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Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process

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Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: *Apprendi*, Adult Punishment, and Adult Process

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This Article makes valuable new contributions to the burgeoning scholarly discourse on Apprendi v. New Jersey*—a landmark decision that celebrates its tenth anniversary this year. It builds on the Author's experience as a public defender, during which she pioneered the surprising but straightforward argument that under* Apprendi, *findings that justify transferring a juvenile to adult court must be proven to a jury beyond a reasonable doubt.* Apprendi *requires that any fact authorizing a sentence higher than the otherwise applicable statutory maximum must be found by a jury using a beyond a reasonable doubt standard. This tenet applies directly to juvenile transfer hearings, which rely on a consideration of facts to determine whether a juvenile should face trial and sentence in adult court. The facts that serve as a basis for transfer result in exposure to a higher sentence than could be imposed if the offender remained in juvenile court. Despite* Apprendi*'s readily apparent application, juvenile courts have refused to apply* Apprendi *to juvenile transfer hearings. This Article presents this argument and critiques the reasoning of courts that have refused to apply* Apprendi *in this context. It then explores the theoretical underpinnings of courts' reluctance to apply* Apprendi, *filling a scholarly void that exists at the intersection of* Apprendi *and the juvenile justice system.*

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INTRODUCTION

Every day in the United States, children are tried and sentenced as adults. These children's convictions are the result of a system where children are transformed, via legal fiction, into adults despite the fact that they have not reached the age of majority. In the process, children are moved from the juvenile justice system to the adult court system for the

purpose of a criminal trial.[1] This process is unique in the area of criminal law as it removes the child from the relatively protective confines of the juvenile justice system, and forces him or her to stand trial in and face the consequences of judicial and penal systems that are designed to address the crimes of adults.[2]

Other legal prohibitions based on age do not adopt similar legal fictions. Especially mature thirteen-year-olds cannot petition for the right to drink alcohol, drive a car, or vote. They cannot buy tobacco or pornography. They are not forced to register for the draft or leave their junior high schools. They cannot serve on juries. In most states they cannot marry or sign binding contracts or even get a credit card without their parents' permission.[3] Such legal prohibitions exist in no small part out of a recognition that juveniles lack the level of maturity necessary to assume the responsibilities that accompany each right or privilege.[4] But states are more than happy to reward a juvenile's criminal precociousness with an adult prosecution and sentence. States have sought to transfer juveniles to adult court not only for the sort of high-profile crimes that end up in the national media spotlight,[5] but for more

1. Such proceedings are identified by various names: transfer, waiver, decline, or certification. Regardless of the name used to identify the proceeding, the underlying goal—to move a minor from juvenile to adult court—remains the same.

2. Questions regarding the constitutionality of such systems of transfer, and the resulting sentences, have recently sparked judicial interest. The Supreme Court has accepted certiorari on two Florida cases in which juveniles received life sentences without the possibility of parole after they were transferred to the adult court system. *See* Sullivan v. State, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7621); Graham v. State, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7412); *see also* Petition for Writ of Certiorari, Sullivan v. State, No. 08-7621, 2008 WL 6031406, at *2, *9–10, *19 (U.S. Dec. 4, 2008). The cases question whether or not the sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See Sullivan*, 987 So. 2d at 83; *Graham*, 982 So. 2d at 46–49. While the cases do not challenge the transfer of the juveniles to the adult court system, they do represent a continuing trend of questioning the constitutional appropriateness of assigning adult roles and punishments to juvenile offenders. *See, e.g.*, *Sullivan*, 987 So. 2d at 83; *Graham*, 982 So. 2d at 46–49.

3. For a more complete list on restrictions of juveniles, see Brief of Juvenile Law Ctr. et al. as Amici Curiae Supporting Respondent at 7–11, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1660637, at *7–11.

4. The Supreme Court acknowledged the law's recognition of the immaturity of juveniles and its effect on legal concepts in *Roper*, 543 U.S. at 569, holding that defendants could not be executed for crimes committed as juveniles in no small part because they lack maturity and suffered an underdeveloped sense of responsibility. There are methods by which juveniles may petition for "emancipation" whereby they can become "adults" in the eyes of the law after establishing maturity and their ability to provide for themselves. *See* Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 240 (1992) (discussing the process of statutory emancipation whereby "minors attain legal adulthood before reaching the age of majority"). But even after emancipation, the juvenile is still precluded from enjoying all the "benefits" of adulthood. They cannot, for example, drink, gamble, or patronize adult-only establishments. *Id.* at 241 (noting that while emancipated minors enjoy certain benefits from achieving the legal status of adulthood, such benefits do not encompass all aspects which accompany actual, biological adulthood).

5. The first weeks of 2009 witnessed the shocking story of an eleven-year-old boy accused of

mundane crimes as well. Such transfers are an increasing trend across the country.[6]

Statutes defining the parameters of juvenile transfer proceedings vary from state to state, but every state has adopted some method to remove children accused of crimes from the juvenile justice system, whether it be judicial waiver of juvenile court jurisdiction, legislative exclusion of offenses from juvenile court jurisdiction, or prosecutorial choice of forum between concurrent jurisdictions.[7] Likewise, the constitutional, evidentiary, and procedural protections juveniles receive in these proceedings vary from state to state.[8] Despite the enormous consequences that flow from the decision to transfer a juvenile offender to an adult court, the Supreme Court has given surprisingly little guidance on the procedures required to remove children from the protections of juvenile court, except to hold that a hearing, no matter how informal, must occur prior to the transfer, and that the court must make certain findings to justify the transfer.[9] In many jurisdictions, this laissez faire attitude toward the particulars of transfer renders the child's removal from the juvenile court system a fait accompli once the state petitions for the transfer.[10]

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fatally shooting his father's pregnant girlfriend; prosecutors have vowed to try the child as an adult. *See* Jill King Greenwood, *DA: Boy Who Shot Father's Pregnant Girlfriend Was Jealous*, PITTSBURGH TRIB.-REV., Feb. 23, 2009, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/breaking/s_613048.html; *see also* John Dougherty, *Prosecutors Say Boy, 8, Methodically Shot His Father*, N.Y. TIMES, Nov. 11, 2008, at A19 (discussing prosecutors' and law enforcement officials' hopes to have eight-year-old boy accused of killing his father and another man transferred to the adult court system); Patrick T. Murphy, Op-Ed., *Convicted at 14*, N.Y. TIMES, May 17, 2001, at A25 (discussing transfer and convictions as adults of two fourteen-year-old Florida boys).

