could be punished with significant time in detention upon conviction of the crimes. Thus, this proceeding was a criminal prosecution as set forth in the Sixth Amendment.

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156 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

157 *Id*.

158 *Id*. at 6.

159 4 BLACKSTONE, *supra* note 12, at 7.

160 *Cf.* Allen v. Illinois, 478 U.S. 364, 377–78 (1986) (comparing Illinois's "sexually dangerous person" proceeding to Illinois's criminal law proceeding).

3. Good Purpose

Given the actual meaning of criminal prosecution—that is, that juvenile prosecutions fit within it—the Court, in denying the right to a jury trial to juveniles, is essentially asserting that it can deny the right if the state believes it is doing so for a good purpose—in *McKeiver*, for a rehabilitative purpose. However, outside of this juvenile context, the good purpose of the state has not been sufficient to alleviate the state's constitutional obligations to provide the right to a jury trial under the Sixth Amendment. As one example, in *Bloom v. Illinois*, the Supreme Court held that a person charged with serious contempt of court possessed the right to a jury trial even though the state argued that summary disposal of the charges by a judge without a jury trial was "necessary to preserve the dignity, independence, and effectiveness of the judicial process."[161] Moreover, where there is historical support for certain constitutional rights, the Supreme Court has not permitted relief from the obligation to be based on the state's good purpose. In *District of Columbia v. Heller*, for instance, the Court stated that despite the good purposes of the District of Columbia for its handgun restrictions, including the prevention of deaths, the historical right to bear a handgun had to be recognized.[162] It emphasized that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[163] When the Court discussed limitations on the right to bear arms, the Court did not discuss the purpose of the state but instead relied on history to support those restrictions. "[T]he sorts of weapons protected were [only] those 'in common use at the time.'"[164] Further, the "limitation [was] fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[165]

It is true that, at times, the Supreme Court has analyzed the purpose of the state to decide whether a right is violated. For example, in *Personnel Administrator of Massachusetts v. Feeney*, it discussed purpose in the context of whether equal protection was violated. There, the Court held a state policy that favored veterans was constitutional; its neutral, legitimate, and worthy purposes were apparent, and the state did not seek to discriminate against women.[166]

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161 Bloom v. Illinois, 391 U.S. 194, 208 (1968).

162 *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008); *id.* at 693–94 (Breyer, J., dissenting).

163 *Id*. at 636.

164 *Id*. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

165 *Id*. at 627 (quoting 4 BLACKSTONE, *supra* note 12, at 148–49 (1769)); *see also* Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (noting that automobiles are distinguishable from other forms of property because of the practical differences due to the inherent mobility of cars and the lessened expectation of privacy through configuration, use, and regulation).

166 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); *see also* Grutter v. Bollinger, 539 U.S. 306,

These reviews of purpose occur in contexts where the constitutional provision is somewhat vague and not in situations where a specific right is historically based.[167]

In conclusion, juvenile courts fall within the definition of criminal prosecutions under the Sixth Amendment. Moreover, where the state acts with a good purpose in juvenile courts—in a manner like a parent and to rehabilitate—the Sixth Amendment continues to require a historical analysis to determine the scope of juveniles' right to a jury trial.

B. The Historical Role of the Jury

As described above, because youth face criminal prosecution in juvenile proceedings, the Sixth Amendment is relevant to those proceedings. So, the question is whether youth in juvenile proceedings possess the Sixth Amendment right to a jury trial.

Historically, juries served important roles in England and in America. For example, they prevented people from being prosecuted for criticizing the government, from serving time for the violation of unjust laws, or from being punished by penalties thought to be too severe. Because the English would sometimes deprive the colonists of trial by jury,[168] when the Constitution was established, the right to a jury trial in criminal cases set forth in the Constitution and the Sixth Amendment was integral. Article III, Section 2 of the Constitution stated that "the trial of all crimes, except in cases of impeachment, shall be by jury."[169] The Sixth Amendment, adopted thereafter, ensured that "[i]n all criminal prosecutions, the accused shall enjoy the right to … an impartial jury ...."[170] It was adopted to "define with greater specificity 'the essential features of the trial required by § 2 of article 3'"[171] and has been held to apply to the

327 (2003) (noting that context matters when reviewing governmental action under the Equal Protection Clause).

[167] The Due Process Clause is another example. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951). The Court has emphasized the balancing that the government must do to ensure the "fairness … between individual and government." *Id.* at 162–63. This context is very different from the Sixth Amendment right to a jury trial, where the Court has stated that the availability of the right is based on the historical right at a set point in time. *See* Patton v. United States, 281 U.S. 276, 288 (1930).

[168] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("For depriving us in many cases, of the benefit of Trial by Jury….").

[169] U.S. CONST. art. III, § 2, cl. 3.

[170] U.S. CONST. amend. VI (stating that in all criminal prosecutions, a defendant is entitled "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

[171] *See* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 383 (2012) (citing Callan v. Wilson, 127

states.[172]

The Supreme Court has stated that the Sixth Amendment right to a jury trial is "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted…."[173] History governs because the "the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument."[174]

To determine, then, whether a juvenile has the right to a jury trial, the rights afforded to juveniles at common law in England at the time of the adoption of the Sixth Amendment, as well as the rights of juveniles in America at the time of the adoption of the Sixth and Fourteenth Amendments, must be examined. The Supreme Court has not done so in any complete manner. As previously mentioned, in *McKeiver*, in denying minors the right under the Sixth Amendment, it simply proclaimed that juvenile adjudications were not criminal proceedings subject to the Sixth Amendment.[175] Prior to that, in *Gault*, without analysis, the Court briefly mentioned that juveniles historically held the same rights as adults in actual criminal proceedings.[176] Those rights did not matter to the Court, however. The concept of *parens patriae* was cited for the power of the state to take away the rights of youth who are adjudicated in juvenile courts, even though the Court recognized *parens patriae* had been applicable only regarding civil issues such as property interests and custody of the child and not to criminal cases.[177]

An analysis of the rights of juveniles accused of crimes shows that historically they enjoyed the right to a jury trial, and state authority over children did not preclude this right. In England, at the time of the adoption of the Sixth Amendment in the late eighteenth century, minors accused of crimes enjoyed the right to a jury trial, and subsequent English legislation to alter that right confirmed that youth possessed the right to a jury trial in the late eighteenth century. Moreover, the *parens patriae* relationship did not affect this right.

U.S. 540, 549–50 (1888)).

172 *See* Duncan v. Louisiana, 391 U.S 145 (1968).

173 Patton v. United States, 281 U.S. 276, 288 (1930).

174 *Id.* at 289.

175 The Supreme Court has acted similarly in other contexts. It has decided that the rights available in criminal contempt proceedings are not required in civil contempt hearings. *See* Turner v. Rogers, 564 U.S. 431, 441–43 (2011).

176 *In re* Gault, 387 U.S. 1, 16–17 (1967).

