Let the Jury Do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings

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INTRODUCTION

Beginning at the turn of the twentieth century, the states challenged the age-old conventions of youth and culpability by creating juvenile court systems.¹ The systems had been designed as a substitute for the discipline juveniles traditionally received from their parents: it mandated informality and individualized treatment, and emphasized rehabilitaing young offenders rather than punishing them.² Despite these ideals, or perhaps because of them, the systems fell short of the mark as American society continued to change during the twentieth century. The supposed benefit of juvenile court adjudications—a lack of formality—increasingly became a burden, as juvenile court judges wielded nearly absolute discretion in the absence of any due process standards.³

Approximately sixty-five years after the first juvenile court was established, the U.S. Supreme Court held that certain due process rights must be afforded to juvenile offenders.⁴ The Court was unwilling, however, to entirely disregard the “unique” nature⁵ of juvenile court proceedings. In McKeiver v. Pennsylvania, it held that the right to a jury trial “is not a constitutional requirement” for juvenile proceedings.⁶ McKeiver never has been overruled, despite widespread criticism of the plurality opinion.⁷

The unique nature of juvenile proceedings has also led to a practice the framers of the juvenile court system never contemplated: modern jurisdictions have allowed juveniles to be tried as adults. The process of sending an individual from juvenile court to “adult” criminal court, which hereinafter will be referred to as juvenile “waiver” or “transfer,” reflects the contemporary societal

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² See infra notes 21-26 and accompanying text.
³ See infra notes 27-28, 31-33 and accompanying text. The U.S. Constitution provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.
⁴ In re Gault, 387 U.S. 1, 13-14 (1967).
⁵ Id. at 22.
⁶ 403 U.S. 528, 545 (1971) (plurality opinion).
⁷ See, e.g., infra notes 64-67 and accompanying text.
belief that some children simply cannot benefit from the rehabilitative nature of juvenile courts. For this reason, all states and the District of Columbia have established by statute at least one method for determining which juveniles should be tried in criminal court.

Compared with criminal court proceedings, and even with juvenile adjudications, transfer proceedings provide the fewest procedural protections for juveniles. An unfavorable result in the transfer proceeding potentially could send an individual away from juvenile court, where he at worst would receive a relatively lenient disposition, to a criminal court, where he could receive a significant sentence for the same offense. The standard for demonstrating the requisite findings for transfer, however, is not difficult to meet. The Supreme Court has held that juvenile transfer proceedings are constitutionally permissible as long as they are completed before any adjudication of the offense and meet basic due process standards. However, it has never found the right to a jury to be a prerequisite.

Apprendi v. New Jersey reflected the Court's dramatic change in perception concerning the jury's role in criminal proceedings. In Apprendi, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." With this holding, the Court specifically addressed the relative "novelty" of sentencing guidelines in criminal proceedings. The actual scope of Apprendi, however, continues to be explored.

With its broad holding, Apprendi and its jury requirement could apply to juvenile transfer proceedings. A number of state and

9. For a discussion of the various methods of juvenile transfer, see infra Part II.B.
10. See infra Part II.B for an examination of the various juvenile transfer statutes and their effects.
11. See infra Part II.B.
15. Id. at 490.
16. See id. at 482-83.
federal courts have examined this possibility, though the Supreme Court has not yet decided to rule on the issue. This Note will analyze *Apprendi*’s applicability to juvenile transfer proceedings throughout the United States. Part I will review the establishment and early history of the juvenile court system, examine the Supreme Court opinions that tempered the system’s abuses with certain procedural standards, and contrast those opinions with *McKeiver*, which actually denied a procedural right in juvenile adjudications. Part II will discuss the cases providing the framework for juvenile transfer proceedings, and then identify the types of transfer statutes since ratified.

Part III will explore the 2000 *Apprendi* decision. It will probe the opinion’s meaning and briefly review subsequent cases interpreting its holding. Finally, it will analyze recent state and federal cases discussing *Apprendi*’s application to juvenile transfer proceedings. After evaluating the rationale of these cases, this Note will conclude in Part IV that due process and the recently enhanced perception of the jury as fact-finder mandate that *Apprendi*’s jury requirement apply, to a certain extent, to juvenile transfer proceedings. It will discuss how the requirement may be met without seriously disrupting the juvenile transfer process or destroying the ideals of juvenile courts that the Supreme Court has always attempted to preserve.

I. DEFINING THE JUVENILE COURT SYSTEM

A. Purpose and Progress

Juvenile justice has evolved dramatically over the past 150 years of American jurisprudence. Up until the late nineteenth century, American courts had followed the overly broad precedent set by English common law.\(^\text{17}\) Children who were denied the excuse of

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17. See Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 779-80 (2002). The English and early American courts divided children into three groups. Those under the age of seven could not be found criminally responsible for any action. *Id.* Conversely, a child over the age of fourteen was deemed fully responsible for his actions and thus would be tried the same as an adult. *See id.* at 780. A child between the ages of seven and fourteen was presumed to lack the capacity for criminal acts, but the State could rebut this presumption. *See id.* Some jurisdictions still recognize
youth automatically were tried in the same criminal court as adults; "there was no separate system of juvenile justice."18

The nineteenth century marked America's transformation from a largely agrarian to a modern, industrial society.19 With urbanization and immigration arose related social problems; the Progressive movement arose to counter these problems.20 One group of Progressives took as their cause the reformation of the juvenile justice system.21 In emphasizing individualized rehabilitation of offenders over mere punishment of crimes, they embraced a positivist view of criminology.22 They believed that children, in particular, were "vulnerable, fragile, and dependent innocents" in need of protection and understanding.23

The Progressives succeeded by the end of the nineteenth century in isolating juveniles from the traditional criminal justice system altogether.24 They introduced "professional" juvenile court workers who supervised and treated children based on individual needs.25 A juvenile court proceeding ideally would consist of "a fatherly judge [who] touched the heart and conscience of the erring youth by talking over his problems, [and] by paternal advice and admonition."26 In reality, "[t]he juvenile court was free to apply whatever

this categorical concept as the "Rule of Sevens." See, e.g., Cardwell v. Bechtol, 724 S.W.2d 739, 744-45 (Tenn. 1987).

19. Feld, supra note 8, at 693.
20. Id.
21. See Berkheiser, supra note 1, at 583. This group was aptly named the "child savers."
22. See 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, 1136-37 (2003). In contrast to the prevailing view of criminal justice at the time, which focused only on the crime committed, positive criminology focused on the factors leading to the crime. See id. at 1136. Its proponents rejected the idea that crime is a function of free will, instead believing that "deterministic forces" beyond one's control could impair moral judgment. Id. at 1137. Rather than punish the offender for falling under the influence of these deterministic forces, the Progressives promoted rehabilitation in order to limit the offender's susceptibility to future moral lapses. See id.
23. Id. at 1135-36.
24. See id. at 1138.
25. See id.
discipline a parent might be free to use, and it was given the same protections that parents had regarding outside interference.\footnote{27}{Brummer, supra note 17, at 784; see also Berkheiser, supra note 1, at 649 ("The broad discretion granted to juvenile court judges by the court's founders and later by state statutes, coupled with the informality of juvenile court proceedings, have impeded the full recognition of juveniles' constitutional rights.").}

Following the doctrine of \textit{parens patriae}, the juvenile court system exercised broad discretion over the lives of children.\footnote{28}{See Brummer, supra note 17, at 784. "\textit{Parens patriae}" is a legal doctrine under which "the state in its capacity as provider of protection to those unable to care for themselves" may act on behalf of those individuals. \textsc{Black's Law Dictionary} 1144 (8th ed. 2004).}

Illinois established America's first juvenile court in 1899.\footnote{29}{See Berkheiser, supra note 1, at 586 & n.44. The enabling Illinois law was entitled "[a]n Act relating to children who are or may hereafter become dependent, neglected or delinquent ... and to provide for the treatment, control, maintenance, adoption and guardianship of the persons of such children." 1899 Ill. Laws 131 (current version at 705 ILL. COMP. STAT. ANN. 405/1-1 to 7-1 (West 2005)), quoted in People v. Suhling, 1924 WL 3453, at *2 (Ill. App. Ct. 1924).}

Within twenty years, all states had established similar courts.\footnote{30}{Lucy S. McGough & Lauren Cangelosi, \textit{Lost Causes}, 65 \textsc{La. L. Rev.} 1125, 1127-28 (2005).}

These courts isolated themselves entirely from the traditional criminal process:

Reformers modified courtroom procedures to eliminate any implication of a criminal proceeding, adopted a euphemistic vocabulary, and endorsed a physically separate court building to avoid the stigma of adult prosecutions. Judges conducted confidential hearings, limited public access to court records, and found children to be delinquent rather than guilty of a crime. Proceedings focused on the child's background and welfare rather than the specifics of the crime. Reformers envisioned a social welfare system rather than a judicial one, and they excluded lawyers, juries, rules of evidence, and formal procedures from delinquency proceedings.\footnote{31}{Feld, supra note 22, at 1138-39 (footnotes omitted).}

Sentencing practices also were open-ended, left almost entirely to the judge's discretion.\footnote{32}{See, e.g., Beschle, supra note 18, at 71 ("[T]hese courts were empowered to act in a way that combined the perceived advantages of procedural informality and individualized tailoring of remedies."). These tailored sentences typically would last only until the juvenile offender became an adult, at which point the offender's record would be expunged, "leaving
little in common with the "adult" criminal courts, to the point that juvenile proceedings were labeled as mere civil dispositions instead of criminal trials. Because of this lack of legal boundary, opponents of the Progressive movement began to call for reforms of their own.

B. Challenging the Kangaroo Court

The 1967 decision *In re Gault* reflected the U.S. Supreme Court's growing impatience with the juvenile court's limitless discretion. With its holding in this case, the Court "began transforming the juvenile court into a very different institution than the Progressives contemplated." Arizona police had taken the fifteen-year-old petitioner into custody on the basis of a neighbor's complaint that he had made a lewd phone call, but they failed to provide notice of the arrest to petitioner's parents. After an informal preliminary hearing, in which no witnesses were sworn in, and a second hearing six days later, the judge concluded that petitioner was a juvenile delinquent, and as such would be sentenced to an Arizona detention center for the remainder of his minority. At no point did the judge advise petitioner or his parents of the right to counsel. The Arizona Supreme Court affirmed the lower court's subsequent dismissal of petitioner's writ of habeas corpus.