6. *See* Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, 23 CRIM. JUST. 61, 61 (2008) (noting the trend of transferring juvenile crimes to the adult court system). *See generally* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189 (1998) (examining statutory changes in juvenile transfer proceedings and the effect such changes have had on increased numbers of juveniles being tried as adults).

7. U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS, REP. NO. 170, at 8–9, 64–89 (1995) (summarizing juvenile court transfer legislation); Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979–1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 23–33 (1995) (offering a state-by-state comparison of juvenile transfer methods).

8. *See infra* Part I.C.

9. Kent v. United States, 383 U.S. 541, 561–62 (1966).

10. *See generally* Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 521–22 (2004) (discussing growing trend to facilitate transfer of juveniles to adult court); Martha June Rossither, Comment, *Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society*, 27 J. JUV. L. 123, 129–30 (2006) (discussing trend fueled by fears of juvenile violence to make transfer process easier for prosecutors despite lack of evidence supporting its deterrent effect); Daniel E. Traver, Comment, *The Wrong Answer to a Serious Problem: A Story of School Shootings, Politics and Automatic Transfer*, 31 LOY. U. CHI. L.J. 281, 293 (2000) (discussing Cook County's efforts to ensure transfer of juvenile offenders); JOLANTA JUSZKIEWICZ, BUILDING BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2008), *available at* http://

This reality is disconcerting given the impact of transfer—a transferred child faces the full force of the adult conviction and punishment with none of the protections normally afforded a minor.[11] A young but active line of Supreme Court cases, beginning with *Apprendi v. New Jersey*,[12] may change all that. The *Apprendi* decision, which celebrates its tenth anniversary this coming Supreme Court Term, has already had a tremendous effect on criminal justice at the state and federal levels. *Apprendi* and its progeny—*Ring v. Arizona*,[13] *Blakely v. Washington*,[14] *United States v. Booker*,[15] and *Cunningham v. California*[16]—have reshaped the constitutional law of criminal procedure and garnered a tremendous amount of scholarly attention.[17] As one federal judge recently noted, "*Apprendi* is fast becoming one of the most-cited Supreme Court cases ever."[18] Courts and commentators have largely failed to appreciate, however, that the logic of *Apprendi* compels a fundamental rethinking of the constitutionally required procedures for transferring a juvenile offender to adult court.[19]

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www.buildingblocksforyouth.org/ycat/ycat.html (noting growing trend in states to insure ready transfer particularly of children of color and underprivileged children).

11. *See Kent*, 383 U.S. at 557 (noting that transfer can bring hefty differences in sentencing and deprives juveniles of protections provided by the juvenile court system); *see also* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentencing Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1215 (2003) ("Because judicial waiver is a form of sentencing decision that represents a choice between the punitive sentences in criminal courts and the shorter, nominally rehabilitative dispositions available to juvenile courts, it increases the maximum penalties that juveniles face."); Juan Alberto Arteaga, Note, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1061 (2002) (articulating the increased sentencing and collateral effects of transfer on juveniles).

12. 530 U.S. 466 (2000).

13. 536 U.S. 584 (2002).

14. 542 U.S. 296 (2004).

15. 543 U.S. 220 (2005).

16. 549 U.S. 270 (2007).

17. *See, e.g.*, Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465 (2001); Stephanos Bibas, *Judicial Fact Finding and Sentencing Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001); Joseph L. Hoffman, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255 (2001); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387 (2001); Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001); Steven A. Saltzburg, *Due Process, History and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243 (2001); Jeffrey Standen, *The End of an Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775 (2001). A Westlaw search of articles using *Apprendi* in the title yields 106 documents, or roughly ten articles per year since the publication of the Supreme Court's ruling. The search was conducted in the "Journals & Law Reviews Database" on November 7, 2009. Likewise, a recent Westlaw search of articles citing *Apprendi* yields over 1700 documents, or roughly 170 articles per year since the decision. This search was conducted using the "citing references" feature, and was restricted by "Law reviews."

18. United States v. Kandirakis, 441 F. Supp. 2d 282, 286 n.15 (D. Mass. 2006).

19. *See* Feld, *supra* note 11, at 1221–27 (contending that *Apprendi* is not appropriately applied to juvenile transfer hearings); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional*

Put simply, the *Apprendi* holding requires that any fact, other than a prior conviction, that exposes a defendant to a sentence in excess of the statutory maximum that would otherwise apply must be found by a jury, not a judge, and must be established beyond a reasonable doubt.[20] The holding in *Apprendi* rests on two constitutional principles: the Sixth Amendment's right to trial by jury in most criminal cases and the Fourteenth Amendment's due process requirement of proof beyond a reasonable doubt in criminal cases.[21] The decision to transfer a child removes him or her from the juvenile court system and places him or her in an adult court system with higher sentences and increased collateral consequences. In short, a transfer to an adult court system has the effect of increasing the child's sentence beyond the otherwise authorized statutory maximum. The findings that justify such a transfer expose the juvenile to higher statutory maximum sentences than he or she would face if tried in the court of primary jurisdiction, the juvenile court system. Therefore, *Apprendi* would seem to require such findings to be proven to a jury beyond a reasonable doubt. Yet nearly every court to consider this issue has refused to apply *Apprendi*'s promise to juvenile transfer decisions.[22] Every day, judges (not juries) continue to weigh facts, using a mere preponderance-of-the-evidence standard or less, to determine whether juveniles should be removed from juvenile court and transferred to the adult court system.[23] These courts' decisions not to apply *Apprendi* to juvenile transfer proceedings are contrary to a plain reading of the *Apprendi* case line, and ignore the true impact and frequently articulated

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Law at Cross-Purposes, 105 COLUM. L. REV. 1082, 1121 (2005) (arguing that it is unlikely that courts would find *Apprendi* applicable to juvenile transfer hearings). *But see* Daniel M. Vannella, Note, *Let the Jury Do the Waive: How* Apprendi v. New Jersey *Applies to Juvenile Transfer Proceedings*, 48 WM. & MARY L. REV. 723, 751–70 (2006) (noting that most courts have declined to apply *Apprendi* to juvenile transfer hearings and arguing that *Apprendi* should be applied to juvenile transfer hearings, though pointing out there may be practical difficulties in the application).

20. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

21. *Id.* at 476–77.

22. Two courts have held the *Apprendi* case line applicable to the sentencing of juveniles as adults. First, the Massachusetts Supreme Court held that *Apprendi* requires that decisions to transfer juveniles to adult court be made by a jury using a beyond-a-reasonable-doubt standard. *See* Commonwealth v. Quincy Q., 753 N.E.2d 781, 789 (Mass. 2001), *overruled on other grounds by* Commonwealth v. King, 834 N.E.2d 1175, 1201 n.28 (Mass. 2005). More recently, the New Mexico Court of Appeals held that determinations of amenability—a postconviction assessment which serves as a basis for imposing adult sentences on juveniles—are subject to the protections of *Apprendi*. *See* State v. Rudy B., 2009 NMCA 104, 216 P.3d 810 (N.M. Ct. App. 2009) (overruling State v. Gonzales, 24 P.3d 776 (N.M. Ct. App. 2001)), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf.

23. *See* Vannella, *supra* note 19, at 739–40 (noting that twenty states only require a probable cause finding for transfer, seven states only require a preponderance of the evidence standard for transfer, and no state requires a beyond-a-reasonable-doubt standard).

goal of transfer proceedings—to subject the juvenile offender to the harsher sentencing scheme only available in the adult justice system.[24]

There are several potential explanations for courts' reluctance to heed *Apprendi* in this context. One is that doing so would introduce juries into the juvenile justice system. The Supreme Court has long held that a juvenile who remains in juvenile court is not constitutionally entitled to have a jury assess his or her culpability.[25] Instead, judges in most jurisdictions weigh children's guilt and mete out appropriate punishments based on their findings of culpability.[26] Courts and scholars justify this abandonment of the Sixth Amendment's most basic tenet by clinging to an ideal of a nurturing and reformative juvenile justice system that embraces the possibility of rehabilitation for young offenders.[27] Whatever the merits of this view, the general aversion to juries in juvenile court is wholly inappropriate in the context of a transfer hearing, where the very issue is whether the juvenile is to be transplanted from that ostensibly nurturing system into an adult court with adult punishments.

Another explanation is that *Apprendi* forces courts to confront some uncomfortable realities about juvenile transfer. By mandating that "the relevant inquiry is one not of form, but of effect,"[28] *Apprendi* prevents courts from swaddling themselves in the euphemistic fiction that transfer decisions are merely jurisdictional or non-adjudicatory determinations. Where the *effect* of a particular finding is to impose a sentence higher than is otherwise authorized, that finding must be treated as an element of the offense for Sixth and Fourteenth Amendment purposes.[29] More troubling is the fact that in the case of juvenile transfer decisions, this element is fundamentally based on the identity of the accused, as defined by the transferring court. The transfer decision alters the child's identity into one that makes him or her simultaneously more culpable and less redeemable—that of an adult. Yet premising criminal culpability on the accused's identity does not sit well with the American criminal justice system.[30] In the context of the juvenile transfer hearing, the court is not only making an assessment of the juvenile's culpability based on identity,

24. *See* Arteaga, *supra* note 11, at 1051–52 (discussing federal movement to implement "severely retributive reforms" through, among others means, increased juvenile transfer rates); Feld, *supra* note 11, at 1215; Rossither, *supra* note 10, at 123, 129–30 (discussing transfer as a means of shifting concern from rehabilitation of juveniles to retribution and deterrence).

25. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion).

26. *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 303 & n.369 (2007) (noting that only eleven states grant juveniles a statutory right to a jury, the remaining rely on judges to assess guilt).

27. *McKeiver*, 403 U.S. at 538–40, 547 (plurality opinion).

28. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

29. *Id.*

30. *See infra* Part IV.

but on an identity that the court has created—that the child is an adult and warrants an adult's punishment. In other words, the court is basing the higher sentence on the child's condition of being a child who no longer merits juvenile court protection—an irredeemable child. Courts' refusal to apply *Apprendi* may be a product of cognitive dissonance that prevents them from recognizing these unpleasant realities and, instead, leads them to evade *Apprendi*'s obvious relevance to transfer decisions.

This Article argues that *Apprendi* and its progeny should and must apply to juvenile transfer proceedings. Part I of the Article examines the constitutional requirements within the juvenile justice system generally. It chronicles the roots of the modern juvenile justice system in the reformist movement and the system's evolution into one which requires fewer constitutional safeguards in exchange for the promise of a greater possibility of rehabilitating the offender. It then specifically focuses on juvenile transfer hearings, which currently require minimal constitutional protections and, in most jurisdictions, consist of a hearing before a judge using a standard less than beyond a reasonable doubt. In these hearings, procedural protections provided by evidentiary rules and the right against self-incrimination are suspended or modified. Only a minimum of process, as articulated by the Court in the *Kent v. United States*[31] decision, is offered. As a result of the minimal procedural protections, including the low standard of proof required, judges rarely refuse a prosecutor's request for transfer.

Part II focuses on the Court's analyses in *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* and the Court's conclusion that findings by a jury using a beyond-a-reasonable-doubt standard are required in order to justify imposition of a criminal sentence in excess of the statutory maximum that would apply. Each of these decisions reiterated the Court's original holding in *Apprendi* that, regardless of the label assigned to the fact by the Court, any fact which increases the defendant's sentence beyond the otherwise authorized statutory maximum is an element of the offense that must comply with the requirements of the Sixth and Fourteenth Amendments.

Part III applies *Apprendi*'s analysis to juvenile transfer proceedings. It urges that because the effect of transfer proceedings is to extend the juvenile's sentence beyond that which he or she would have received in the juvenile court, *Apprendi* requires the findings justifying transfer to be made by a jury under a beyond-a-reasonable-doubt standard. This Part also examines arguments courts have relied on in refusing to apply *Apprendi* to juvenile transfer proceedings—that transfer hearings merely determine jurisdiction and do not adjudicate guilt, and that juvenile court

31. 383 U.S. 541 (1966).

is different and so the procedural protections mandated by *Apprendi* are inapplicable or inappropriate. The Article explains why such arguments do not withstand scrutiny. Instead, they appear to be efforts by the courts to relabel what, under *Apprendi*, must be treated as elements of the offenses.