177 *Id.* at 16; *see also* Schall v. Martin, 467 U.S. 253, 263, 265 (1984).

Additionally, no special juvenile courts existed in England in the late eighteenth century. Finally, the right of juveniles to juries in America in the late eighteenth century and at the time of the adoption of the Fourteenth Amendment, as well as subsequent legislation that altered that right, also support that juveniles held the right to a jury trial. Again, the *parens patriae* relationship did not affect this right, and no special juvenile courts existed at that time.

1. Juvenile Jury Rights in England

a. English Legal Commentary

As described briefly above, the English placed a high value on the right to a jury trial. The English commentator William Blackstone, who was very influential in America, praised the jury right as a filter that would prevent England from becoming like the failed civilizations of the past.[178] In the late eighteenth century, he wrote: "[Trial] by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!"[179] Blackstone also described the jury right as a citizen's greatest honor: "[It] is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by unanimous consent of twelve of his neighbors …."[180]

Juveniles possessed this right when they were prosecuted for crimes. Their treatment differed from adults in limited ways. They could not be prosecuted for some crimes, and they could assert the defense of infancy. Blackstone described that English children below age twenty-one were considered "infants" and could "escape fine, imprisonment, and the like" for some misdemeanors.[181] But for "notorious breaches of the peace" such as "battery" a child fourteen or above was "equally liable to suffer" as if he were twenty-one.[182] For felonies for which a person could be put to death, youth who were under seven could not be found guilty.[183] Those who were seven to thirteen were provided a rebuttable presumption that they were mentally incapable but at times were found mentally

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178 *See* 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (Univ. Chi. Press 1979) (1780).

179 *Id.*

180 *Id.*

181 4 BLACKSTONE, *supra* note 12, at 22.

182 *Id.* at 22–23; *cf.* Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577 (2017) (describing the nuances of the common law infancy defense).

183 4 BLACKSTONE, *supra* note 12, at 23.

capable.[184] Blackstone stated that, in these circumstances, if it appeared to the "court *and* jury" that the child could differentiate between good and evil, they could be convicted by a jury and even be put to death.[185] Similarly, in the late eighteenth century, Sir Matthew Hale's summation of the law surrounding youth also supports that where they could be prosecuted, juries would decide their guilt or innocence.[186] He said that if it appeared to the court and "jury" that the child could discern between good and evil at the time of the offense, he could be convicted and undergo judgment and execution.[187]

b. English Cases and Secondary Sources

English case law and secondary sources in and around the late eighteenth century also support that English juveniles possessed the right to a jury trial. Distinctions between juveniles and adults were described, and the right to a jury trial was not one of them. When children were accused of crimes, juries tried those who were of an age where they could be held accountable. Examples from the eighteenth and the early-to-mid-nineteenth centuries are mentioned below. While these cases do not directly state that juveniles possessed a right to a jury trial—consistent with treatise writers' description of the trial by jury of youth—these cases show that juries tried children in and around the late eighteenth century. Thereafter, the next subsection describes how legislation to take away the jury trial from children followed this period, confirming that young people who were tried for crimes received jury trials in the relevant late eighteenth century period similar to adults.

A case in the mid-eighteenth century, the *Case of William York*, shows at least some youth were tried by jury. There, a ten-year-old boy allegedly brutally murdered a five-year-old girl.[188] The boy had confessed to the crime, and a "jury" had convicted him.[189] In another case in that period, the *Case of Elizabeth Harris*, "the jury" had previously convicted fourteen-year-old Elizabeth Harris along with another person of arson.[190] Due to her age, Elizabeth was reprieved and subject to transportation.[191]

Several cases in the early nineteenth century also show youth tried by jury.

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184 *See* 4 BLACKSTONE, *supra* note 12, at 23.
185 *Id.*
186 *See* 1 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 16–29 (1736).
187 *Id.* at 22, 26–29.
188 *See* The Case of William York (1748) 168 Eng. Rep. 35, 35, Fost. 70, 71.
189 *See id.* at 36.
190 *See* The Case of Elizabeth Harris (1753) 168 Eng. Rep. 56, 56–57, Fost. 113, 113–15.
191 *Id.*

In *Rex v. John Davis*, a "little boy" had been charged with burglary for breaking a window to steal property at a house.[192] A "jury convicted the prisoner."[193] In another case, *C. Langstaffe's Case*, a jury convicted a twelve-year-old boy of manslaughter.[194] After being refused chips from an apprentice in a woodshop, the boy threw a sharp knife at the apprentice, and the apprentice died.[195] At trial, "the jury found the [child] guilty" of manslaughter.[196] In a third case, *Rex v. Elizabeth Owen*, a ten-year-old girl was accused of stealing coals.[197] The court cited *York* for the proposition that a ten-year-old could be convicted of murder.[198]After a discussion that the jury must find that she knew what she was doing was wrong, the court stated that "I think I must leave it to the Jury," and after a verdict of not guilty, the foreman of the jury stated that "[w]e do not think that the prisoner had any guilty knowledge."[199] In *Rex v. Groombridge*, the prisoner—who was younger than fourteen—was indicted for rape of a child who was under ten.[200]The court discussed the traditional rule that you must be fourteen to be convicted of rape. As a result, the court directed "the jury" to find the defendant not guilty.[201] In a similar case, *Regina v. Jordan and Cowmeadow*, the judge told the jury that the boy John Jordan must be fourteen years old to be convicted of an offense similar to rape against a girl who was under the age of ten, and the jury found the defendant not guilty.[202]

Some cases in the mid-nineteenth century also suggest youth held the right to a jury trial. In *Regina v. Brimilow*, the defendant was under fourteen and accused of raping a girl who was eleven.[203] The judge "directed the jury to acquit of the rape," and instead, "[t]he jury found him guilty of the assault."[204] In a somewhat similar case, *Regina v. Smith*, a ten-year-old boy was accused of maliciously setting fire to a hayrick.[205] Upon the judge's instruction that the defendant was presumed incapable of committing the crime, "the jury" found him not guilty.[206] In another case, *Regina v. Elizabeth Garner*, the jury convicted

192 R v. John Davis (1823) 168 Eng. Rep. 917, 917, Russ. & Ry. 498, 499.
193 *Id.* at 918.
194 *See* C. Langstaffe's Case (1827) 168 Eng. Rep. 998, 998, 1 Lewin 161, 163.
195 *See id.*
196 *Id.*
197 *See* R v. Elizabeth Owen (1830) 172 Eng. Rep. 685, 685, 4 Car. & P. 236, 236–37.
198 *Id.*at 685–86.
199 *See id.* at 685–86.
200 *See* R v. Groombridge (1836) 173 Eng. Rep. 256, 256–57, 7 Car. & P. 581, 582–83.
201 *Id.* at 256–57.
202 *See* R v. Jordan (1839) 173 Eng. Rep. 765, 766–67, 9 Car. & P. 119, 120.
203 *See* R v. Brimilow (1840) 169 Eng. Rep. 49, 49, 2 Mood. 123, 123.
204 *Id.*
205 *See* R v. Smith (1845) 1 Cox 260, 260.
206 *Id.*

a young, thirteen-year-old girl.[207] There, "the jury" heard her confession that she tried to kill her employer and convicted her.[208] In a final example, *The Queen v. George Read and Others*, three boys, who were eleven, twelve, and thirteen, were accused of common assault of a nine-year-old girl. "[T]he jury" that heard the case convicted the boys.[209]