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33. See id.
34. See id. at 71-72.
35. 387 U.S. 1 (1967).
37. See *Gault*, 387 U.S. at 4-5. The parents first learned of petitioner's arrest through the codefendant's parents. See id. at 5. The superintendent of the detention center where petitioner was being held filed a formal petition with the court the day after petitioner's arrest; again, the parents never received notice. See id.
38. See id. at 5-8. At the conclusion of the first hearing, the judge told petitioner only that "he would 'think about'" his decision on delinquency. Id. at 6. The parents did receive notice of the second hearing: a brief note on plain paper with no letterhead. See id. At neither of these hearings was the complaining neighbor present. See id. at 6-7. The judge concluded that petitioner's alleged confession to making a lewd remark over the phone was sufficient to establish delinquency. See id.
39. See id. at 94.
corpus, which argued that petitioner's basic due process rights had been violated in the delinquency proceeding.\textsuperscript{40}

Justice Fortas, writing for the majority of the United States Supreme Court, stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."\textsuperscript{41} While noting that "wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles," he argued that avoidable instances of "unfairness" and "inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy" have plagued the juvenile court system.\textsuperscript{42} In making this assertion, Justice Fortas dismissed arguments that juveniles already were protected adequately from procedural shortcomings, and even benefitted from the isolated and secretive nature of the juvenile court.\textsuperscript{43} He offered an alternative to that Progressive standard: "[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."\textsuperscript{44} Although agreeing that the concept of "the kindly juvenile judge" should not be entirely eliminated from the juvenile court, he made clear that "the condition of being a boy [or girl] does not justify a kangaroo court."\textsuperscript{45}

The Court established that the fundamental due process owed to juveniles included providing them and their parents with the same type of notice adequate for a criminal or civil proceeding.\textsuperscript{46} Fundamental due process also required the assistance of counsel at all stages of the proceedings, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.\textsuperscript{47} In applying this "fundamental fairness doctrine," Justice Fortas did caution that not all due process requirements of a criminal trial necessarily applied to juvenile proceedings.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{40} See id. at 9-10.
\item \textsuperscript{41} Id. at 13.
\item \textsuperscript{42} Id. at 14, 19-20.
\item \textsuperscript{43} See id. at 24. Justice Fortas labeled this claim as "more rhetoric than reality." Id.
\item \textsuperscript{44} Id. at 26.
\item \textsuperscript{45} Id. at 27-28.
\item \textsuperscript{46} See id. at 33-34.
\item \textsuperscript{47} See id. at 36-37, 38 n.65, 55, 57.
\item \textsuperscript{48} Id. at 30; see, e.g., Berkheiser, supra note 1, at 592 ("The fundamental fairness doctrine permitted the Court to stake out a middle ground that abandoned the former 'worst
Three years later, the Court added a procedural right to its list of essentials. Delivering the majority opinion for *In re Winship*, Justice Brennan argued that "virtually unanimous adherence to the reasonable-doubt standard" strongly suggested that it was "as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*."49 He pointed out that the lofty burden-of-proof standard commanded the respect of the fact-finder, the juvenile, and the community at large.50 Petitioner, in particular, had a significant interest in a reasonable doubt standard "both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."51 Mindful of the fundamental fairness doctrine, the Court determined that requiring the reasonable doubt standard would not have a destructive effect on the informality, flexibility, or other beneficial features of juvenile court proceedings.52

**C. McKeiver v. Pennsylvania**

The lower courts' early reactions to *Gault* and *Winship* were cautious at best and defiant at worst. Many juvenile court judges refused to comply fully with the new requirements; some refused to comply at all.53 Perhaps in consideration of this backlash, the Supreme Court relented and provided one due process limitation in *McKeiver v. Pennsylvania*.54 In this case, decided four years after *Gault* and one year after *Winship*, a plurality of Justices held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."55 The plurality reasoned that "one

50. *See id.* at 363-64.
51. *Id.* at 363.
53. *See Berkheiser,* supra note 1, at 607-08.
54. 403 U.S. 528 (1971) (plurality opinion).
55. *Id.* at 545.
cannot say that in our legal system the jury is a necessary component of accurate factfinding.  

Justice Blackmun, writing for the plurality, listed thirteen reasons to support this conclusion. These enumerated reasons can be simplified into six main rationales. First, *Gault* and *Winship* cautioned against adding procedural requirements that would eliminate the distinction between juvenile and criminal courts. Second, a jury requirement potentially could bring with it the delay, formality, and adversary process an ideal juvenile court would lack. Third, Court dicta and outside reports suggested that a jury was not necessary to ensure a fair juvenile court process. Fourth, the majority of states, as well as federal legislation, did not support the right to jury trial in juvenile proceedings. Fifth, the Court was not yet willing to abandon the juvenile court system, despite its clear abuses. Finally, the Court explained that a juvenile court judge already had the power to use an “advisory jury” whenever he deemed it necessary.

In his dissenting opinion, Justice Douglas rebutted several of the plurality’s reasons. He argued that the presence of “twelve objective citizens” would impress on the juvenile the gravity of the event. Disagreeing with the plurality’s presumption that a jury requirement would backlog the courts, he emphasized that a juvenile who believed he was treated fairly in the judicial process would be a better candidate for rehabilitation. Rather than accept

56. *Id.* at 543.
57. *See id.* at 545-51; cf. *Feld, supra* note 22, at 1147 (criticizing the *McKeiver* plurality’s offering of “reasons, rather than reasoning and analysis, to justify its rejection of a jury right”).
59. *See id.*
60. *See id.* at 546-47; *id.* at 551 (White, J., concurring). The Court specifically cited its recent decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *McKeiver*, 403 U.S. at 547 (plurality opinion). In incorporating the Sixth Amendment jury guarantee to apply to the states, the Court in *Duncan* suggested in a footnote that one could eliminate juries entirely and still maintain a “fair and equitable” criminal process. *Duncan*, 391 U.S. at 149 n.14. But see *McKeiver*, 403 U.S. at 557 (Harlan, J., concurring) (arguing that, until juvenile courts are “restructured to fit their original purpose,” *Duncan* should apply to juvenile adjudications).
61. *See McKeiver*, 403 U.S. at 548-50 (plurality opinion).
63. *Id.* at 548.
64. *See id.* app. at 563-64 (Douglas, J., dissenting).
the plurality’s attempt to balance procedural rights, Justice Douglas stated that when an individual is adjudicated in juvenile court and faces “confinement” until the end of minority, “he is entitled to the same procedural protection as an adult.”

Scholars have long criticized the *McKeiver* plurality’s analysis, if not its holding. Indeed, *McKeiver* is one of the few Supreme Court opinions that has applied a fundamental fairness analysis and restricted procedural liberties in juvenile adjudications. To put the opinion in perspective, perhaps it may be useful to identify two additional Supreme Court cases that have tackled the challenge of determining procedural rights in juvenile court.

II. THE MODERN APPROACH OF JUVENILE TRANSFER

A. Setting the Ground Rules for a “Critically Important” Proceeding

The second half of the twentieth century saw many structural changes in the juvenile court system, particularly after *Gault*. The result that *Gault* attempted to avoid—a connection between the juvenile and criminal courts—seemed to become all the more inevitable with its holding:

In *Gault*, the Supreme Court engrafted formal trial procedures onto the juvenile court’s individualized treatment sentencing scheme. Although the Court did not intend to alter the juvenile court’s therapeutic mission, ... legislative, judicial, and administrative responses to *Gault* have modified the court’s jurisdiction, purpose, and procedures. As a result, juvenile courts now

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66. *Id.* at 559.

67. See, e.g., 1970 Term, *supra* note 36, at 116 (agreeing with the plurality’s application of the fundamental fairness analysis, but arguing that the plurality “seriously underestimated the jury’s potential role in assuring fairness in the juvenile process”); Feld, *supra* note 22, at 1148-50 (identifying several critical factors, including flexibility, formality, and “whether delinquents also required procedural protections against government oppression,” that the plurality failed to consider in any great detail).

68. See also *Schall v. Martin*, 467 U.S. 253, 268 (1984) (finding that holding juveniles in detention during pretrial proceedings does not violate fundamental fairness).
converge procedurally and substantively with adult criminal courts.\textsuperscript{69}

Sentencing practices, in particular, have experienced a "fundamental change ... as considerations of the offense, rather than the offender, [now] dominate the decision."\textsuperscript{70} Retribution, rather than rehabilitation, has become the dominant sentencing philosophy.\textsuperscript{71} Reflecting this shift in philosophy, the states have mandated that certain juveniles receive true retribution for their actions by being tried as adults.\textsuperscript{72} They believed that some children simply could not benefit from the juvenile court system. Two U.S. Supreme Court decisions provided constitutional form to these "juvenile transfer" statutes: \textit{Kent v. United States}, a pre-\textit{Gault} decision; and \textit{Breed v. Jones}, a post-\textit{McKeiver} decision.