Part IV considers the theoretical basis for courts' reluctance to apply *Apprendi* to juvenile transfer hearings. It examines the courts' struggles to recognize the true effect of transfer proceedings, namely, to increase the child's punishment and to criminalize the condition of being an especially unruly child incapable of reform. Part V addresses outstanding questions raised by attempting to apply *Apprendi* to juvenile transfer proceedings, including how these protections might be implemented in practice. The Article concludes that *Apprendi*'s procedural requirements are applicable to juvenile transfer proceedings and must be applied.

I. OLD SCHOOL: TWENTIETH-CENTURY STANDARDS FOR JUVENILE TRANSFER HEARINGS

This Part summarizes the traditional standards for juvenile transfer hearings. Section A provides a short history of juvenile justice systems. Section B describes the Supreme Court decisions that deal explicitly with the constitutional requirements for juvenile transfer hearings, beginning with the Court's decision in *Kent v. United States*.[32] Section C summarizes the different procedures that states have adopted for juvenile transfer hearings.

A. A BRIEF HISTORY OF JUVENILE COURT

The history of juvenile courts is well documented and analyzed. Juvenile court systems arose in response to changes in social attitudes about childhood and delinquency.[33] Inherent in these new social attitudes was a notion that children required supervision and socialization in order to become productive members of society and that, with proper supervision, even a delinquent child could be "redeemed."[34] In response to these changing social attitudes, court systems were created to adjudicate juvenile offenders.[35] These systems rejected the jurisprudence and procedural formalities of the adult court system.[36] Instead,

32. *Id.*

33. *See* FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25–41 (1964). *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978).

34. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1098–1101 (1991).

35. *See id.*

36. *See* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 212–25 (1980); RYERSON, *supra* note 33, at 38–39; Ainsworth, *supra* note 34.

proceedings were conducted in private and focused as much on the child's social history as the particulars of his or her alleged offense.[37] The courts reasoned that procedural protections and constitutional rights akin to those found in the adult court system had no place in a juvenile court system that sought not only to discipline the child, but also to reform and save him or her.[38] Matters involving juvenile offenders were treated as "domestic" issues to be addressed by those who were best able to determine the needs of the child.[39] Constitutional "technicalities" had no place in this realm, and juries were excluded from the proceedings.[40] Instead social workers, probation officers, and judges investigated and decided both the source of and the solution for the child's delinquency.[41] The "sentences" imposed by these courts varied greatly, but always articulated a goal of addressing the child's character and lifestyle, and always terminated at the age of majority (usually either eighteen or twenty-one).[42]

The Supreme Court's ruling in *In re Gault* began to shift the focus of the juvenile court from an assessment of the child's needs to a determination of his or her criminal liability as a prerequisite for sentencing.[43] *Gault* rejected the informality of juvenile court systems, noting that "unbridled discretion, however benevolently motivated, is a poor substitute for principle and procedure."[44] *Gault*, therefore, held that the Constitution entitled juvenile defendants to notice, assistance of counsel during all stages of the proceedings, privileges against self-incrimination, and the right to confront and cross-examine witnesses.[45] Three years later, the majority in *In re Winship* expanded the procedural protections applicable to juvenile court to include the Fourteenth Amendment's beyond-a-reasonable-doubt standard.[46]

One year later, however, the Court pulled back from the trend of expanding protections for juvenile offenders. Despite the Court's warnings in *Gault* that lack of procedure would lead to arbitrary application of the law, a plurality in *McKeiver v. Pennsylvania*[47] refused to extend the Sixth Amendment right to a jury trial to juveniles in the juvenile court system.[48] The plurality reasoned that *Gault* and subsequent

37. *See* Ainsworth, *supra* note 34, at 1100–01.
38. *See id.*; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).
39. *See* ROTHMAN, *supra* note 36, at 212–25; Ainsworth, *supra* note 34, at 1100–01.
40. *See* Ainsworth, *supra* note 34, at 1100–01.
41. *See* Ainsworth, *supra* note 34, at 1100–01; Feld, *supra* note 11, at 1139–40.
42. *See supra* note 41.
43. 387 U.S. 1, 13–18 (1967).
44. *Id.* at 18.
45. *Id.* at 33–34, 36–41, 45–57.
46. 397 U.S. 358, 361–68 (1970).
47. 403 U.S. 528 (1971).
48. *Id.* at 545–51 (plurality opinion).

cases that extended procedural protections to juvenile court did so in the interest of promoting "fundamental fairness" and accurate fact-finding.[49] These goals, the *McKeiver* plurality reasoned, were just as likely to be realized using a judge or a jury.[50] The *McKeiver* plurality did not undo the procedural protections of *Gault* and *Winship*.[51] Nonetheless, the *McKeiver* plurality evoked the pre-*Gault* image of the juvenile court system as presided over by a sympathetic, paternalistic judge who had the child's best interests at heart. It rejected the notion that juvenile delinquents required a jury as protection from government oppression and arbitrary judges.[52] In his dissent, Justice Douglas warned that the plurality's return to the pre-*Gault* image of the juvenile court seriously underestimated the jury's potential role in assuring the fairness of the process.[53] Justice Douglas argued that in painting such a rosy image of the juvenile system, the plurality turned a blind eye to the fact that juvenile offenders in that system faced confinement until the age of majority, and so should be "entitled to the same procedural protection[s] as an adult."[54]

B. *KENT V. UNITED STATES*: THE SUPREME COURT SPEAKS

Despite the creation of juvenile court systems designed to reform and save the errant child, not all juveniles were considered appropriate candidates for the system. In *Kent v. United States*, the Court considered the case of Morris Kent, Jr. Kent was sixteen years old and charged with housebreaking, robbery, and rape.[55] As a minor, he was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court unless that court, after "full investigation," decided to waive jurisdiction and remit him for trial in the United States District Court for the District of Columbia.[56] Kent was no stranger to juvenile court.[57] Beginning at age fourteen, he was placed on probation and began to accumulate a "Social Service" file chronicling his criminal activity.[58] When in the case at issue, he was arrested and confessed—after a lengthy police interrogation—to committing a rape after breaking into a home to rob it, the possibility that the juvenile court might waive jurisdiction and remit Kent to trial in