Other writings from the time period also support that children accused of crimes received jury trials. In a plea to his fellow townsfolk, George Teale criticized a post-trial investigation after a jury acquitted two boys accused of stealing velveteen.[210] In the original case, the boys were accused of stealing from the owner of a dye house.[211] Both stated that an unknown man had given them the pieces of velvet to carry in return for payment.[212] After describing a man that resembled the person who had reported the crime, the court arranged for that man to sit in the courtroom.[213] Upon his arrival, both boys cried out "that is the man who gave us the goods."[214] After a lengthy trial, and in part because of this demonstration, "a discerning and honest jury" acquitted the two boys.[215]

In addition to historical accounts of famous trials, records were kept of juveniles whom juries found guilty of capital offenses and sentenced to death.[216] In 1730, for example, there were written accounts of three juveniles who were executed after a jury found them guilty.[217] A jury found John Mines, who was sixteen years old, guilty of armed robbery for holding a pistol to a man's head and stealing his hat, money, and the bacon that he was carrying.[218] A jury also convicted George Wych, who was almost eighteen years old, of assault, theft, and placing the assaulted in fear of his life.[219] Finally, a jury found fifteen-year-old Bernard Fink guilty of assault of a woman on a highway.[220]

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207 *See* R v. Elizabeth Garner (1848) 169 Eng. Rep. 267, 267–68, 1 Den. 327, 329–30.

208 *Id.*

209 *See* The Queen v. George Read and Others (1848) 169 Eng. Rep. 288, 288, 290, 1 Den. 377, 380.

210 *See* GEORGE TEALE, A REFUTATION OF A REPORT OF THE PROCEEDINGS IN THE CASE OF WILLIAM HINDLEY, CHARGED WITH FELONY, AND WITH FALSELY PREFERRING AN ACCUSATION AGAINST RICHARD HILL & THOMAS LEAR 6, 13, 38 (1818).

211 *Id.* at 13–15.

212 *Id.* at 17.

213 *Id.* at 18.

214 *Id.*

215 *Id.* at 6.

216 *See* THE ORDINARY OF NEWGATE, HIS ACCOUNT OF THE BEHAVIOUR, CONFESSIONS, AND DYING WORDS, OF THE MALEFACTORS, WHO WERE EXECUTED AT TYBURN, ON WEDNESDAY THE 23D OF THIS INSTANT DECEMBER, 1730 3 (1730).

217 *Id.*

218 *Id.* at 14.

219 *See id.* at 15–17.

220 *See id.* at 10–11.

c. Subsequent English Legislation as Support

In the nineteenth century, legislation was proposed to alter the right to a jury trial for juveniles. This effort demonstrates that youth previously possessed the right in England at the time of adoption of the Sixth Amendment in the late eighteenth century.

Beginning in 1836, as a response to inquiries from magistrates who had presided over criminal cases and preliminary examinations of minors in the late eighteenth century, a royal commission was appointed "to consider whether it was advisable 'to make any distinction in the mode of trial between adult and juvenile offenders, and if not, whether any class of offenders can be made subject to a more summary proceeding than trial by jury.'"[221] This commission concluded that "a distinction in the mode of trial would not be advisable."[222]

Despite this conclusion, a bill was introduced in 1840 to create a separate court for children under the age of sixteen who were charged with committing minor offenses.[223] Under this bill, a juvenile would be tried by a magistrate without a jury.[224] Magistrates were to treat the juvenile as would a "father over his son" and would decide whether the minor was guilty of the charged offense.[225] Despite passage in the House of Commons, the bill failed in the House of Lords, which found it "unconstitutional."[226] It was defeated because there "would be no end to juvenile offences, juvenile goals, juvenile courts and all that, without the benefit to the prisoners of trial by jury. The principle of the bill was unconstitutional because it conferred a power upon … magistrates to become judge, jury, and executioner at once."[227]

In 1847, Parliament successfully passed a more conservative bill.[228] The Juvenile Offenders Act of 1847 authorized "summary nonjury trials" for what the bill characterized as "trivial crimes" (e.g., simple larceny) by juveniles and capped the maximum time in detention that the court could impose at three months.[229] The Act did not abolish the right to a jury trial for juveniles, however.

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221 REPORT OF DEPARTMENTAL COMMITTEE ON THE TREATMENT OF YOUNG OFFENDERS 11 (1927).

222 *Id.*

223 A Bill to Authorize the Summary Conviction of Juvenile Offenders in Certain Cases of Larceny and Misdemeanor, and to Provide Places for Holding Petty Sessions of the Peace 1840, HC Bill [48] cl. 1.

224 *Id.*

225 *In re* Javier A., 159 Cal. App. 3d 913, 935 (1984) (quoting 52 Parl Deb HC (3rd ser.) (1840)).

226 *See id.* at 935–36 (citing PARSLOE, JUVENILE JUSTICE IN BRITAIN AND THE UNITED STATES 114 (1979)).

227 PHYLLIDA PARSLOE, JUVENILE JUSTICE IN BRITAIN AND THE UNITED STATES 114 (1979).

228 An Act for the More Speedy Trial and Punishment of Juvenile Offenders 1847 HC Bill [9Q] cl. 1.

229 *In re Javier A.*, 159 Cal. App. 3d at 936 (citing Act for the More Speedy Trial and Punishment at cl. 1).

It specifically allowed the juvenile to demand a jury trial:

> [I]f the Person charged shall, upon being called upon to answer the Charge, object to the Case being summarily disposed of under the Provisions of this Act, such Justices shall, instead of summarily adjudicating thereupon, deal with the Case in all respects as if this Act had not been passed.[230]

Later, in 1850, Parliament reconsidered a bill where minors would not hold the right to a jury trial.[231] Under this bill, upon conviction by a judge, juveniles would be sent to industrial schools of reform that would be created. Upon conviction of their third offense, minors were subject to up to seven years in prison.[232] Among other criticisms in the defeat of this bill was the denial of the right to trial by jury to juveniles.[233]

Subsequently in the early twentieth century, a specific juvenile court was created.[234] Even then, minors accused of a crime could opt for a jury trial outside of the juvenile court in England.[235] Currently, in England, for certain crimes, minors do not hold the right to jury trial.[236]

d. Misconception of Parens Patriae *and Civil Wardship*

Many states in the United States will take custody of a juvenile accused of a crime after only a judge has found the juvenile delinquent—in other words, without requiring a conviction by a jury. With that said, the state must have a lawful reason to take custody of a child. The only explicit constitutional basis for a state's authority to take custody of an individual is its power under the Sixth Amendment to take custody after a jury convicts the youth or he pleads guilty and waives the right to a jury trial.