1. \textit{Kent v. United States}

The sixteen-year-old petitioner in \textit{Kent} was arrested for housebreaking, robbery, and rape.\textsuperscript{73} The juvenile court judge waived jurisdiction over petitioner, without a formal hearing or even a conference with petitioner's counsel or parents.\textsuperscript{74} In so doing, the judge relied on the statutory authority of the District of Columbia Juvenile Court Act, which provided that a "judge may, after full investigation, waive jurisdiction and order" a criminal trial for any child sixteen years of age or older who was charged with a felony offense.\textsuperscript{75} Petitioner was convicted in criminal court and sentenced to a minimum of thirty years in prison.\textsuperscript{76} On appeal to the Court of Appeals for the D.C. Circuit, and eventually to the Supreme Court, petitioner argued that the juvenile court judge's initial decision to
waive jurisdiction amounted to an "infirmity of the proceedings" that should not stand.\textsuperscript{77}

The Supreme Court agreed that the waiver decision was invalid. Writing for the majority, Justice Fortas stated that juvenile court judges should enjoy only the level of latitude that "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'"\textsuperscript{78} To satisfy these requirements, Justice Fortas continued, petitioner must be provided a hearing, at which he would have access to all records and reports that the judge may consider.\textsuperscript{79} If the judge should decide to order a waiver, he must state the reasons for his decision.\textsuperscript{80}

In entering this holding, the Court did not require that waiver hearings "conform with all of the requirements of a criminal trial," but only with the "essentials of due process and fair treatment."\textsuperscript{81} However, it was not swayed by the traditional arguments for a separate juvenile court system, namely, the \textit{parens patriae} doctrine and the "civil" label typically afforded to juvenile proceedings.\textsuperscript{82} Indeed, it made very clear in \textit{Kent} that juvenile transfer is "a 'critically important' proceeding."\textsuperscript{83}

\textbf{2. Breed v. Jones}

Nine years after \textit{Kent}, the Supreme Court reaffirmed the critical importance of juvenile transfer hearings in \textit{Breed v. Jones}.\textsuperscript{84} The

\textsuperscript{77} \textit{Id.} at 552.
\textsuperscript{78} \textit{Id.} at 552-53 (quoting \textit{Green v. United States}, 308 F.2d 303 (D.C. Cir. 1962)). With this statement, Justice Fortas established the framework for the fundamental fairness doctrine he would develop fully one year later in \textit{Gault}. \textit{See supra} notes 41-48 and accompanying text.
\textsuperscript{79} \textit{Kent}, 383 U.S. at 557.
\textsuperscript{80} \textit{See id.} at 557, 561.
\textsuperscript{81} \textit{Id.} at 562.
\textsuperscript{82} \textit{See id.} at 554-56; \textit{supra} notes 27-28, 33 and accompanying text. Rather, Justice Fortas argued, "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." \textit{Kent}, 383 U.S. at 556.
\textsuperscript{83} \textit{Id.} at 560.
\textsuperscript{84} 421 U.S. 519 (1975).
respondent in *Breed* allegedly had committed armed robbery. Following a hearing in which respondent and two witnesses testified, the juvenile court judge determined by a preponderance of the evidence that the allegations against respondent were accurate. In a subsequent hearing, the judge also determined that respondent was “not ... amenable to the care, treatment and training program available through the facilities of the juvenile court,” and ordered that he be tried as an adult. Respondent underwent a trial and was found guilty of first-degree robbery.

The Supreme Court unanimously held that respondent’s adjudicatory hearing, when followed by his criminal trial, violated the Double Jeopardy Clause. Writing for the Court, Chief Justice Burger noted at the start that “jeopardy of life or limb” traditionally had been associated only with criminal prosecution. He concluded, nevertheless, that an individual who experiences a juvenile adjudication, the result of which could cast social stigma on him and deprive him of his liberty, has been put in jeopardy of life or limb. The possibility of transfer to criminal court, certainly, “is a matter of great significance to the juvenile.” Essentially, the Court believed that the juvenile in this case had experienced two “trials,” and all the burdens inherent in each, for the single charge of first-degree robbery.

Directly addressing the decision in *McKeiver*, Chief Justice Burger distinguished *Breed* as merely analyzing the risk inherent in a juvenile adjudication rather than addressing a formality of the criminal process. Applying the double jeopardy standard, he argued, would not destroy the unique nature of juvenile courts

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85. *Id*. at 521.
86. *See id*. at 521-22. The juvenile court judge acted under the authority of section 701 of the California Welfare and Institutions Code (current version at CAL. WELF. & INST. CODE § 701 (Deering 2005)). *See id*. at 521 & n.3.
87. *Id*. at 523-24 (internal quotation marks omitted). Here the judge applied section 707 of the California Welfare and Institutions Code (current version at CAL. WELF. & INST. CODE § 707 (Deering 2005)). *See id*. at 523.
88. *Id*. at 525.
89. *Id*. at 541. The Double Jeopardy Clause provides that no person “shall ... be twice put in jeopardy of life or limb” for the same offense. U.S. CONST. amend. V, § 2.
90. *Breed*, 421 U.S. at 528.
91. *Id*. at 529.
92. *Id*. at 535.
93. *Id*. at 531.
either by upsetting the balance of informality and flexibility or by hindering the administration of the system. To ensure that these interests would remain unharmed, the Chief Justice admitted, most transfer decisions would need to be made before the adjudication process actually commenced.

B. Contemporary Statutes

All states and the District of Columbia currently provide by statute certain circumstances in which a juvenile may be transferred to criminal court. Although the statutes differ from state to state, three main types exist: "judicial waiver" statutes, "legislative waiver" statutes, and "prosecutorial waiver" statutes. Most states have adopted more than one of these forms of transfer in their juvenile courts. While many states have ratified "reverse waiver" statutes providing that certain juveniles may be transferred from criminal court back to juvenile court, many states also have ratified "termination" statutes, which mandate that juveniles tried and convicted as adults will forever lose their juvenile status.

1. Judicial Waiver

The transfer hearings conducted by the juvenile court judge in Breed v. Jones were governed by a judicial waiver statute. Judicial waiver statutes generally require that juveniles who have (1) reached a certain age, and (2) committed an act that would constitute a serious felony if committed by an adult, should undergo a transfer hearing before a juvenile court judge. After making a limited factual finding, if the state even so requires, the judge must determine whether the interests of the juvenile and society would be met by transferring the juvenile to criminal court. Unless these "amenability findings" dictate otherwise, the judge has discretion,

94. See id. at 535-39.
95. See id. at 535-36.
97. See supra notes 86-87 and accompanying text.
99. See id. at 556-57.
or sometimes is mandated, to waive juvenile court jurisdiction so that the juvenile may be tried as an adult.\textsuperscript{100}

Forty-five states and the District of Columbia have some form of judicial waiver statute.\textsuperscript{101} Although no two are identical, these statutes have common elements. One significant element is the level of proof necessary for the judge to make factual findings. Twenty states, for example, explicitly require that the judge find probable cause that the juvenile committed the act or acts with which he is charged before the transfer process may continue.\textsuperscript{102}

\textsuperscript{100} See, e.g., 705 ILL. COMP. STAT. ANN. 405/5-805(2) (West 1999 & Supp. 2005) (requiring that juveniles charged with certain serious offenses face a rebuttable presumption of transfer to criminal court); IND. CODE ANN. § 31-30-3-2 (LexisNexis 2003) (providing that a judge may waive jurisdiction if he finds that the juvenile was at least fourteen years old, has been charged with a "heinous or aggravated" act, has no potential for rehabilitation, and should in the best interest of society be tried as an adult).


Seven states require only that the judge find by a preponderance of the evidence, or else by a reasonableness or prima facie standard, that the juvenile committed the acts. The remaining states, as well as the District of Columbia, require no particular level of proof. No state has required a reasonable doubt standard before a judge may waive juvenile court jurisdiction.

More so than the other types of transfer statute, the judicial waiver statute "embodies the juvenile court’s approach to individualized sentencing." That being said, the juvenile judge’s relatively high level of discretion under these statutes clearly creates problems of its own:

Like individualized sentencing, the subjectivity of waiver decisions produces inequities and disparities. Judges cannot administer discretionary statutes on an evenhanded basis. Within a single jurisdiction, "justice by geography" prevails as courts interpret and apply the same law inconsistently. National evaluations of judicial waiver provide compelling evidence that it is arbitrary, capricious, and discriminatory. A youth’s race, as well as geographic locale, affects waiver decisions. Idiosyncratic differences in judicial philosophy or the location of the hearing are more important than the nature of the crime. In short, judicial waiver exhibits all the characteristic defects of discretionary sentencing.


104. Feld, supra note 8, at 703; see infra Part II.B.2-3.

105. Feld, supra note 8, at 704-05 (citations omitted). See supra notes 32-34 and accompanying text for further discussion of the problems historically associated with overly broad judicial discretion in the juvenile court system.
This unbridled discretion is perhaps even more profound in the eight states that have gone so far as to declare that any juvenile may be transferred to criminal court, regardless of his age.\(^\text{106}\)

2. Legislative Waiver

Some state legislatures have awarded themselves the role of the juvenile court judge in certain transfer decisions. With "legislative waiver" statutes, these state legislatures have provided that juveniles of a certain age who have committed certain acts automatically will be tried in criminal court.\(^\text{107}\) Twenty-nine states have provided for this automatic form of waiver.\(^\text{108}\) Of these states, six exclude certain acts from being within a juvenile's capacity; in other words, one who could commit such an act cannot, by legal definition, be only a "juvenile."\(^\text{109}\) The remaining states have modeled

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\(^{107}\) Michigan, for example, has stipulated that "[t]he [criminal] court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 17 years of age." MICH. COMP. LAWS ANN. § 600.606(1) (West Supp. 2006).


their statutes after the judicial waiver statutes, except for the fact that juveniles of certain age who have committed certain offenses shall be tried in criminal court.

Legislative waiver statutes reflect the notion that state legislatures, which created juvenile courts in the first place, "may modify the courts' jurisdictions as they please." These statutes effectively eliminate the flexibility of juvenile courts, as they offer no possibility for an individual to remain in juvenile court for amenability reasons. Indeed, "[u]sing offenses to structure or eliminate judicial discretion repudiates rehabilitation, narrows juvenile court jurisdiction, reduces its clientele, and denies it the opportunity even to try to treat certain youths." One may view legislative waiver statutes, then, in one of two ways: (1) as an efficient counterbalance to the juvenile court system's abuses in discretion, or (2) as a dangerously oversimplified solution to the complex problem of determining which juveniles truly should be tried in criminal court.

3. Prosecutorial Waiver

A few states have provided that the juvenile court and the criminal court exercise dual jurisdiction over juveniles of certain age who have committed certain crimes. In these situations, the charging prosecutor makes the transfer decision in lieu of a judge or the state legislature. Because both court systems already have jurisdiction over such juveniles, the prosecutor enjoys absolute discretion in deciding which court system shall hear the charge.