49. *Id.* at 543.
50. *Id.* at 543–51.
51. *Id.* at 531–34.
52. *Id.* at 539–40, 543–51.
53. *Id.* at 562–63, app. at 563 (Douglas, J., dissenting); Feld, *supra* note 11, at 1145 (citing DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 107 (2003)).
54. *Id.* at 559.
55. 383 U.S. 541, 543 (1966).
56. *Id.* at 547.
57. *See id.* at 543.
58. *Id.*

the district court was very real.[59] His counsel made known "his intention to oppose waiver" before charges were even filed.[60] While Kent was held at a receiving home awaiting either an arraignment or a determination of probable cause, Kent's counsel had him examined by two psychiatrists and a psychologist.[61] He then requested a hearing on the question of waiver, and filed a copy of the affidavit of a psychiatrist certifying that Kent was "'a victim of severe psychopathology' and recommending hospitalization."[62] He argued that waiver to adult court was inappropriate because Kent could receive treatment in a hospital through juvenile court.[63] Kent's attorney noted that juvenile court, unlike the adult court system, had an articulated goal of rehabilitation.[64] Kent's suitability for rehabilitation therefore counseled against transfer.[65] In addition, Kent's counsel requested access to Kent's social service file, which the juvenile court judge would undoubtedly consider in determining whether to retain or waive jurisdiction.[66]

The juvenile court judge "did not rule on the motions," hold a hearing, or confer with Kent, his parents, or his counsel.[67] Instead, the judge entered an order reciting the requirements of the statute, and stating that after a "full investigation" transfer was appropriate.[68] The judge entered no findings, nor did he provide a basis for his decision.[69]

The U.S. Supreme Court held that while the District of Columbia's Juvenile Court Act may grant substantial latitude in determining whether to retain jurisdiction, such "latitude is not complete."[70] The juvenile court was still required to comply with the "basic requirements of due process and fairness" as well as hold a "full investigation."[71] The Court in *Kent* did not require this investigation to conform to the requirements of a criminal trial, or even an administrative hearing.[72] In fact, *Kent* offered little guidance as to the type of hearing the court should conduct, what facts it should consider, and what weight it should give those facts.[73] The Court did require that at a minimum the juvenile

59. *Id.* at 543–44 (citing D.C. CODE § 11-914 (1961)).
60. *Id.* at 544.
61. *Id.* at 544–45.
62. *Id.* at 545.
63. *Id.*
64. *See id.*
65. *See id.*
66. *Id.* at 546.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 552–53 (referring to D.C. CODE § 11-914 (1961)).
71. *Id.*
72. *Id.* at 562.
73. *See id.* at 557 (holding that the minor was entitled to a hearing without elaborating further). Despite the Court's effort to avoid a list of appropriate factors to be considered, in its appendix the

court allow the minor to participate, be aware of the proceedings, and receive representation.[74] The Court also concluded that such protections must exist at the waiver hearing, and could not be cured subsequently by protections afforded by the adult court system.[75] While the Court declined to explicitly extend Kent all the constitutional guarantees that would be applicable in an adult criminal court, it explicitly acknowledged that procedural protections were critical in a waiver hearing, because the outcome of the hearing would affect Kent's potential sentence.[76]

The Court's decision in *In re Gault*[77] came a year after *Kent*. With its holding in *Gault*, the Court made it clear that procedural guarantees for juvenile offenders, such as those identified in *Kent*, were of constitutional dimension and could not be withheld simply because a proceeding occurred in juvenile court, as opposed to adult court.[78] In 1975, the Supreme Court in *Breed v. Jones* continued to assign constitutionally significant procedural guarantees to the juvenile transfer process when it applied the Double Jeopardy Clause to transfer hearings, requiring prosecutors to choose the forum of prosecution before a hearing on the merits of the offender's guilt.[79]

C. Defining Basic Requirements of Due Process and Fairness in Transfer Hearings

Since the rulings in *Gault*, *Kent*, and *Breed*, state and federal legislatures have set up a range of standards and procedures for making transfer determinations. Most jurisdictions conclude that transfer hearings do not require adherence to strict rules of evidence or procedure present in trial proceedings. For example, the majority of

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Court provided a list of "determinative facts" that it determined were appropriate to be considered in deciding whether to waive or retain jurisdiction. *Id.* app. at 565–68. These eight factors have come to be known as the *Kent* factors and are frequently used as a guideline in transfer proceedings. *See, e.g.*, State v. Avery, 649 S.E.2d 102, 108 (S.C. Ct. App. 2007); Hidalgo v. State, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999).

74. *Id.* at 557.

75. *Id.* at 563–64 (reasoning that the juvenile court possessed a unique expertise to determine the appropriateness of waiver that the district court lacked).

76. *Id.* at 557 ("In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to [Kent] as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, [Kent] was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.").

77. 387 U.S. 1 (1967).

78. *Id.* at 13; *see* Irene Merker Rosenberg, Gault *Turns 40: Reflections on Ambiguity*, 44 Crim. L. Bull. 330, 334–37 (2008); *see also* Harris v. Procunier, 498 F.2d 576, 581 n.1 (9th Cir. 1974) (Hufstedler, J., dissenting) ("At the time of the *Kent* decision, there was some doubt that the requirement of counsel it announced was of constitutional dimension. . . . In re Gault . . . clarified the *Kent* decision . . . .").