At times, including implicitly in *McKeiver* and after the *McKeiver* decision, the Supreme Court has invoked the concept of *parens patriae* to support a court's special power over a minor.[237] However, the historical circumstances surrounding *parens patriae* were very limited and did not permit the state to take

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230 Act for the More Speedy Trial and Punishment at cl. 1.

231 A Bill for The Correction and Reformation of Juvenile Offenders and the Prevention of Juvenile Offences 1850 HC Bill [108] cl. 1, 13, 22.

232 *Id.*

233 *In re* Javier A, 159 Cal. App. 3d 913, 939–40 (Cal. App. Ct. 1984).

234 Children Act 1908, 8 Edw. 7 c. 67, § 111 (Eng.).

235 *Id.*

236 Children and Young Persons Act of 1933, 23 Geo. 5 c. 12, § 45-49 (Eng.).

237 *See, e.g.*, Schall v. Martin, 467 U.S. 253, 263 (1984) (*parens patriae* interest in preserving and protecting welfare of child "makes a juvenile proceeding fundamentally different from an adult criminal trial").

custody of a minor accused of a crime without a jury trial. Writing about the historical use of *parens patriae* when the state took custody of a juvenile, Neil Cogan described that there were various interests the state sought to further, including "the preservation of juvenile estates; the furtherance of juvenile education; and the protection of juveniles from improper marriages."[238] Where a state took custody generally appeared to involve a request by one parent for the state to prevent another parent from taking some action, or the state acting because the parent himself had acted inappropriately.[239] The child had not committed wrongdoing in any of the cases where the state became involved in a *parens patriae* relationship.[240]

The English Infant Felons Act of 1840 supports the fact that children always had a right to a jury trial even in circumstances involving the state's wardship.[241] There, the English first sought to establish wardship over a child accused of a felony.[242] However, the courts had the power to declare wardship only *after* a juvenile had been *convicted* of an offense in courts of law—where juveniles enjoyed the right to a jury trial.[243] Parliament specifically highlighted this post-

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[238] Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of* Parens Patriae, 22 S.C. L. REV. 147, 147 (1970).

[239] *See* Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 202–03, 205–06 (1978); *see also In re* Javier A., 159 Cal. App. 3d 913, 941 (1984).

[240] In the early twentieth century, a judge also explained that this relationship was not created except where there was property associated with the child so that the state would have the resources to care for the child. *See* Mack, *supra* note 34, at 104. The judge emphasized that the state could not care for all children. *Id.* However, writing about the property requirement, a judge discussed how especially in the mid and late nineteenth century, English courts recognized that property was not required for the state to make an order regarding a child. *See In re* Spence (1847) 41 Eng. Rep. 937, 937–38; 2 PH. 247, 249. For example, in *In re Spence*, the court held that without property of the child to protect, the court still had jurisdiction to order that children taken by one parent be given to the other parent. *Id.* A Justice on the Supreme Court and a historian have both recognized the doubtful extension of the doctrine to permit the state to take a child accused of a crime without a jury trial or other protections. *See* Custer, *supra* note 239, at 207–08 (discussing Justice Fortas's majority opinion in *In re Gault*).

[241] An Act For The Care and Education For Infants Who May Be Convicted Of Felony 1840, HC Bill [532] cl. 1 (Eng.); *see In re Javier A.*, 159 Cal. App. 3d at 942 (citing An Act For The Care and Education For Infants Who May Be Convicted Of Felony at cl. 1). "As of 1850, an English minor could not be declared a ward of the court—or be sent to a reform school or prison—on the basis of his commission of a felony unless he had been afforded a right to trial by jury." 159 Cal. App. 3d at 931.

[242] *In re Javier A.*, 159 Cal. App. 3d at 942.

[243] *See* An Act For The Care and Education For Infants Who May Be Convicted Of Felony at cl. 1 ("In every case in which any person being under the age of twenty-one years shall hereafter be convicted of felony, it shall be lawful for her Majesty's High Court of Chancery, upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such court find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural guardian, of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations as the said Court of Chancery shall think proper to prescribe and direct ….").

conviction power: "[Before] this bill could come into operation, the civil rights of the infant must be forfeited by a conviction …."[244]

e. The Existence of Juvenile Courts

The final historical question is whether, in the late eighteenth century, special English juvenile courts existed where juries did not try children. Such courts did not exist, and Parliament rejected subsequent proposed legislation to create them. A jury was the only decision-maker which could try any individual accused of committing a serious crime, including a child.[245]

2. Juvenile Jury Rights in the United States

As described above, minors had a right to a jury trial in England in the late eighteenth century. [246] The right to a jury trial of children in the United States in the late eighteenth century must also be examined along with the right in the mid-to-late nineteenth century. If juveniles in the United States did not have a right to a jury trial at the time of the adoption of the Sixth Amendment or at the time of the adoption of the Fourteenth Amendment, it might be argued that there was no intention to grant them the right to a jury trial.

Youth held the right to a jury trial at both of these points in time in the states, however. The constitutions of the original thirteen states and all of the constitutions of the states that later joined the union guaranteed the right to a jury trial.[247] Youth who were prosecuted for crimes were treated in the same manner as adults under these constitutions.[248] This began to change in the late nineteenth century. As the result of the reform movement described above, the first juvenile court—without a jury trial—was established in 1899 in Chicago.[249] Other jury-less juvenile courts spread quickly thereafter.[250]

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[244] 55 Parl Deb HC (3rd ser.) (1840) col. 1258–60 (UK); *see also Parliamentary Intelligence: House of Commons*, LONDON TIMES, Aug. 1, 1840, at 4 ("It had been attempted … to remove such children from the influence of their parents, but it had been found impossible as the law at present stood …. [T]his was a new principle, and one of a dangerous and peculiar character ….").

[245] 4 BLACKSTONE, *supra* note 12, at 255–76.

[246] *See* discussion *supra* Section II.B.1.

[247] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 875 n.44 (1994); *see also* William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SO. SCI. 201, 231–32 (1893).

[248] *See* JUVENILE CRIME JUVENILE JUSTICE, *supra* note 44, at 157.

[249] *See supra* notes 34–39 and accompanying text.

[250] *See* JUVENILE CRIME JUVENILE JUSTICE, *supra* note 44, at 157.