Twelve states currently supply this discretion via a "prosecutorial waiver" statute. These statutes combine elements from the

110. Feld, supra note 8, at 706.
111. Id. at 708.
112. A county attorney in Montana, for example, "may, in [his] discretion[,...] file with the [criminal] court a motion for leave to file an information in the [criminal] court" for juveniles over sixteen years of age who committed certain enumerated violent crimes, and for juveniles over twelve years of age who committed nonconsensual sexual intercourse, assault of a peace or judicial officer, homicide, or attempted homicide. MONT. CODE ANN. § 41-5-206(1) (2005).
judicial and legislative waiver statutes. Although the state legislatures grant dual jurisdiction over juveniles, the ultimate decision to transfer the juvenile, as with judicial waiver statutes, rests with one person. Unlike the judicial waiver statutes, the decision maker is not a judge but a prosecutor, who, as such, is not required to base his decision on any factual or amenability finding, or even on any due process consideration. For this reason, and especially in consideration of certain studies showing prosecutors to be especially prone to political pressure and racial bias, many have questioned the fairness of prosecutorial waiver statutes.

4. Post-waiver Statutes

Not all juvenile transfers are final. Most states provide that, under certain circumstances, juveniles who face trial in criminal court may instead be transferred back to the juvenile court system. These “reverse waiver” statutes serve to correct some of the inconsistencies of juvenile transfer proceedings. Six states, for example, allow a juvenile convicted in criminal court to sometimes

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be sent back to the juvenile court system for sentencing.\footnote{117} Four states allow such an individual to be sentenced in juvenile court if he was convicted only of a lesser included offense or misdemeanor.\footnote{118} Fourteen states even allow a trial judge in criminal court to overturn the legislative or prosecutorial waiver of a juvenile by finding that a juvenile court adjudication would best meet the interests of the juvenile and society.\footnote{119} Of course, reverse waiver statutes cannot completely protect all juveniles from the potential abuses of judicial and prosecutorial waiver, or conversely from the automatic nature of legislative waiver.\footnote{120}

At the other end of the spectrum are "termination" statutes. Twenty-three states, as well as the District of Columbia, have ratified this type of statute.\footnote{121} Essentially, these statutes require that a juvenile tried and convicted in criminal court shall be tried in criminal court for any offense thereafter. No matter the age,

\begin{footnotesize}


\footnote{120} In addition, twenty-four states do not seem to have any reverse waiver statute at all. Cf. supra note 116.

no matter the offense, the juvenile can never again enjoy the benefits of the juvenile court system. Under the law, his right to be a juvenile is terminated.

III. THE ADVENT OF APPRENDI

A. Making the Jury the Constitutional Fact-finder

Much like the juvenile court system, the concept of sentencing in traditional criminal trials has significantly changed since the colonial era. The early colonists, rejecting the English legal tradition, gave the jury a substantial role in sentencing.122 Although the early federal courts had a minimal role in the criminal process, most state courts diligently upheld the tradition of jury sentencing until the twentieth century.123 In the few states that allowed judicial sentencing, judges had little discretion beyond applying the sentencing schemes that state legislatures provided.124 Gradually the norm of jury sentencing was replaced by the concept of discretionary judicial sentencing. By the mid-twentieth century, sentencing became, as one scholar has characterized, "a Wild West of unregulated discretion."125 With a deficiency of reviewable boundaries, the inequities and irrationalities of judicial sentencing became readily apparent.126 Ironically, the rise of judicial sentencing came about from the same rehabilitative ideals that Progressives had imposed on the earliest juvenile courts.127

As with the juvenile courts, modern American jurisprudence has largely replaced the rehabilitation model of criminal courts with a sentencing system based on the theory of retribution.128 This system

123. Id. at 964.
125. See Chanenson, supra note 124, at 392.
126. See id. at 393-94. The disparity in sentencing by different judges for similar crimes, as well as an apparent trend of racial bias (that is, black offenders receiving longer sentences than white offenders for comparable offenses), were two such problems. Id. at 393.
127. See Hoffman, supra note 122, at 965-66. For an overview of the Progressives' rehabilitation doctrine and the problems associated with absolute judicial discretion in the early juvenile courts, see supra notes 21-33 and accompanying text.
128. See Hoffman, supra note 122, at 967-68. For a brief discussion of the juvenile court system's shift in sentencing philosophy from rehabilitation to retribution, see supra notes 69-
operates on the assumption that "criminal acts deserve proportionate retribution." Statutory sentencing guidelines have replaced sentencing decisions that were left almost entirely to the judge's discretion. Although some states' guidelines are only advisory, others are mandatory or highly prescriptive. In any event, sentencing guidelines establish suggestive or presumptive sentencing ranges for specific crimes, within which judges retain some flexibility in imposing sentences for individual defendants.

The problem with sentencing guidelines is determining the limits to the legislature's ability to define elements of crimes, other factors that come into play during sentencing, and the difference between the two. The U.S. Supreme Court provided constitutional meaning to this problem in *Apprendi v. New Jersey*. The Court, relying on recent case precedent, declared for the first time that the Sixth Amendment guarantees not only a jury trial, but also jury sentencing to a certain extent. Writing the opinion of the Court, Justice Stevens first noted that among the principles rooted in traditional common law is the "right to have the jury verdict [in a criminal case] based on proof beyond a reasonable doubt." The Founding Fathers, Justice Stevens pointed out, would not have recognized the "distinction between an 'element' of a felony offense

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72 and accompanying text.

129. Hoffman, supra note 122, at 967-68.

130. See Chanenson, supra note 124, at 395-96.

131. See id. at 396.

132. See id. at 396-97.


134. 530 U.S. 466 (2000).

135. See Hoffman, supra note 122, at 974-78. In *Jones v. United States*, 526 U.S. 227 (1999), the Court had distinguished case facts from sentencing elements, stating that case facts are elements of an offense that "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Id.* at 232. As a matter of statutory interpretation, the Court held only that these facts each must have been specified in the indictment and proven to the jury beyond a reasonable doubt. See *id.* at 251-52. In rendering this holding, the Court exempted from the jury requirement proof of prior convictions, noting that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249.

136. *Apprendi*, 530 U.S. at 478. Ironically, the Court here cited the holding of *In re Winship*, which, as explained before, established a procedural right to juvenile court proceedings. See *id.; supra* notes 49-52 and accompanying text.
and a ‘sentencing factor’ as exists in contemporary sentencing practices.\(^{137}\)

The petitioner in *Apprendi* had fired gunshots into the home of an African American family; he was charged with, and pled guilty to, second-degree unlawful possession of a firearm.\(^{138}\) A separate New Jersey statute allowed a trial judge to enhance a defendant’s sentence beyond the normal range for the firearm offense if the judge found, by a preponderance of the evidence, that the defendant committed the offense with the intent to intimidate a person or group because of race.\(^{139}\) Although petitioner had not even been charged under this statute, the trial judge made the requisite finding of intent following the prosecutor’s motion.\(^{140}\) Petitioner, who under the second-degree felony charge alone would have served a prison term of five to ten years, instead was sentenced to a twelve-year prison term.\(^{141}\) He argued on appeal that due process required that a jury find the element of racial bias beyond a reasonable doubt.\(^{142}\)

The Supreme Court agreed with petitioner. “As a matter of simple justice,” wrote Justice Stevens, “it seems obvious that the procedural safeguards designed to protect [petitioner] from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment.”\(^{143}\) The New Jersey hate crime statute’s “sentence enhancement factor,” in this sense, was no different than any other element of an offense a jury normally would find.\(^{144}\) Acknowledging that criminal trial practices may

\(^{137}\) *Apprendi*, 530 U.S. at 478.

\(^{138}\) *Id.* at 469-70 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

\(^{139}\) *See id.* at 468-69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

\(^{140}\) *Id.* at 470-71. The trial judge held a hearing to determine the “purpose” of petitioner’s shooting. *Id.* at 470. Petitioner earlier had confessed to police that he did not want the occupants of the house in his neighborhood because of their race; however, he later retracted this statement. *Id.* at 469. At the hearing, petitioner explained that he was intoxicated at the time of the shooting and that he had no bias against African Americans. *Id.* at 471. Petitioner also introduced the testimonies of a psychologist and seven character witnesses to support this claim. *Id.* at 470-71. The trial judge, nevertheless, found the evidence to support a finding that petitioner was motivated by racial bias. *Id.* at 471.

\(^{141}\) *Id.* at 470, 471. Petitioner had also pled guilty to a third-degree offense, the sentence for which set to run concurrently with that of the second-degree offense. *See id.* at 469-70.

\(^{142}\) *Id.* at 471.

\(^{143}\) *Id.* at 476 (emphasis added).

\(^{144}\) *See id.*
change over time, Justice Stevens explained that they must always adhere to basic principles of fairness. \textsuperscript{145} Those principles, to a certain degree, must extend "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." \textsuperscript{146} Citing \textit{In re Winship}, Justice Stevens also stressed the "vital role" of the reasonable doubt requirement in the criminal process. \textsuperscript{147} Because of its importance, and because of the heightened loss of liberty and social stigma attached to a more significant sentence, the reasonable doubt requirement had to be included among the procedural safeguards for sentencing enhancements. \textsuperscript{148} The Court ultimately held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." \textsuperscript{149}

\textbf{B. Interpreting \textit{Apprendi}}

In rendering its holding in \textit{Apprendi}, the Court understood that it was making a broad statement on the jury's role in the administration of justice—a statement with potentially overreaching effects. It attempted to prevent those effects from manifesting down the road by explaining in its written opinion how sentencing schemes may be modified—rather than destroyed—and still satisfy the jury requirement. Justice Stevens specifically defended the holding against Justice O'Connor's dissenting argument that the Court had established an unwarranted "constitutional rule." \textsuperscript{150} First, Justice Stevens emphasized that the "rule" applied only to

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\item[145.] \textit{See id.} at 484-85; \textit{see also id.} at 498 (Scalia, J., concurring) ("The founders of the American Republic were not prepared to leave [the administration of criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.").
\item[146.] \textit{Id.} at 484 (majority opinion) (alteration in original) (quoting \textit{Almendarez-Torres v. United States}, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).
\item[147.] \textit{See id.}
\item[148.] \textit{See id.} at 483-84.
\item[149.] \textit{Id.} at 490.
\item[150.] \textit{See id.} at 524 (O'Connor, J., dissenting). "In one bold stroke," Justice O'Connor wrote, "the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder." \textit{Id.} at 525.
\end{enumerate}
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statutes that enhanced sentences beyond the prescribed statutory range for a given offense. A judge still could consider sentencing factors that may aggrivate or mitigate a sentence within that statutory range. A sentence enhancement, "[o]n the other hand, ... is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an ‘element’ of the offense." Second, in considering whether a sentencing factor is an element to be determined by a jury, Justice Stevens explained that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?" Even with these two clarifications, however, the Court was not yet finished.