79. 421 U.S. 519, 541 (1975).

jurisdictions have held that evidentiary rules prohibiting the use of hearsay do not apply in transfer proceedings,[80] with only Alaska,[81] Connecticut,[82] and South Dakota[83] applying evidence rules to transfer

80. Courts in many states have explicitly held that evidentiary rules, specifically hearsay rules, do not apply in juvenile transfer proceedings. *See, e.g.*, O.M. v. State, 595 So. 2d 514, 516 (Ala. Crim. App. 1991); *In re* Appeal in Pima County, 546 P.2d 23, 25 (Ariz. Ct. App. 1976); People v. Superior Court, 173 Cal. Rptr. 788, 793–96 (Ct. App. 1981); Drotzur v. State, 372 So. 2d 515, 516 (Fla. Dist. Ct. App. 1979); *In re* R.B., 448 S.E.2d 690, 691 (Ga. 1994); *In re* Dinson, 574 P.2d 119, 123–24 (Haw. 1978), *overruled on other grounds by* State v. Sanders, 76 P.3d 569, 571 (Haw. 2003); State v. Christensen, 603 P.2d 586, 589 (Idaho 1979); People v. Taylor, 391 N.E.2d 366, 372 (Ill. 1979); Clemons v. State, 317 N.E.2d 859, 863–67 (Ind. 1974); State v. Wright, 456 N.W.2d 661, 664 (Iowa 1990); Hazell v. State, 277 A.2d 639, 644 (Md. Ct. Spec. App. 1971); Commonwealth v. Watson, 447 N.E.2d 1182, 1185 (Mass. 1983); People v. Williams, 314 N.W.2d 769, 771–72 (Mich. Ct. App. 1981); *In re* Welfare of T.D.S., 289 N.W.2d 137, 140–41 (Minn. 1980); *In re* Three Minors, 684 P.2d 1121, 1124 (Nev. 1984) (noting, however, that hearsay evidence could not serve as the sole basis for transfer), *disapproved on other grounds by In re* William S., 132 P.2d 1015, 1021 & n.23 (Nev. 2006); State *ex rel.* A.T., 584 A.2d 861, 863 (N.J. Super. Ct. App. Div. 1991); State *ex rel.* B.G., 589 A.2d 637, 640 (N.J. Super. Ct. App. Div. 1991); People v. Giaccio, 96 N.Y.S.2d 912, 917–18 (Sup. Ct. 1950); Blore v. C.N., 301 N.W.2d 636, 640–41 (N.D. 1981); State v. Carmichael, 298 N.E.2d 568, 571–73 (Ohio 1973); C.G.H. v. State, 580 P.2d 523, 527 (Okla. Crim. App. 1978); *In re* Fox, 625 P.2d 163, 165 (Or. Ct. App. 1981); State v. Strickland, 532 S.W.2d 912, 919–20 (Tenn. 1975); G.R.L. v. State, 581 S.W.2d 536, 538 (Tex. Civ. App. 1979); State v. D.M.Z., 830 P.2d 314, 316–17 (Utah Ct. App. 1992); *In re* Harbert, 538 P.2d 1212, 1217 (Wash. 1975) (en banc); State v. Piche, 442 P.2d 632, 635 (Wash. 1968); *In re* E.H., 276 S.E.2d 557, 565 (W. Va. 1981); P.A.K. v. State, 350 N.W.2d 677, 685 (Wis. 1984). *But see* W.T.J. v. State, 665 So. 2d 1019, 1023 (Ala. Crim. App. 1995) (disallowing hearsay if it is the sole basis of the transfer); *In re* Stephfon W., 442 S.E.2d 717, 721 (W. Va. 1994) (holding that hearsay evidence cannot serve as the sole basis for transfer); Comer v. Tom A.M., 403 S.E.2d 182, 188 (W. Va. 1991) (same). Federal courts have followed suit in some jurisdictions, including the U.S. Virgin Islands, *see* Virgin Islands *ex rel.* A.M., 34 F.3d 153, 160–62 (3d Cir. 1994), Texas, *see* United States v. Doe, 871 F.2d 1248, 1255–56 (5th Cir. 1989), the District of Columbia, *see* United States v. H.S., 717 F. Supp. 911, 913 (D.D.C. 1989), *rev'd on other grounds by In re* Sealed Case (Juvenile Transfer), 893 F.2d 363, 370 (1990), and Oregon, *see* United States v. E.K., 471 F. Supp. 924, 929–30, 935 (D. Or. 1979).

81. *See* P.H. v. State, 504 P.2d 837, 842–43 (Alaska 1972), *superseded by statute on other grounds*, ALASKA STAT. § 47.10.080(b)(1) (1977), *as stated in In re* F.S., 586 P.2d 607, 610 (Alaska 1978). In *P.H.*, the court held that strict rules of evidence do apply to juvenile "waiver" hearing (Alaska's term for "transfer" hearings), noting in particular that a determination of probable cause at such a hearing could not be based on hearsay testimony. *Id.* at 842–43. However, the *P.H.* court also noted that background information was not considered within the definition of hearsay and, therefore, was admissible because it did not speak to the offense itself. *Id.*

82. *See In re* Jose M., 620 A.2d 804, 810 (Conn. App. Ct. 1993). In *Jose M.*, the court noted that the Connecticut legislature had actually amended the statute governing transfer hearings to incorporate all procedural protections governing probable cause hearings, including the rules of evidence, for persons charged with crimes punishable by death or life imprisonment. *Id.*; *see* CONN. GEN. STAT. ANN. §§ 46b-127, 54-46a (West 2009). The court therefore concluded that hearsay was not admissible in transfer hearings unless otherwise allowed by the rules of evidence. *Jose M.*, 620 A.2d at 810.

83. *See* State v. Milk, 519 N.W.2d 313, 315 (S.D. 1994). The *Milk* court held that a juvenile transfer hearing was not a dispositional hearing and, therefore, the rules of evidence did strictly apply, including those that prohibited hearsay. *Id.* The court based this conclusion on two South Dakota statutes. *Id.* The first, S.D. CODIFIED LAWS § 19-9-14(7) (1987), indicated that the rules of evidence do not apply at juvenile dispositional hearings. *Milk*, 519 N.W.2d at 315. The second, S.D. CODIFIED LAWS § 26-7A-1(17) (1992), defined a dispositional hearing as one occurring after an adjudication of guilt. *Milk*, 519 N.W.2d at 315. As transfer hearings occurred prior to an adjudication, the court concluded

proceedings. In other jurisdictions, while the courts may not have specifically abandoned the evidentiary rules, admission of hearsay evidence is not reversible error.[84] In justifying their decisions not to apply evidentiary rules to transfer hearings, most courts have concluded that such protections are not necessary because the hearings are essentially dispositional in nature, as opposed to adjudicatory, or are mere determinations of jurisdiction; however, they often acknowledge that evidence used to justify transfer might be inadmissible in a determination of the delinquency.[85] Other courts have justified relaxed evidentiary standards in juvenile transfer proceedings by pointing to juvenile courts' generally looser policies and protections.[86]