C. Petty Offenses by Comparison

Despite the Supreme Court's recognition that history governs whether a right to a jury trial exists, juveniles continue to be improperly denied the right to a jury trial. By comparison, the Supreme Court's analysis of petty offenses demonstrates when an exception to the imposition of the right to a jury trial is appropriate. At common law, many offenses were deemed "petty."[251] Juries did not try these cases.[252] Instead, judges or other officers tried them.[253] Because of this history, the Court has held that these petty offenses are not "crime[s]" under the Sixth Amendment, and thus defendants accused of these offenses do not have the right to a jury trial.[254] Additionally, in circumstances where an offense was petty at common law but the current severity of the penalty is comparable to that of common law crimes, the Court has held that the accused is entitled to a jury trial.[255]

How the Supreme Court has treated the analysis of the right to a jury trial when a person is accused of committing a petty offense confirms that the right to a jury trial for juveniles under the Sixth Amendment should be assessed similarly—using history. As described above, no historical exception exists for the availability of the jury trial for juveniles who are accused of crimes and subject to significant detention.

III. THE RIGHT TO A JURY TRIAL FOR JUVENILES UNDER THE DUE PROCESS CLAUSE

Outside of the Sixth Amendment, the right to a jury trial for youth could derive from the Supreme Court's holding that "the essentials of due process and fair treatment" must be met in juvenile proceedings.[256] The Court has already stated that juveniles hold many rights under this requirement.[257] These include the right to counsel, right to notice of charges, right to confront and cross-examine witnesses, the privilege against self-incrimination, and the right for proof of a crime demonstrated beyond a reasonable doubt.[258]

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[251] District of Columbia v. Clawans, 300 U.S. 617, 624 (1937).

[252] *Id.*

[253] *Id.* at 625–26.

[254] *Id.* at 625–26; Stephen I. Vladeck, *Petty Offenses and Article III*, 19 GREEN BAG 2D 67, 74 (2015).

[255] *See Clawans*, 300 U.S. at 625. Because historically, jury trials were generally available for offenses with a possible penalty of more than six months, defendants hold the right to a jury trial where the possible penalty of an offense is more than six months. Frank v. United States, 395 U.S. 147, 150 (1969).

[256] *In re* Gault, 387 U.S. 1, 30 (1967).

[257] *Id.* at 30–31.

[258] *Id.* at 31–57.

In *McKeiver*, the plurality limited the meaning of due process and fair treatment when it decided juries were not necessary for fundamental fairness in juvenile proceedings.[259] It emphasized the competence of judges and their role in other types of cases such as military and deportation cases.[260] Also supported by Justice White in his concurrence,[261] it said that juries were not a "necessary part of every criminal process that is fair and equitable" and "imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function."[262] The plurality and Justice White provided no support for these statements that favored the authority of their fellow judges. Zawadi Baharanyi and Randy Hertz pointed out that in the plurality opinion in *McKeiver*, Justice Blackmun "relie[d] on unsubstantiated assertions" to assert judges were as good as juries at factfinding.[263]

To the contrary, Blackstone described juries as necessary specifically because of the possible bias of judges.[264] Blackstone said the jury was "the grand bulwark of [every Englishman's] liberties."[265] The jury could check the power of the King to appoint a biased judge who could sit in a case where the King accused a subject.[266] Blackstone even anticipated "new and arbitrary methods of trial" such as "by justices of the peace" which "may appear at first" to be "convenient." Such methods were not sufficiently protective of an individual's "liberty" like the right to a jury trial.[267] He also said if justice is entirely "entrusted to the [magistry], a select body of men, and those generally selected by the prince or such as enjoy[ing] the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity …."[268] Blackstone further stated: "[I]n settling and [adjudicating] a question of fact, when [e]ntrusted to any single magistrate, partiality and injustice have an ample field to range in …."[269] On the other hand, because "the law is well known" judges could be trusted to instruct on the law, and "partiality [could] have little scope."[270]

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259 McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (plurality opinion).
260 *Id.*
261 *See supra* notes 100–102 and accompanying text.
262 *McKeiver*, 403 U.S. at 547.
263 *See* Baharanyi & Hertz *supra* note 81, at 12.
264 4 BLACKSTONE, *supra* note13, at 342–343.
265 *Id.* at 342.
266 *Id.* at 343 (noting the "partiality of judges appointed by the crown").
267 *Id.* at 343–44.
268 3 BLACKSTONE, *supra* note 178, at 379.
269 *Id.* at 380.
270 *Id.*

Thus, historically, because of that potential for bias, judges were not given the power to decide whether adults or minors were guilty of crimes. Instead, based on this history, the Constitution provided that "[t]he [t]rial of all [c]rimes, except in [c]ases of [i]mpeachment, shall be by [j]ury," and the Sixth Amendment later provided more details on the right to a jury trial.[271]

Historically, and then set forth textually in the United States Constitution, only a jury could decide whether a defendant committed a crime.[272] With that stated, some might believe that there are reasons not to follow the historical and textual interpretation of the Constitution. For example, if judges do not now possess bias toward the state or the possibility of corruption that motivated the constitutional provision, then the constitutional provision need not be followed. With that said, there is no reason to believe that circumstances have changed substantially since the Constitution was adopted—that is, that judges are not subject to bias and corruption. Baharanyi and Hertz have stated that even Justices of the Supreme Court can be "blind … to distortions in the system and manifest abuses in a particular case."[273] For example, they argued that a jury would have acquitted on the facts in *McKeiver* and that judicial bias was evident in *In re Burrus*, another one of the consolidated cases.[274]

The possibility of the corruption of judges and thus the problem with judges as decision-makers are illustrated by the "Kids for Cash" scandal.[275] The builder of two private youth detention centers paid two judges to make delinquency findings and impose significant detention time for juveniles.[276] As the result of their acceptance of bribery, the judges were convicted and sent to federal prison.[277] Their adjudications affected thousands of children; many were given extended terms in youth centers for trivial offenses such as mocking school officials on MySpace, writing prank notes, and shoplifting DVDs from Wal-Mart.[278] Although the Supreme Court of Pennsylvania subsequently investigated cases handled by the judges and overturned adjudications of delinquency, many

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[271] U.S. CONST. art. III, § 2.

[272] In *Patton v. United States*, the Supreme Court decided a person could opt for a trial by judge. *See* 281 U.S. 276, 298 (1930).

[273] Baharanyi & Hertz, *supra* note 81, at 12.

[274] There were allegations of discrimination by the school system in that county in North Carolina. *See id.* at 14–15.

[275] *See* Ian Urbina, *Despite Red Flags, Judges Ran Kickback Scheme for Years*, N.Y. TIMES (Mar. 27, 2009), http://www.nytimes.com/2009/03/28/us/28judges.html?_r=1.

[276] *See id.*

[277] *See id.*

[278] *See id.*; see *also Luzerne "Kids for Cash" Scandal*, JUV. L. CTR., https://jlc.org/luzerne-kids-cash-scandal (last visited June 8, 2018); *Court Tosses Convictions of Corrupt Judge*, CBS NEWS (Mar. 26, 2009 9:30 PM), https://www.cbsnews.com/news/court-tosses-convictions-of-corrupt-judge/.

juveniles were improperly detained or held for longer periods than was warranted.[279] Without juries, this type of corruption can occur and go unchecked.