1. Subsequent Cases

In Blakely v. Washington, the Court made clear that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Justice Scalia elaborated on behalf of the Court:

In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.

In Ring v. Arizona, meanwhile, the Court considered whether Apprendi’s rule applied to capital defendants, when an aggravating element, if found to exist, could enhance the sentence from a prison

151. See id. at 494 n.19 (majority opinion).
152. See id.
153. Id.
154. Id. at 494 (emphasis added).
156. Id. at 303-04 (citation omitted).
term to the death penalty. Relying on Apprendi's "not form, but effect" argument,\footnote{158. See Apprendi, 530 U.S. at 494.} the Court concluded that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."\footnote{159. Ring, 536 U.S. at 589.} Addressing the argument that an experienced judge is the better authority with which to entrust the finding of facts that may lead to the death penalty, the Court flatly responded that "the superiority of judicial factfinding in capital cases is far from evident."\footnote{160. Id. at 607.} In addition, the Court argued, the administration of criminal justice, including the ability to impose the death penalty on a convicted defendant, never was meant to be left to the will and whim of the State alone.\footnote{161. See id. (citing Apprendi, 530 U.S. at 498 (Scalia, J., concurring)).}

One issue that has been debated by federal circuit courts, but not yet by the Supreme Court, is whether prior juvenile adjudications should count under the "prior convictions" exception to the Apprendi jury requirement.\footnote{162. The case opinions that follow focus on the federal Armed Career Criminal Act, which in part mandates that a person who violates a specified criminal statute, and who has three prior convictions for violent felonies or serious drug offenses, "shall" be sentenced for a minimum of fifteen years. 18 U.S.C.A. § 924(e) (West Supp. 2005).} The Court of Appeals for the Ninth Circuit concluded in United States v. Tighe that prior juvenile adjudications are not "prior convictions" under Apprendi and should not be used to enhance sentences unless proven to a jury like any other element of an offense.\footnote{163. 266 F.3d 1187, 1194 (9th Cir. 2001).} The court characterized the relatively informal juvenile adjudication as lacking the "certainty" attached to the "fact' of prior conviction" that allowed the Supreme Court to exempt such a fact from its jury requirement in Apprendi.\footnote{164. See id. at 1193-94 (quoting Apprendi, 530 U.S. at 488). In making this point, the court specifically cited the holding in McKeiver v. Pennsylvania. See supra Part I.C for a discussion of McKeiver's denial of a jury guarantee in juvenile adjudications.} The Court of Appeals for the Eighth Circuit disagreed with this rationale in United States v. Smalley.\footnote{165. 294 F.3d 1030 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003).} The court in Smalley argued that juvenile adjudications indeed are reliable for Apprendi purposes.\footnote{166. See id. at 1033.}
confrontation and cross-examination of witnesses, as well as the privilege against self-incrimination, as sufficient procedures to guarantee the reliability of juvenile adjudications.\textsuperscript{167}

This circuit split, though still unresolved by the Supreme Court, does prove at least that the \textit{Apprendi} holding is ripe for consideration in the context of the juvenile court system. Any further consideration of the \textit{Tighe/Smalley} conflict is beyond the scope of this Note;\textsuperscript{168} however, this Note now will address \textit{Apprendi}'s applicability to another issue unique to the juvenile court system.

2. \textit{Courts that Have Not Applied Apprendi to Juvenile Transfers}

With the advent of the \textit{Apprendi} decision in 2000, several federal circuit and state supreme courts have debated the applicability of the jury guarantee to juvenile transfer proceedings. Although \textit{Apprendi} itself made no reference to juvenile proceedings at all, some juveniles sent to criminal court have been quick to invoke the constitutional rule that \textit{Apprendi} imposed on criminal trials. If due process considerations require that a jury find all facts that may enhance a criminal sentence beyond the statutory maximum, surely they also would require a jury to make factual findings that would send a juvenile to a court system with a significantly enhanced sentencing range for the same offense.

Of the courts that have considered this possibility, however, most have said that \textit{Apprendi} does \textit{not} apply. Although the circumstances of the cases varied, the courts have offered the same basic arguments against a jury requirement. The Kansas Supreme Court was one of the first state courts of last resort to decide against \textit{Apprendi}


application. In *State v. Jones*, the sixteen-year-old petitioner argued that the trial court’s decision to authorize adult prosecution on the charge of first-degree murder substantially increased the penalty he would face upon conviction. Consequentially, under the principles of *Apprendi*, his Sixth and Fourteenth Amendment rights were violated because a jury should have found beyond a reasonable doubt the facts necessary to authorize the transfer.

The Kansas court disagreed with this argument for three reasons. First, it pointed out that juveniles had always been treated “under a comprehensive system which has been modified by statute and case law.” That separate system, the court reasoned, necessarily “treated juveniles different than they would be treated under adult criminal systems.” The procedural safeguards already granted to juveniles were “adequate to withstand the demands for jury determinations within the juvenile system, as well as to support other differences afforded in the adult system but not in the juvenile system.” Second, the court argued that the decision to transfer a juvenile to criminal court “does not involve guilt or innocence, but involves the determination of which system will be appropriate for a juvenile offender.” Once transferred, the juvenile “will be subjected to the statutory maximum sentence under the applicable criminal statute only after a jury has determined his or her guilt beyond a reasonable doubt.” Only then, the court implied, should the rule of *Apprendi* take effect. Finally, the court argued that adding a jury requirement to the transfer process is contrary to the convention that “[t]he juvenile system is differ-

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170. See id. at 793. In making this argument, petitioner implied that the applicable “statutory maximum” for *Apprendi* purposes is the maximum sentence a defendant may receive in the juvenile court system, which was considerably less than the type of sentence to which the defendant would be subject in criminal court. See id. at 794.
171. Id. at 795 (citing *In re Gault*, 387 U.S. 1 (1967)).
172. Id.
173. Id. On this point, the court cited an earlier Kansas case, in which it had reasoned that the state juvenile court system was not constitutionally required but rather created by statute, and therefore did not need to provide all of the procedural safeguards required in the adult system. Id. at 795 (citing *State v. Hitt*, 42 P.3d 732, 738 (Kan. 2002)).
174. Id. at 798.
175. Id.
ent,” and “potentially [would] erode some of the protections offered by the juvenile system.”\textsuperscript{176}

Most of the courts that have decided against \textit{Apprendi} application have offered the same reasons as the Kansas Supreme Court did in \textit{Jones}.\textsuperscript{177} The New Mexico Supreme Court, however, approached the issue from a different angle. The New Mexico legislature had created a unique juvenile transfer system: all juveniles would be tried in juvenile court, after which the judge could sentence certain offenders as adults following an amenability hearing.\textsuperscript{178} In \textit{State v. Gonzales}, thus, petitioner argued only that \textit{Apprendi} required a jury to make the amenability determination.\textsuperscript{179} The court disagreed, noting, “a determination that a child is not amenable to treatment within the juvenile system differs from findings related to the elements of crime.”\textsuperscript{180} The court gave three reasons supporting this finding:

First, while findings of guilt are measures of the degree of an individual’s criminal culpability, the finding that a child is or is not amenable to treatment is a measure of a child’s prospects for rehabilitation. Second, while findings of guilt are based on historical facts susceptible of proof beyond a reasonable doubt, a finding that a child is not amenable to rehabilitation requires a prediction of future conduct based on complex considerations of the child, the child’s crime, and the child’s history and environment. Third, a determination of amenability or eligibility for commitment requires some foreknowledge of available facilities and the programs in them that trial judges who make sentencing decisions every day have, while juries do not.\textsuperscript{181}

\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{See, e.g., United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003) (“Apprendi does not require that a jury find the facts that allow the transfer to [criminal] court. The transfer proceeding establishes the [criminal] court’s jurisdiction over a defendant.”); People v. Beltran, 765 N.E.2d 1071, 1075-76 (Ill. 2002) (denying \textit{Apprendi} application because (1) the due process standards of a juvenile proceeding do not require a jury, and (2) a transfer hearing “is dispositional, not adjudicatory”); Caldwell v. Commonwealth, 133 S.W.3d 445, 453 (Ky. 2004) (adopting the “jurisdiction” argument, and additionally holding that the transfer process “does not violate the fair hearing requirement of [\textit{Kent v. United States}].”).
\textsuperscript{178} \textit{See State v. Gonzales, 24 P.3d 776, 781 (N.M. 2001).}
\textsuperscript{179} \textit{See id. at 783.}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id. at 783-84.}
Like the Kansas court in *State v. Jones*, the New Mexico court concluded that mandating a jury for amenability findings “would require an overly broad interpretation of *Apprendi*.182

3. An Exception

The first court that considered *Apprendi*’s applicability to juvenile transfer decided that the jury guarantee *should* extend to those proceedings. In *Commonwealth v. Quincy Q.*, the Massachusetts Supreme Judicial Court considered the constitutionality of a prosecutorial waiver statute, under which the prosecutor initially charged petitioner as a youthful offender in the criminal court.183 Unlike the courts that later would deny the jury requirement for juvenile transfer proceedings, the court in *Quincy Q.* had no problem comparing the Massachusetts statute with the hate crime statute in *Apprendi*.184 Much like the *Apprendi* statute, the court argued, the Massachusetts statute “authorizes judges to increase the punishment for juveniles convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles.”185 For that reason, the court held that petitioner’s motion to dismiss the subsequent indictment should have been granted.186