In addition to relaxed evidentiary standards, several jurisdictions have refused to apply bedrock principles of constitutional criminal procedure to juvenile transfer hearings. Arkansas,[87] Hawaii,[88] Idaho,[89] Indiana,[90] Iowa,[91] New Hampshire,[92] New Jersey,[93] Texas,[94] and

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that such hearings were not exempt from evidentiary rules. *Id.*

84. In Kansas, Kentucky, Montana, New Mexico, and Rhode Island, the courts failed to reverse transfers following admission of hearsay evidence against a minor offender. *See* Templeton v. State, 447 P.2d 158, 163–64 (Kan. 1968); Whitaker v. Commonwealth, 479 S.W.2d 592, 596 (Ky. 1972); *In re* Stevenson, 538 P.2d 5, 7 (Mont. 1975); *In re* Doe, 556 P.2d 1176, 1179 (N.M. Ct. App. 1976); State v. Mastracchio, 605 A.2d 489, 492–94 (R.I. 1992). In *Mastracchio*, 605 A.2d at 493, the court even allowed admission of the juvenile's father's criminal record because the court believed it was relevant to the determination of the child's potential for rehabilitation.

85. *See In re Three Minors*, 684 P.2d at 1124 (concluding that formal evidentiary rules were not necessary in juvenile court since "[t]ransfer hearings are essentially dispositional in nature and not adjudicatory"), *disapproved on other grounds by In re William S.*, 132 P.3d at 1021 & n.23; *In re P.W.N.*, 301 N.W.2d at 640 (holding that evidentiary rules in transfer proceedings would inappropriately limit the information the court could consider; acknowledging that evidence that is inadmissible at an adjudicatory hearing may be used to justify transfer).

86. *See, e.g.*, *In re* Welfare of T.D.S., 289 N.W.2d 137, 139–40 (Minn. 1980) (holding that in an informal setting such as juvenile court, formal evidentiary rules did not seem appropriate).

87. *See* United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992) (rejecting juvenile's claim that admission at transfer hearing of transcript from prior hearing denied juvenile's right to confront witnesses).

88. *See In re* Dinson, 574 P.2d 119, 123 (Haw. 1978) (indicating that transfer proceedings are akin to dispositional hearings therefore mooting the need for "the full criminal procedural protections"), *overruled on other grounds by* State v. Sanders, 76 P.3d 569, 571 (Haw. 2003); *see also* HAW. REV. STAT. § 571-22 (2006) (setting out which factors may be considered in deciding whether jurisdiction should be waived in juvenile transfer proceedings).

89. *See* Wolf v. State, 583 P.2d 1011, 1015 (Idaho 1978) (holding that a defendant had no right at a transfer hearing to cross-examine a prosecutor who provided testimony that there was probable cause to believe that the defendant had committed murder).

90. *See* Spikes v. State, 460 N.E.2d 954, 958 (Ind. 1984) (concluding that hearsay was properly admitted in a juvenile transfer hearing because the juvenile had no right to cross-examine during a transfer hearing which was more akin to a probable cause hearing than an adjudicatory proceeding), *vacated on other grounds by* Spikes v. Indiana, 471 U.S. 1001, 1001 (1985).

91. *See* State v. Wright, 456 N.W.2d 661, 664–65 (Iowa 1990) (holding that the Sixth Amendment right to confrontation does not apply to transfer hearings but instead only to criminal prosecutions).

92. *See In re* Eduardo L., 621 A.2d 923, 930 (N.H. 1993) (holding that evidence presented in transfer hearings must only have indicia of trustworthiness and that juveniles are not afforded the

Washington[95] have all held that the Sixth Amendment right to confrontation (or the equivalent) does not apply in juvenile transfer hearings. Indiana,[96] Texas,[97] and Wisconsin[98] have held that the Fifth Amendment right against self-incrimination is inapplicable, allowing confessions procured in violation of the juvenile's Fifth Amendment rights to be admitted in transfer hearings. Likewise, until November 2008, Nevada allowed transfer to the adult court system based on evidence obtained in violation of the juvenile's Fifth Amendment rights.[99] In justifying these rulings, courts have emphasized that, despite the protections afforded by the Supreme Court in *Kent*, *Gault*, and *Breed*, transfer hearings are not adjudications of guilt or innocence and, therefore, full constitutional protections are not necessary.[100]

II. THE *APPRENDI* REVOLUTION

While the state courts have struggled to develop the appropriate constitutional standards for transfer hearings, the Supreme Court has remained silent since *Kent* as to what, if any, procedural protections are required in juvenile transfer hearings. A series of recent Supreme Court

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constitutional right to meaningfully cross-examine a live witness as long as the evidence is otherwise deemed trustworthy); *see also* N.H. R. EVID. 1101(d)(3) (precluding application of the rules of evidence in transfer hearings).

93. *See* State *ex rel.* B.T., 367 A.2d 887, 889–90 (N.J. Super. Ct. App. Div. 1976) (holding that the constitutional right to confrontation does not apply to preliminary proceedings, which only requires that a defendant have representation and an opportunity to be heard and to present evidence).

94. *See In re* R.G.S., 575 S.W.2d 113, 117–18 (Tex. Crim. App. 1978) (finding that transfer hearings, which do not determine guilt, do not require confrontation under the Sixth Amendment).

95. *See In re* Harbert, 538 P.2d 1212, 1216–17 (Wash. 1975) (en banc) (holding that because juvenile transfer hearings do not result in confinement, they are not prosecutorial in nature and therefore do not require Sixth Amendment guarantees of confrontation).

96. *See* Clemons v. State, 317 N.E.2d 859, 865–66 & n.12 (Ind. Ct. App. 1974) (holding that the Fifth Amendment right against self-incrimination does not apply to juvenile waiver hearings because the offender's guilt is not at issue, but limiting the use of self-incriminating testimony to the issue of "the child's welfare and the best interests of the state," and only where the waiver judge will not subsequently be adjudicating guilt (quoting IND. CODE § 31-5-7-14 (1971))).

97. Hidalgo v. State, 983 S.W.2d 746, 756 (Tex. Crim. App. 1999) (permitting admission of a juvenile's confession to a doctor in transfer hearings despite Fifth and Sixth Amendment concerns).

98. J.G. v. State, 350 N.W.2d 668, 674 (Wis. 1984) (allowing admission of a reliable, though facially involuntary, confession at a transfer hearing).