The exchange of the freedom of children for cash is not the only form of misconduct present in the juvenile justice system. For example, racism by judges has been widely reported.[280] Moreover, innocent minors can be detained.[281] Although a jury could convict an innocent juvenile, the oversight of several members of the community was historically considered better than a judge who could be biased in favor of the government or those of his own rank or class, or who could engage in corruption.

Modern studies show other types of possible bias. For example, information bias can occur when judges learn of inadmissible evidence in stages prior to factfinding.[282] Judges often have such information available to them to make decisions regarding whether or not a juvenile will be transferred to criminal court and if he or she will be detained pending adjudication.[283] This information can include the defendant's record.[284] A judge will also rule on evidentiary matters including pretrial motions to suppress evidence.[285] Through these processes, the judge can learn of otherwise inadmissible evidence.[286] If the judge somehow avoids becoming aware of this information during the pre-adjudication phase, he or she may absorb such information from the review of the court file or comments made by court staff in the judge's presence.[287] Both psychological evidence and empirical studies show that people have difficulty disregarding

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[279] *See* Jon Schuppe, *Pennsylvania Seeks to Close the Books on "Kids for Cash" Scandal*, NBC NEWS (Aug. 12, 2015, 4:45 PM), https://www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666; *see Court Tosses Convictions of Corrupt Judge*, CBS NEWS (Mar. 26, 2009 9:30 PM), https://www.cbsnews.com/news/court-tosses-convictions-of-corrupt-judge/.

[280] *See* Aldrich v. State Comm'n on Judicial Conduct, 447 N.E.2d 1276, 1277 (N.Y. 1983) (per curiam) (upholding removal of juvenile court judge from bench for using "profane, improper and menacing language" and making "inappropriate racial references"); Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEG. ETHICS 97, 131 (2011).

[281] *See, e.g.*, Drizin & Luloff, *supra* note 29, at 259.

[282] See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571–572 (1998).

[283] *Id.*

[284] *See supra* note 64 and accompanying text.

[285] Guggenheim & Hertz, *supra* note 282, at 571.

[286] *See id.* at 572 n.68 (citing Commonwealth v. Goodman, 311 A.2d 652, 654 n.4 (Pa. 1973)) (concluding that judge who presided over suppression hearing should have recused himself from bench trial in marijuana possession case because hearsay testimony at suppression hearing gave "[a]n impression … that [accused was] … trafficking in narcotics").

[287] *See id.* at 572 n.69 (citing *In re* James H., 341 N.Y.S.2d 92, 93 (N.Y. App. Div. 1973)); *see also id.* at n.70 (citing *In Re* Gladys R., 464 P.2d 127, 132 (Cal. 1970)).

such relevant information,[288] and judges are not immune from this problem.[289]

On the other hand, when juries find facts, judges can try to prevent them from hearing inadmissible information by the use of rules of evidence and procedure. The use of jury trials can also help lessen information bias because groups of people—or juries in this case—are less susceptible to such biases than a single person.[290]

In addition to the information bias of judges that is not present to the same extent with jurors, judges have other additional biases. Repeat players come before them such as prosecutors, and bias toward those individuals can occur.[291] Additionally, bias toward the state by which they are employed can occur.[292] Additionally, judges can be concerned about reelection or reappointment to their positions.[293] All of these factors can influence a judge to find against a child and in favor of the state.

Jurors, unlike judges, are subject to a regular check on their potential bias by outside parties. Voir dire of jurors helps eliminate bias as prospective jurors can be excused for a variety of reasons including if they have had previous experiences with a potential witness or parties to the case, if they have had too much experience with the issue at hand, or if they believe that they cannot be neutral.[294] Unlike jurors, judges screen their own potential bias except in rare cases when a party mounts a challenge to the neutrality of a judge.

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[288] *See* Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 34 (1994); *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pre-trial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 678, 686 (2000) (summarizing studies finding juries were affected by ironic processes).

[289] MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 50 (1997) ("[T]he juryless court is a unitary tribunal: the admissibility of evidence is decided here by the ultimate fact finder, who inevitably comes into contact with tainted information. And when this information is persuasive, the professional judge has as much trouble ignoring the acquired knowledge as do amateur adjudicators."); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.431 (2004) (supporting the statement that judges are good at ignoring inadmissible materials by stating they are "accustomed to reviewing matters that may not be admissible"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 41 (2d ed. 1994) ("[I]t is realistic to suppose that judges can do better than juries in relying on what is admissible and ignoring what is not."); *see* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005).

[290] Guggenheim & Hertz, *supra* note 282, at 575 (citations omitted).

[291] *See* Prescott Loveland, *Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court*, 45 FORDHAM URB. L.J. 283, 295–96 (2017).

[292] *Id.* at 298.

[293] *Id.* at 295–96.

[294] Anne R. Mahoney, *American Jury Voir Dire and the Ideal of Equal Justice*, 18 J. APPLIED BEHAV. SCI. 481, 483–86 (1982).

Also unlike judges, jurors have explicit instructions on the law that govern the case prior to deliberation.[295] These instructions are scrutinized and subject to appellate review.[296] Without these instructions, which do not exist in juvenile cases, when judges try minors, some commenters believe that "prejudicial errors of law can easily go undetected because they are not articulated."[297]

Another check on the bias of jurors is the requirement of a unanimous decision. For the most part, a decision by the jury to convict must be unanimous.[298] Thus, six to twelve lay people must agree to convict an adult. This procedure contrasts with the power of just one person—a judge—to convict a minor.

Minors who are tried by judges also do not benefit from the power of juries to decide not to convict and not to follow the law. Blackstone pointed out that "juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense."[299] Judges, unlike juries, must follow the law.

Children who are tried by judges also cannot benefit from the fact that juries tend to acquit more often than judges. Judges' higher conviction rate can be attributed to a variety of factors, some of which have already been mentioned. These include: the credibility of repeat players such as police and prosecutors who appear before them; information bias; high caseloads of judges causing them to pay less attention and lessen standards of proof; differences from decision-making by an individual; lack of diversity; lack of inquiry into possible bias; and the lack of legal instructions.[300]

Finally, a jury ensures that "a variety of different experiences, feelings,

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[295] *See* Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 942 (1995).

[296] *See id.*

[297] *Id.*; *see* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 677 (2000) (concluding from empirical research that limiting instructions are at best "relatively ineffective" and may actually backfire).

[298] *See* SUJA A. THOMAS, THE MISSING AMERICAN JURY 190 (2016).

[299] 4 BLACKSTONE, *supra* note 12, at 19. Judges could historically recommend a pardon. "Judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy." *Id*. An example may be a recent case where a jury did not convict a child accused of stealing a gun from a retired judge. Edith Brady-Lundy, *In Rare Jury Trial, Bloomington Juvenile Acquitted of Gun Charges*, PANTAGRAPH (Nov. 17, 2018), https://www.pantagraph.com/news/local/crime-and-courts/in-rare-jury-trial-bloomington-juvenile-acquitted-of-gun-charges/article_7db05bc1-d247-5e8a-b65e-ed1acf7ab80e.html.