The court was willing to apply *Apprendi*’s jury guarantee in its entirety to the Massachusetts statute. It found critical the fact that a juvenile tried in criminal court could face a substantially greater sentence than one who remained in juvenile court.187 For that reason, the court believed that the enhanced status of “youthful offender” may not be attached to a juvenile by the whim of the

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182. *Id.* at 783.
183. See 753 N.E.2d 781, 786 (Mass. 2001), *abrogated on other grounds by Commonwealth v. King*, 834 N.E.2d 1175, 1198-201 & 1201 n.28 (Mass. 2005). As authorized by the Massachusetts “direct filing” statute, “[t]he commonwealth may proceed by complaint in juvenile court or in a juvenile session of a [criminal] court, ... or by indictment as provided” if the defendant was between the ages of fourteen and seventeen, and either (1) was charged with an offense that could result in imprisonment if committed by an adult, and had previously been committed to the department of youth services, or (2) was charged with an offense involving the infliction or threat of serious bodily harm, or some other enumerated offense. MASS. GEN. LAWS. ANN. ch. 119, § 54 (West 1996).
184. *See Quincy Q.*, 753 N.E.2d at 789; supra note 139 and accompanying text.
185. *Quincy Q.*, 753 N.E.2d at 789.
186. *See id.* at 796.
187. *See id.* at 789.
LET THE JURY DO THE WAIVE

charging prosecutor alone, but only after a formal disposition.\textsuperscript{188} The court recognized that a juvenile court system, along with its "preferential treatment" of juveniles, "is not constitutionally required,"\textsuperscript{189} but found that argument inconsequential to its holding:

[O]nce the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services for a defined time period, any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt.\textsuperscript{190}

The court thus ordered that a jury must find beyond a reasonable doubt all pending factual elements required under the prosecutorial waiver statute before a juvenile may be tried as a youthful offender in criminal court.\textsuperscript{191}

IV. A PROPOSAL TO INVOKE THE JURY FOR (SOME) JUVENILE TRANSFERS

A. Defending the Right to a Jury Trial

If one thing is certain from the state and federal cases that have addressed \textit{Apprendi}'s applicability to juvenile transfers, it is that the potential for application exists.\textsuperscript{192} Granted, most courts that have considered this issue have firmly held that \textit{Apprendi} cannot apply to the juvenile court system in any respect. Their arguments

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\item \textsuperscript{188} See id. at 787.
\item \textsuperscript{189} Id. at 789.
\item \textsuperscript{190} Id. (citation omitted).
\item \textsuperscript{191} See id. at 789-90; supra note 183. The court also held that, at the indictment stage, the grand jury must find by sufficient evidence that the requirements of the prosecutorial waiver statute were met. See \textit{Quincy Q.}, 753 N.E.2d at 789. This finding seems comparable to a grand jury's finding of probable cause that an offense has been committed before the prosecutor may proceed with a trial against a criminal defendant.
\item \textsuperscript{192} See also Kevin R. Reitz, \textit{The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes}, 105 COLUM. L. REV. 1082, 1121 (2005) (arguing that, although one would think it unlikely that courts would apply the \textit{Apprendi} rule to juvenile transfers, "before \textit{Apprendi}... no one thought the Sixth Amendment had anything to do with factfinding in the sentencing hearing either").
\end{itemize}
against Apprendi's application, however, do not lay the issue to rest. Their holdings likely reflect, to a certain degree, their hesitance to add federal constitutional protections to state-created institutions, absent, as one court expressly stated, "a clear mandate from the United States Supreme Court."193

This Note now will consider and attempt to refute the main arguments that courts denying Apprendi application have brought forth. It then will offer additional policy arguments that favor adding a jury element to certain juvenile transfer decisions. Finally, it will explain how existing judicial waiver, legislative waiver, prosecutorial waiver, reverse waiver, and termination statutes may be modified in a way that ensures the intended protections of Apprendi and yet does not seriously disrupt the function of the juvenile transfer system.

1. The "Effect" of Juvenile Transfer Is To Enhance Sentences

Perhaps the most impressive argument against applying Apprendi to juvenile transfer proceedings is that those proceedings do not determine either sentencing or one's guilt or innocence, per se, but instead determine which jurisdiction—the juvenile court or the criminal court—is appropriate for a particular juvenile.194 Proponents would argue that Apprendi's language, which requires that a jury determine "any fact that increases the penalty for a crime beyond the prescribed statutory maximum,"195 does not encompass considerations of jurisdiction.

The U.S. Supreme Court, however, made one thing very clear in Apprendi: "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"196 Apprendi represented the judiciary's attempt to revise legislative sentencing guidelines. These guidelines, the Court believed, eliminated too much discretion in fact-finding that constitutionally

194. See United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003); People v. Beltran, 765 N.E.2d 1071, 1076 (Ill. 2002); Jones, 47 P.3d at 798; Caldwell v. Commonwealth, 133 S.W.3d 445, 453 (Ky. 2004).
196. Id. at 494 (emphasis added).
should belong to the jury. With its “not form, but effect” argument, the Supreme Court denied the states the absolute right to decide which factors a jury may or may not determine. In its decision in Ring v. Arizona, the Court reaffirmed this principle, holding that when the “effect” of a factual finding is to enhance a defendant’s sentence beyond the threshold of a jail term to the death penalty, a jury must make that finding beyond a reasonable doubt.

Even if one regards a juvenile transfer proceeding as a purely jurisdictional determination, the fact remains that the determination at the proceeding means the difference between a relatively minor sentence following a juvenile adjudication and a much longer sentence following a conviction in criminal court. Certainly, juveniles have much at stake in transfer proceedings. The prospect of facing a full-fledged trial, not to mention the increased loss of liberty and social stigma attached to a conviction, are considerations to which the Supreme Court has given substantial weight in past decisions to grant procedural rights to juveniles. The implications of transfer are even more serious in the states with termination statutes, where the transfer decision likely would signal the end of an individual’s statutory right to be treated as a juvenile ever again.

The right to be treated as a juvenile is not constitutionally guaranteed. It is, nevertheless, a tradition each state respects. As the Massachusetts Supreme Judicial Court suggested in Commonwealth v. Quincy Q., once this tradition is in place, the states cannot revoke the right merely at the whim and will of their legislative bodies, nor by the whim and will of their judges or prosecutors. In fact, the U.S. Supreme Court has stepped in more than once to impose constitutional guarantees on a juvenile court tradition that

197. See id.
200. See supra note 121.
supposedly had already provided greater protections for the accused than a criminal court would.\textsuperscript{203}

Declaring a proceeding to be isolated from \textit{Apprendi}'s influence merely because of the form of the statute authorizing that proceeding is not a sufficient argument; \textit{Apprendi} has made that much clear.\textsuperscript{204} The effect of a juvenile transfer proceeding is the key issue in determining whether \textit{Apprendi} should apply. The effect of the proceeding is to send a juvenile to criminal court. Its effect—indeed, its very purpose—is to expose some juveniles to the possibility of a much greater sentence for the same offense than they otherwise would receive.\textsuperscript{205} Once a juvenile court system has been established—once a state has imposed statutory limits on the sentencing range that a juvenile court judge alone may impose on an individual—any factual finding that could punish the individual beyond that range is a sentence enhancement under \textit{Apprendi}.\textsuperscript{206} A sentence enhancement is precisely what will result when an erstwhile juvenile is tried, convicted, and sentenced in criminal court.

\textit{2. The Jury's Newfound Importance Outweighs Its Costs}

In \textit{McKeiver v. Pennsylvania}, the Supreme Court held that juries are not a necessary part of accurate fact-finding.\textsuperscript{207} In the few years since \textit{Apprendi}, lower courts have relied heavily on this plurality holding in their decisions not to extend a jury right to transfer proceedings.\textsuperscript{208} Inherent in the \textit{McKeiver} decision is the presumption that juries lack the level of expertise that judges have in deciding whether a particular juvenile is better suited for juvenile court or criminal court.\textsuperscript{209} A jury requirement, the \textit{McKeiver}

\begin{itemize}
\item \textsuperscript{204} See \textit{Apprendi v. New Jersey}, 530 U.S. 466, 494 (2000).
\item \textsuperscript{205} See supra notes 69-72 and accompanying text.
\item \textsuperscript{206} See \textit{Quincy Q.}, 753 N.E.2d at 789.
\item \textsuperscript{207} 403 U.S. 528, 545 (1971) (plurality opinion).
\item \textsuperscript{209} See \textit{McKeiver}, 493 U.S. at 551 (White, J., concurring); \textit{State v. Gonzales}, 24 P.3d 776, 785 (N.M. 2001). The level of expertise required for amenability findings will be discussed \textit{infra} Part IV.A.4.
\end{itemize}
plurality claimed, also would strap costly administrative burdens on the juvenile court system. 210

*Apprendi* directly challenged the notion that juries are not necessary as fact-finders. Indeed, the *Apprendi* rule has provided new meaning to the jury’s role in fact-finding. That role not only is important, but, as *Apprendi* indicates, it is constitutionally guaranteed. 211 In rendering its holding, the Court was willing to challenge recent innovations to sentencing procedures—specifically, the sentencing guidelines—that it believed ran contrary to the long-standing traditions of the common law. 212 As with sentencing guidelines, the juvenile transfer proceeding is a relatively recent innovation to the common law tradition. 213 Like sentencing guidelines, the juvenile transfer proceeding is a byproduct of American society’s modern embrace of the theory of retribution in sentencing. 214 In exposing the juvenile to a greater sentence in criminal court, with little or no discretion afforded to a fact-finder to decide otherwise, transfer statutes, like sentencing guidelines, 215 are legal novelties. The *Apprendi* rule, by design, focused on tempering the latter novelty with traditional constitutional rights; it should not remain blocked from tempering the former.

As the Supreme Court itself has admitted, the mere novelty of a sentencing practice does not necessarily make it unconstitutional. 216 On the other hand, it certainly does not make the practice untouchable by the judiciary’s guiding hand. Although the *McKeiver* plurality held that a jury trial is not a constitutional requirement for a juvenile adjudication, 217 it did not address the concept of juvenile transfer. Juvenile transfer proceedings, which emerged long after the first state juvenile court system and which continued to be defined after the *McKeiver* decision, 218 cannot simply be equated

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210. *See McKeiver*, 403 U.S. at 550 (plurality opinion).
212. *See id.* at 478, 483-84.
213. *See supra* text accompanying notes 69-72.
214. *See Feld*, *supra* note 8, at 700-01.
216. *See id.* at 483.
218. *See supra* text accompanying notes 69-72.
with juvenile adjudications under the *McKeiver* rationale. In a way, juvenile transfers more closely associate with traditional criminal trials than with juvenile adjudications. They provide a direct connection to the criminal court system from a juvenile court system that initially was meant to remain isolated and independent.

As Justice Scalia indicated in his concurring opinion to *Apprendi*, the jury guarantee was never meant to be left to the will of the State alone, despite the recent addition of sentencing guidelines. In the same way, juvenile transfer proceedings should not remain unaffected by the jury's newfound importance as fact-finder. The Supreme Court already has held that this importance is undiminished by any presumption that a judge is a greater "expert" in considering factors that could send a defendant to his death. Surely the factors that could send a juvenile to criminal court, though complicated, are not more complicated than factors relating to the death penalty. Furthermore, the "costs" of a jury requirement in certain transfer decisions, if any actually exist, should not outweigh the importance of the event to the juvenile.

3. Juries in Transfer Proceedings Do Not Impair the Unique Function of Juvenile Courts

Since the formation of the juvenile court system, its supporters have argued that it is meant to be different. The Supreme Court has considered this argument in each of its decisions concerning whether to add procedural rights to juvenile adjudications and transfer proceedings. In most cases, the Court has concluded that adding procedural rights would not irreparably harm the juvenile

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219. Any argument supporting an extension of the *Apprendi* jury guarantee to juvenile adjudications, which effectively would overturn the *McKeiver* plurality decision, is beyond the scope of this Note. This Note argues only that the rule should apply to certain juvenile transfer proceedings.

220. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).


In *McKeiver*, of course, the Court argued that the "unique" nature of the juvenile court would be damaged by adding a jury requirement. Some recent state and federal court decisions, relying on the *McKeiver* opinion, have concluded that a jury requirement similarly would impair the function of transfer proceedings. Other due process guarantees, the courts have argued, are sufficient to protect the juvenile from any procedural deficiencies in the transfer process.

Again, the juvenile transfer process is only one aspect of the juvenile court system, and a recent addition at that. The *McKeiver* opinion focused entirely on juvenile adjudications, not transfer proceedings. Certainly, one may argue that imposing a jury requirement for juvenile adjudications could impose substantial burdens on the juvenile court system, to the point that the system may lose its unique function. Imposing a jury requirement only on certain juvenile transfer decisions, however, would not have the same negative impact. Transfer proceedings, as indicated earlier, deal as much with the criminal court system as they do with the juvenile court system. The *McKeiver* plurality opinion, therefore, would have a lesser impact on these proceedings than on the juvenile adjudications to which the decision was meant to apply.

One may even argue that juvenile transfer proceedings *already* impair the unique function of juvenile courts. The original juvenile court system was meant to isolate *all* juveniles from the criminal court system. It was meant to rehabilitate, or at least attempt to rehabilitate, *all* juveniles, regardless of their age or the offense with which they were charged. Today, all states mandate that certain juveniles should be exempt from the protections of the juvenile court system. In doing so, they have implied that modern society

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226. *See Beltran*, 765 N.E.2d at 1076; *Jones*, 47 P.3d at 796.
227. This Note does not argue that a jury should be required for juvenile adjudications. *See supra* note 219.
228. After all, transfer proceedings were instituted to connect the once separate systems. *See supra* notes 69-72 and accompanying text.
229. *See supra* Part II.B.
cannot afford to rehabilitate all juvenile offenders; some juveniles instead must be treated as adults. This much certainly could be true. If a state can allow certain juveniles to be treated as adults, however, it cannot deny procedural rights in transfer proceedings on the argument that the juvenile court is meant to be isolated, independent, or different from the criminal court. This argument may be justified for juvenile adjudications; those proceedings were meant to be “unique” from their inception, and in a way still are. The same cannot be said for juvenile transfer proceedings.

4. Amenability Findings Need Not Be Eliminated

A slim majority of judicial waiver statutes contain two components; the remainder contain only the second component. In twenty-seven states, the judge first must make a factual finding about culpability, usually having to satisfy only a probable cause or preponderance standard of certainty. Afterward, the judge must consider a number of amenability factors in determining whether a juvenile could or should be rehabilitated in juvenile court. If he could not or should not be rehabilitated, the juvenile shall be transferred to criminal court.

In State v. Gonzales, the New Mexico Supreme Court focused on whether, under Apprendi, a jury must find the amenability factors beyond a reasonable doubt. The court concluded that amenability factors were not the same as elements of a crime, and therefore the rule in Apprendi did not apply. The court added that a jury, which lacks the expertise of a juvenile court judge, is incapable of determining which future treatments are appropriate for a particular juvenile.

Although amenability findings are not identical in form to elements of a crime, they may have the effect of sending a juvenile to criminal court. Some amenability hearings even presume that a

230. Any discussion of whether transfer statutes violate due process, other than as it relates to the Apprendi decision, is beyond the scope of this Note.
231. See supra notes 102-03 and accompanying text. The remaining eighteen states that have imposed judicial waiver statutes do not expressly require a finding of fact. See supra note 101 for a comprehensive list of judicial waiver statutes.
234. See id. at 784.
juvenile shall be transferred. In other cases, amenability factors, if found to exist, would prescribe that the judge keep the individual in the juvenile court system. Only some amenability factors, therefore, would enhance a juvenile’s potential sentence. Only those factors possibly could fall under Apprendi’s rule. The Supreme Court in Apprendi was not concerned with factors that, if found to exist, would only mitigate a defendant’s sentence. A judge, therefore, could determine those mitigating factors even if the Apprendi rule applied.

It is true that amenability findings predict a juvenile’s future conduct, rather than determine his past conduct. The Supreme Court, however, has questioned a judge’s “superior” authority in making such complex determinations in other types of sentencing. Indeed, the thirty-five states that have enacted legislative and prosecutorial waiver statutes already have decided that a state legislature or a charging prosecutor is as qualified as a judge to determine which individuals are not fit for treatment in juvenile court. Surely a group of jurors, who in a criminal trial would be qualified to determine one’s motive, bias, or credibility, are just as qualified to consider one’s propensity for rehabilitation.

At any rate, amenability findings are only one part of the determination that must be made under the judicial waiver statutes. In legislative waiver and prosecutorial waiver situations, a juvenile’s amenability is not a required determination at all. The presence of a jury, therefore, would not have a significant effect on the transfer process for this reason alone.

235. For example, the Minnesota judicial waiver statute mandates that, in most circumstances, the juvenile shall be transferred to criminal court unless the judge finds by “clear and convincing evidence” that public safety would be served by keeping the young defendant in the juvenile system. MINN. STAT. ANN. § 260B.125 (West 2003).

236. The Minnesota statute, which does impose a presumption of waiver under certain circumstances, allows a judge to rebut this presumption upon finding that the existence of certain factors—such as seriousness of the alleged offense, the juvenile’s level of participation in committing the offense, the juvenile’s prior record and responsiveness to past treatment, and the adequacy of the dispositional options available in the juvenile court system—indicate that “public safety” would be served by keeping the individual in the juvenile court system. Id.


238. See Gonzales, 24 P.3d at 784.

B. Policy Arguments Favoring a Jury Requirement

Undoubtedly, the ideal juvenile court system has not been realized. No longer are all juveniles regarded as "vulnerable, fragile, and dependent innocents."\(^{240}\) The enactment of transfer statutes by every state legislature reflects this transition in popular opinion. Although judicial waiver statutes leave a moderate amount of discretion to the judge over whether to authorize the transfer, legislative waiver statutes leave no discretion at all. Prosecutorial waiver statutes, meanwhile, leave absolute discretion to the charging prosecutor, who may authorize a transfer for any reason. None of these systems is perfect. Although some states have attempted to minimize these imperfections—such as through reverse waiver statutes—no absolute safeguard exists. Indeed, in the states that have enacted termination statutes, the imperfections of the transfer process cannot be rectified once a juvenile has been transferred, tried in criminal court, and convicted.

Having a jury determine the facts necessary to transfer a juvenile to criminal court will not eliminate all the imperfections of the transfer proceeding. No aspect of the criminal process, after all, is flawless. A jury requirement, however, will hold a transfer proceeding to the same standard as the criminal trial to which the juvenile would be transferred. In setting the same high standard, a jury requirement will bring with it additional policy benefits.\(^{241}\)

A jury trial, for example, will help to involve the community in the disposition of juvenile offenders. The recent changes in the juvenile court system reflect in part a societal unease in the way it was being run.\(^{242}\) Entrusting some juvenile waiver decisions to representatives of the community could inspire public confidence in the system. Some court opinions have suggested that the jury’s lack

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241. The policy arguments discussed in the remainder of this section are only illustrative, because this Note’s central argument concerns the *legal* applicability of *Apprendi v. New Jersey* to juvenile transfers. As predicting the actual impact of *Apprendi*’s application is difficult, if not impossible, one certainly might question the validity of these policy arguments. The potential impact alone, however, does not in any way affect the validity of this Note’s central argument.