[300] *See* Ainsworth, *supra* note 40, at 1122–26.

intuitions, and habits" play a role in factfinding.[301] Additionally, jury deliberations also offer "the give-and-take of a discussion format [that] promotes accuracy and good judgment by ensuring that competing viewpoints are aired and vetted."[302] This all increases the likelihood that witness credibility and factual accuracy will be better assessed.[303]

In each of the Court's decisions on juveniles, the Court was careful to describe how the required procedure protected minors and thus, was part of "the essentials of due process and fair treatment."[304] In *McKeiver*, in its assessment of whether the right to a jury trial was required for fundamental fairness, the plurality fell short. The core of fairness in any criminal proceeding, including in a juvenile court, is the person who actually makes the decisions regarding guilt. Without empirical support and with historical support to the contrary, the Court proclaimed that judges were just as good at decision-making as juries.

Add to this that judges themselves often are not involved in the primary decision on whether a juvenile loses his liberty. Instead, plea bargaining often occurs, and prosecutors hold almost exclusive power here. In these circumstances where prosecutors who represent the state possess charge or sentencing bargaining authority that can be used to incentivize a juvenile to plead guilty, the right to a jury trial is also a necessary component for fundamental fairness. With the right, juveniles hold some bargaining power against the prosecutor to actually contest the charges against them; to the contrary, a prosecutor likely does not see the trial by judge as a chip stacked in the juvenile's favor. Moreover, the prosecutor also may recognize that a judge can punish a juvenile for not taking a plea.

In the decision that the right to a jury trial was not required as a part of fundamental fairness under the Due Process Clause, the Court relied heavily on the idea that judges were as good at factfinding as juries. It also listed several reasons that bear mentioning. The Court cited the actions of groups, states, and judges. First, it mentioned that the national task force that studied juvenile proceedings did not recommend a jury trial, and that various organizations, including the one for uniform laws, had not recommended a right to a jury trial. What various groups have said about the right to a jury trial does not substantiate that there is no constitutional right to a jury trial. Second, the Court explained

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301 Guggenheim & Hertz, *supra* note 282, at 575–76 (citations omitted).

302 *Id*. at 578–79.

303 Duncan v. Louisiana, 391 U.S 145, 156–57 (1968); *see* Guggenheim & Hertz, *supra* note 282, at 576–82.

304 *In re* Gault, 387 U.S.1, 31–58 (1967).

that states could implement different procedures in their juvenile courts including jury trials, that many states had denied a juvenile jury right by statute, and that many states had concluded that jury trials were not required constitutionally. Again, the decision of states regarding the right to a jury trial has no bearing on whether a right to a jury trial exists under the Constitution. Finally, the Court mentioned that a judge could use an advisory jury.[305] Again, the availability of an advisory jury to a judge does not eliminate the constitutional right to a jury trial for a minor.

The Sixth Amendment sets forth several rights that the Court has already recognized as necessary to fundamental fairness in juvenile proceedings, including the right to counsel, right to notice of charges, right to confront witnesses, and the right to compulsory process. The right to a jury trial is the only right in the Sixth Amendment that the Court has said is not fundamental to due process and fair treatment for minors. But the importance of the jury trial was especially emphasized by its inclusion in the original Constitution, in contrast to the other protections for youth that the Court has recognized.

Indeed, the trial by jury has been historically recognized as one of the most important, if not the most important, right. As William Nelson has recognized, "[f]or Americans, after the Revolution, as well as before, the right to a trial by jury was probably the most valued of all civil rights."[306] Although the Court has held that the right to a jury trial is not part of the fundamental fairness required in a juvenile proceeding, the right to a jury trial was integral to the historic protection provided to an accused, and accordingly this protection should be provided to juveniles as a part of the essentials of due process and fair treatment under the Fifth and Fourteenth Amendments.

IV. CRITICISMS OF IMPLEMENTING THE JURY TRIAL IN JUVENILE COURT

Some opponents of implementing jury trials in juvenile court may believe it will be inefficient, increase costs, and undermine the rehabilitative features of the juvenile justice system. In *McKeiver*, the Court specifically wrote that

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[305] *See* McKeiver v. Pennsylvania 403 U.S. 528, 545–551 (1971) (plurality opinion). The Court concluded: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." *Id.* at 551. Concurring in the judgment, Justice White began by proclaiming "[a]lthough the function of the jury is to find facts, that body is not necessarily or even probably better than the conscientious judge." *Id.* at 551 (White, J., concurring). Some years later, in 1984, the decision in *Schall v. Martin* followed. There, the Supreme Court held it was constitutional to detain a juvenile before trial on the basis that he may commit an act that would be a crime if committed by an adult. *See* 467 U.S. 253 (1984).

[306] WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 96 (1975).

imposing the jury trial on juvenile courts would bring with it "the traditional delay, the formality, and the clamor of the adversary system."[307]

A. Efficiency and Cost

The addition of jury trials to a state juvenile justice system could decrease any efficiency that may be present in the juvenile courts. For example, a felony jury trial can take between two and four days on average.[308] In contrast, bench trials typically last a single day.[309] In *McKeiver*, in dissent, Justice Douglas disagreed with the plurality that jury trials would be inefficient.[310] He cited a decision from the family court of Providence, Rhode Island, rejecting the idea of an inevitable decrease in efficiency.[311] This court found "that there is no meaningful evidence that granting the right to jury trials will impair the function of the court" given that "few juries have been demanded" in the states that permit jury trials in their juvenile courts.[312] More recently, in Kansas, few jury trials have occurred after the Kansas Supreme Court decided the right to a jury trial was constitutionally required.[313]

The continued use of jury trials in juvenile courts in roughly twenty-five percent of the states is also evidence of the viability of jury trials in states.[314] One can infer that the jury trial operates reasonably well because the jury trial right is conferred by statute in some states, and state legislatures could do away with it if the right caused problems.

Related to efficiency is cost. The addition of jury trials may require new facilities. For instance, after the Kansas Supreme Court's decision in *In re L.M.*, the most populous county in Kansas realized it had only one juvenile courtroom capable of presiding over a jury trial.[315] The second most populous county did not even have juvenile justice facilities able to house jurors.[316] In addition to the costs of additional facilities, juries require many expenses not associated with

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[307] *McKeiver*, 403 U.S. at 550.

[308] *See* Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS. 41, 60 (1999).

[309] DALE ANNE SIPES ET AL., NAT'L CTR. FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 14–15 (1988).

[310] *See McKeiver*, 403 U.S. at 562 (Douglas, J., dissenting).

[311] *Id.*

[312] *Id.* at 564.