242. *See supra* notes 69-72 and accompanying text.
of experience in juvenile matters would be a liability.\textsuperscript{243} Yet, not only has the Supreme Court recently cast doubt on that assumption,\textsuperscript{244} but the jury's "lack of experience," as it were, has an added advantage. Members of a jury, who unlike judges do not render judgment in criminal matters on a nearly daily basis, likely would exercise greater caution in making their decision.\textsuperscript{245} This cautious approach would help to prevent what have been described as the unavoidable "inequities and disparities" of the judicial transfer process.\textsuperscript{246}

The outcome of almost all Supreme Court decisions in this area has been the extension of procedural rights to juvenile proceedings; \textit{McKeiver} was an exception to the rule. These decisions all have indicated that such extensions would not disrupt the unique nature of the juvenile court system. Imposing a jury requirement on certain transfer proceedings will not seriously disrupt the system, either. In fact, it ultimately might create a more efficient system. A jury that considers the facts more carefully than a judge who makes such findings every day could more effectively weed out the juveniles who truly should be treated as adults. The presence of several jurors in the transfer proceeding also could more impressively signal the gravity of the situation to an individual who is in danger of losing his juvenile status.\textsuperscript{247}

\textbf{C. How the Jury Requirement Could Safely Apply}

As this Note has argued, juvenile transfer decisions should not be exempt from \textit{Apprendi}'s jury requirement. Other than the fact of a prior conviction, any unstipulated factual findings needed to enhance a juvenile's sentence, such that he could be tried in juvenile court but instead will be tried in criminal court, should be

\begin{footnotesize}
\textsuperscript{244} See \textit{Ring} 536 U.S. at 607.
\textsuperscript{245} See \textit{McKeiver}, 403 U.S. at 565-66, 568-69 (Douglas, J., dissenting).
\textsuperscript{246} See Feld, supra note 8, at 704-05. Inconsistent court decisions and evidence of "arbitrary, capricious, and discriminatory" judicial decisions indicate that the same transfer hearing might be decided differently depending on the particular jurisdiction in which it takes place, or even the particular judge presiding over the hearing. See \textit{id.} at 704.
\textsuperscript{247} See \textit{McKeiver}, 403 U.S. at 563-64 (Douglas, J., dissenting).
\end{footnotesize}
What is left to determine is how this rule would affect the existing transfer statutes. The statutes may be revised in a way that incorporates the *Apprendi* rule without destroying the function either of the transfer process or the juvenile court system in general. This Note now will explain exactly how this may be accomplished.

1. Judicial Waiver

Judicial waiver statutes mandate that a judge, under certain circumstances, must decide whether a juvenile meets the prerequisites for transfer, or instead is amenable to treatment in juvenile court. These statutes may be modified to incorporate the jury requirement in the same way as any other sentencing practice falling under *Apprendi's* influence. First, the statutes should be revised to require that a jury make any preliminary factual finding that a given statute may mandate. The jury should find the necessary facts beyond a reasonable doubt. One might argue that requiring a reasonable doubt standard contradicts the Supreme Court's holding in *Breed v. Jones*.\(^{249}\) Having a jury decide the facts that would transfer a juvenile to criminal court, only to have a second jury decide the facts necessary to convict the juvenile in the eventual trial, might fall too close to a Double Jeopardy violation. This argument is not sufficient to justify a denial of the jury requirement, however. If the juvenile's substantial interest in a jury requirement were weighed against the potential burden he might suffer by appearing before two separate juries, surely the benefit would outweigh the burden. In addition, the jury making the transfer determination would consider different factors than the jury making the determination of guilt. The first jury would be more concerned with the juvenile's chances for rehabilitation than with the details of the offense itself, other than what it shows of

\[\text{248. See } \textit{Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Any argument favoring or opposing the inclusion of prior juvenile adjudications as "prior convictions" is beyond the scope of this Note. But see supra notes 162-68 and accompanying text for a brief overview of this issue.}\]

\[\text{249. See supra notes 98-100 and accompanying text. As discussed earlier, a slim majority of states also require that the judge make a limited factual finding. See supra notes 102-03 and accompanying text.}\]

\[\text{250. 421 U.S. 519 (1975).}\]
the juvenile's character. The second jury, meanwhile, would decide de novo only whether the facts themselves support a conviction in criminal court.

As discussed before, not all amenability findings necessarily require a jury under Apprendi. Amenability factors that serve to keep an individual in the juvenile court system do not violate Apprendi even if a judge, rather than a jury, finds that they exist. Such factors do not enhance a juvenile’s sentence beyond the statutory maximum afforded by the juvenile court system. Only factors that would mandate or authorize the judge to transfer the juvenile to the criminal court system are subject to Apprendi. An individual state could resolve this conflict in one of two ways. If it wishes, it simply could allow juries to make all amenability findings. As explained before, juries are not necessarily inferior determiners of a juvenile's amenability to rehabilitation. In some ways, in fact, they may be superior to judges.

If a state does not believe this to be the case, it still may revise its statute in a way that satisfies the jury requirement but does not eliminate the amenability hearing entirely. The statute could impose a presumption of transfer once the preliminary factual finding, if any, has been satisfied. Any amenability findings would serve to rebut this presumption. In other words, only factors that indicate a juvenile may be amenable to treatment in juvenile court would be considered. Absent these factors, a juvenile automatically may be transferred to criminal court after a jury makes any preliminary factual finding that may be required. Because the factors only would serve to keep an individual in juvenile court, rather than enhance his potential sentence by sending him to criminal court, a judge may make this determination without violating Apprendi.

251. See supra notes 99-100 and accompanying text; cf. Breed, 421 U.S. at 535-36 (suggesting that transfer decisions violate the Double Jeopardy Clause only when they reproduce the adjudication process).
254. See supra Part IV.A.4.
2. Legislative Waiver

Legislative waiver statutes provide that when a juvenile, usually of a certain minimum age, is charged with certain serious offenses, that juvenile automatically will be sent to criminal court. The effect of such statutes, unlike judicial waiver and prosecutorial waiver statutes, is that the juvenile never faces the possibility of treatment in juvenile court. For this reason, legislative waiver statutes do not violate Apprendi.

Certainly, powerful arguments against this type of statute abound. Many commentators have pointed out that the automatic nature of legislative waiver, which provides absolutely no room for discretion, violates the juvenile's due process rights. This may be so; however, one right that it does not violate is the right espoused in the Apprendi decision. Legislative waiver is not a matter of determining whether a given fact is a sentencing factor or an element of a crime. The juvenile is not left in the dark as to whether he will be sent to criminal court. If he commits a certain offense, and he is of a certain age, he will be sent to criminal court. His potential sentence was not enhanced by being tried in criminal court, for the only applicable sentencing range from the beginning was that which applies to criminal defendants. Apprendi, therefore, does not affect the constitutionality of these statutes.

3. Prosecutorial Waiver

Like legislative waiver statutes, prosecutorial waiver statutes give prosecutors authority to send certain juveniles to the criminal court system without having to make any formal factual or amenability determinations. The difference, however, is that the juvenile's fate ultimately lies in the prosecutor's discretion. Until the prosecutor makes his decision, the juvenile is left in the dark as to whether he will be adjudicated in juvenile court or tried as an adult in criminal court.

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255. See supra note 107 and accompanying text.
256. See supra notes 110-11 and accompanying text.
258. See supra note 112 and accompanying text.
259. Cf. Apprendi, 530 U.S. at 498 (Scalia, J., concurring) (arguing that the criminal who receives a greater sentence “than he bargained for when he did the crime” was treated
Other critical differences exist between prosecutorial waiver and legislative waiver statutes. Prosecutorial waiver decisions are especially subject to unfairness, political bias, and overcharging. Indeed, prosecutorial waiver statutes already impose fewer procedural limits on the charging prosecutors than judicial waiver statutes place on juvenile court judges. If judicial waiver decisions, in their present form, do not meet Apprendi standards, surely prosecutorial waiver decisions do not either.

Apprendi, of course, dealt only with judge-made decisions. Its holding, however, did not specify which entities may not make sentence enhancement decisions. It required, rather, that one particular entity—the jury—make all such decisions. Apprendi's applicability, therefore, is not affected if a prosecutor, rather than a judge, makes the transfer decision.

No easy way exists to remedy the prosecutorial waiver statutes, other than the method suggested in Commonwealth v. Quincy Q: before a trial may commence, a jury must determine whether the prosecutor's decision to charge the juvenile in criminal court was appropriate. That requirement, of course, would almost defeat the very purpose of prosecutorial waiver. The best solution simply may be to abolish such statutes entirely. The various states could replace them with judicial waiver or legislative waiver statutes, or both. This would not pose a serious administrative problem. Of the twelve states that currently have prosecutorial waiver statutes, only two do not already have judicial or legislative waiver statutes.

4. Post-waiver Statutes

Neither reverse waiver nor termination statutes seem to be affected by the Apprendi rule. Reverse waiver statutes serve to send

unfairly if a jury did not decide all the facts that increased the sentence).

260. See supra notes 114-15 and accompanying text.
261. See supra Part II.B.3.
263. Prosecutorial waiver statutes, in a sense, serve to speed up the adjudication process by bypassing the relative formality of a judicial hearing. See supra Part II.B.3.
264. See MASS. GEN. LAWS. ANN. ch. 119, § 54 (West 2003); NEB. REV. STAT. ANN. § 43-261 (LexisNexis 1998). Of these two states, Massachusetts already has imposed a jury requirement. See Quincy Q., 753 N.E.2d at 789-90.
an individual who currently falls under criminal court jurisdiction back to the juvenile court system. Any factual or amenability determinations such statutes authorize could not possibly violate Apprendi, as they would not enhance the juvenile's potential sentence. If anything, they only would mitigate it. Termination statutes, meanwhile, are similar to legislative waiver statutes in that they mandate that certain juveniles shall be tried in criminal court. Such juveniles know for certain that, by being tried and convicted of certain offenses in criminal court, they shall be tried in criminal court for any subsequent offenses. For the same reasons that legislative waiver statutes remain unaffected by Apprendi, therefore, so do termination statutes.

CONCLUSION

Few people would argue that the juvenile court system has lived up to the ideals of the Progressive movement. Until these ideals are met, the best alternative is for courts to continue to consider and modify the procedural rights applicable to juvenile proceedings. The U.S. Supreme Court has done just that since In re Gault.

This Note does not rebut the juvenile transfer process in its entirety. It merely makes an argument about which rights should be granted for such proceedings. The procedures of these proceedings cannot remain firmly in place while the law's ever-changing view of sentencing practices moves forward. Apprendi v. New Jersey reflects this movement. In order to maintain its proper function, juvenile transfer proceedings must be subject to this movement. A guarantee that a jury will make the necessary findings is but a minor burden to place on a decision to subject a juvenile to the trial and punishment of an adult. Indeed, given the Supreme Court's recent holding in Apprendi, it is an essential right that should be afforded all juveniles facing that possibility.

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266. See supra Part IV.C.2.
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