[313] *See* James Carlson, *Juvenile Jury Trials Remain Rare*, TOPEKA CAPITAL-JOURNAL (May 16, 2010, 2:42 PM), http://www.cjonline.com/news/local/2010-05-16/juvenile_jury_trials_remain_rare.

[314] *See* HERTZ, *supra* note 3, at 416–17.

[315] *See* Andrew Treaster, *Juveniles in Kansas Have a Constitutional Right to a Jury Trial. Now What? Making Sense of* In re L.M., 57 KAN. L. REV. 1275, 1293–94 (2009).

[316] *See id.*

bench trials, including: preparing and updating juror lists and instructions, juror fees, administrators' salaries, jury summoning mailers, juror meals, and potential costs of sequestering a jury during deliberations.[317]

At the same time that trials can add to costs, the detention of juveniles is already a significant cost that could be reduced if juveniles were not detained as often.[318] Although juries often find in the same way as judges, they tend to convict less often.[319]

With that said, as recognized already, jury trials could be less efficient and more costly. But the right to a jury trial is not constitutionally required to be efficient or costless. While efficiency and decreasing costs should be goals given limited resources, those considerations do not affect their constitutional viability.

There actually could be good results that derive from inefficiency. The Rhode Island court pointed out that if the jury trial in juvenile court lead to delays, this could be beneficial: "[B]y granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time."[320]

B. Keeping Rehabilitative Features

Opponents of jury trials for juveniles commonly assume that the implementation of jury trials will undermine any rehabilitative features of juvenile court. In *McKeiver*, the Court emphasized this point, even going so far as to state that "if the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."[321] Simply implementing jury trials, however, does not undermine rehabilitative goals or require the abolishment of juvenile justice systems.[322] While any intimate bench trial that may occur could disappear with the introduction of the jury trial,[323] other rehabilitative features such as diversion

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317 *See id*. (citing Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS. 41, 60 (1999)).

318 *See* SCOTT & STEINBERG, *supra* note 38, at 187–90.

319 HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 tbl.12 (1966).

320 McKeiver v. Pennsylvania 403 U.S. 528, 565 (1971) (Douglas, J., dissenting) (decision in appendix).

321 *Id*. at 545–51.

322 *See* Feld, *supra* note 9, at 88.

323 As previously discussed, few bench trials actually occur. Instead, plea bargaining is prevalent. *See supra* notes 48–57 and accompanying text.

programs, early involvement of probation officers and families, access to social service agencies, and sentencing alternatives that are less punitive than jail will remain.[324] These features will be accompanied by protection from the bias and the incentives of judicial decision-making—which ultimately can result in a more just juvenile justice system.

Despite the Supreme Court's assertions about the jury trial preventing rehabilitation, in certain nations, the goal of rehabilitation continues where lay people participate. For example, in France, a juvenile court consists of a single juvenile judge and two non-professional judges (e.g., experts in juvenile delinquency and the field of childhood).[325] In Germany, three-member juvenile panels include a man and a woman who serve as "lay assessors," who are selected and appointed to German youth courts by local authorities.[326]

However, similar to most states in the United States, a majority of international jurisdictions try juveniles only by judges. A single judge or panels with multiple judges act as triers of fact.[327] Despite this similarity with most nations that judges are the fact-finders in juvenile cases, the United States differs from all of these jurisdictions because the Constitution conveys a broad right to jury trial in criminal cases.[328]

With all of this stated including that jury trials could bring harm to juveniles,[329] youth have a constitutional right to a jury trial. Even if the imposition of this right could somehow lead to injury to minors, it is a constitutional right that cannot be taken away without amendment.[330]

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[324] Loveland, *supra* note 293, at 308 (citing DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 436, 479, 506 (3rd ed. 2007)).

[325] *See Children's Rights: France*, LIBR. CONGRESS, https://www.loc.gov/law/help/child-rights/france.php (last visited Jan. 25, 2019).

[326] THOMAS, *supra* note 298, at 202–05.

[327] *See Children's Rights: International and National Laws and Practices*, LIBR. CONGRESS, https://www.loc.gov/law/help/child-rights/index.php#Country%20Reports (last visited Jan. 25, 2019). *See generally* FRANKLIN ZIMRING ET AL., JUVENILE JUSTICE IN GLOBAL PERSPECTIVE (Franklin Zimring et al. eds., 2015) (describing several juvenile systems).

[328] *See generally* THOMAS, *supra* note 298.

[329] *See also* Feld, *supra* note 65, at 1159–61 (arguing that jury trials could bring harm to juveniles); Irene M. Rosenberg, *Leaving Bad Enough Alone*: *A Response to the Juvenile Court Abolitionists*, 1993 WISC. L. REV. 163; Ainsworth, *supra* note 40, at 1122–23 (arguing for abolition of juvenile courts and for importance of jury trial right).

[330] Also, states are free to give minors further protections including separate prosecution in special juvenile courts. Innovation may work. In fact, there have been successful teen courts where groups of teens have tried fellow children and are involved in the rehabilitative process. Teens who have completed the teen court process are less likely to commit other crimes. *See* Stephanie N. Lehman, *Teens, Judges Who Have Been through Teen Court Say it Works*, LAKE COUNTY J., (2010). Another result has been a 50% reduction in the teens detained in the Juvenile Detention Center. *See* Elvia Malagon, *Justice for Teens, By Teens in Lake County*, NWI TIMES

CONCLUSION

As described in this Article, contrary to the Supreme Court's unsupported assertions, juvenile proceedings fall within the meaning of criminal prosecutions under the Sixth Amendment. Further, the good purpose of the state to rehabilitate cannot preclude coverage under the Sixth Amendment. Because the Sixth Amendment guarantees defendants the right to "a trial by jury as understood and applied at common law,"[331] and historically youth were afforded the right to a trial by jury, juveniles possess this right. This conclusion is also supported by English legal commentary, cases, and secondary sources in the period surrounding the adoption of the Sixth Amendment. Additionally, nineteenth century English legislation to take away the right to a jury trial for juveniles confirms youth possessed the right in the eighteenth century. Moreover, contrary to Supreme Court assertions, the eighteenth-century concept of *parens patriae* does not support the power of the state to try a juvenile by a judge. Finally, juveniles in the United States possessed the right to a jury trial at the time when the Sixth and Fourteenth Amendments were adopted.

In addition to a right under the Sixth Amendment and Fourteenth Amendments, juveniles have a right under the Due Process Clause via the Fifth and Fourteenth Amendments. History and modern studies show as untrue the Supreme Court's assertion that the jury trial right is not necessary to fundamental fairness to juveniles. Judges are not equally as good at decision-making as juries. Juries were chosen because judges could have bias against the defendant and could engage in corruption—all of which can occur today.

(May 15, 2016), https://www.nwitimes.com/news/education/justice-for-teens-by-teens-in-lake-county/article_d7589921-3bfc-5cc7-a340-58aa162c5c73.html.

[331] Patton v. United States, 281 U.S. 276, 288 (1930).