99. *See* William M. v. State, 196 P.3d 456, 457 (Nev. 2008). In *William M.*, the Supreme Court of Nevada held that Nevada's statute, which required a juvenile to rebut a presumption of transfer by showing that his or her commission of the offense was "substantially influenced by substance abuse or emotional or behavioral problems," required the juvenile to admit to the offense to avoid transfer in violation of the Fifth Amendment. *Id.* at 457. This decision overturned Nevada's more sweeping opinion in *Marvin v. State*, 603 P.3d 1056 (Nev. 1979), which had generally allowed the admission of a juvenile's inculpatory statements to determine if transfer was appropriate. *See William M.*, 196 P.3d at 464. It remains to be seen whether Nevada will redraft its transfer statute to allow confessions obtained in violation of the Fifth Amendment to be admitted during transfer hearings so long as juveniles may rebut a presumption of transfer through other evidence.

100. *See infra* Part III.

cases requires a reevaluation of this issue and, in fact, has sparked renewed litigation over the level of procedural protections required in transfer hearings. As will be discussed further in Part III, the Supreme Court's decisions in *Apprendi*,[101] *Ring*,[102] *Blakely*,[103] *Booker*,[104] and *Cunningham*[105] demand increased procedural protections where, as in many states, the transfer decision exposes an offender to a sentence higher than the statutory maximum that would apply in the juvenile system. This Part summarizes *Apprendi* and its progeny.

A. *APPRENDI* REDEFINES CONSTITUTIONAL CRIMINAL PROCEDURE

In *Apprendi*, the Court considered a challenge to New Jersey's hate-crime sentencing enhancement.[106] Mr. Apprendi had entered a guilty plea to two counts of "possession of a firearm for an unlawful purpose" in the second degree and one count of "unlawful possession of an antipersonnel bomb" in the third degree.[107] Under the relevant statute, Apprendi faced a maximum sentence of ten years on the two greater counts.[108] At sentencing, however, the judge was allowed to consider the underlying motive for Apprendi's actions.[109] The judge sentenced Apprendi to twelve years in prison after finding, by only a preponderance of the evidence and without submitting the issue to the jury, that Apprendi had acted with the purpose to intimidate an individual based on race.[110] Under New Jersey's statute, Apprendi had therefore committed a "hate crime" and was subject to a sentencing enhancement.[111] Apprendi argued that because the "hate crime" factor increased his possible punishment, evidence of this factor should have gone to a jury for a determination of his culpability beyond a reasonable doubt.[112] The Supreme Court agreed. It began its analysis:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every

101. 530 U.S. 466 (2000).
102. 536 U.S. 584 (2002).
103. 542 U.S. 296 (2004).
104. 543 U.S. 220 (2005).
105. 549 U.S. 270 (2007).
106. 530 U.S. at 468–69.
107. *Id.* at 469–70.
108. *Id.* at 468, 470 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).
109. *Id.* at 470–71.
110. *Id.*
111. *Id.*
112. *Id.* at 471.

element of the crime with which he is charged, beyond a reasonable doubt."[113]

The Court rejected New Jersey's argument that the factual decision made by the judge was merely a "sentencing factor" and therefore not subject to the same constitutional safeguards as an adjudication of guilt.[114] While acknowledging that "sentencing factors" and "elements" are conceptually similar, the Court rejected the State's attempt to use the labels interchangeably to shield certain factual determinations from constitutional protection.[115] Justice Stevens, writing for the majority, explained that "the relevant inquiry is one not of form, but of effect."[116] Where a factual determination has the effect of increasing the sentence beyond the statutory maximum otherwise available, it "must be submitted to a jury and proved beyond a reasonable doubt."[117] Justice Stevens concluded: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[118]

B. EXTENDING *APPRENDI*

Two years later in *Ring v. Arizona*, the Court considered the extent to which *Apprendi* applied to Arizona's death-penalty sentencing scheme.[119] Timothy Ring was sentenced to death for his role in the murder of an armored car driver in the course of a robbery allegedly committed by Ring and two accomplices.[120] At trial, the jury had convicted Ring of first-degree murder, but did not convict him of premeditated murder.[121] Under Arizona's sentencing scheme, first-degree murder was punishable by death or life imprisonment.[122] Once a jury returned a verdict of guilt on first-degree murder, the trial judge was required under the statute to consider the existence, or non-existence, of certain enumerated aggravators in an effort to assess the appropriate sentence.[123] The court had to find at least one aggravator, and no mitigators sufficient to warrant leniency, before it could sentence a

113. *Id.* at 476–77 (alterations in original) (footnote omitted) (citations omitted) (quoting U.S. CONST. amends. VI, XIV; United States v. Gaudin, 515 U.S. 506, 510 (1995)).

114. *Id.* at 491–97.

115. *Id.*

116. *Id.* at 404.

117. *Id.* at 490. By creating an exception for cases where the sentence-enhancing fact is the mere existence of a prior conviction, *Apprendi* avoided overruling *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See Apprendi*, 530 U.S. at 487–90 & n.14.

118. *Apprendi*, 530 U.S. at 490.

119. 536 U.S. 584, 588–89 (2002).

120. *Id.* at 591, 594–95.

121. *Id.* at 591.

122. *Id.* at 592 (citing ARIZ. REV. STAT. ANN. § 13-1105(C) (2001)).

123. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-703(C)).

defendant to death.[124] Ring challenged this scheme under *Apprendi*, arguing that the factual finding of such circumstances increased his potential sentence, and therefore should have been presented to a jury, not a judge, and proven beyond a reasonable doubt.[125] The Court had previously reviewed Arizona's statute in *Walton v. Arizona*, upholding the statutory sentencing scheme.[126] In light of *Apprendi*, however, the Court overturned *Walton*, reasoning that Arizona's statutory aggravators operate as "the functional equivalent of an element of a greater offense" by increasing the defendant's sentence from life imprisonment to death, and therefore must be proven to a jury beyond a reasonable doubt.[127] The Court explicitly rejected the State's argument that Ring was sentenced within the range of punishment authorized by the jury verdict, reiterating that *Apprendi*'s procedural protections attached whenever some factor exposed a defendant to a greater punishment than was otherwise available—that the inquiry was "one not of form, but of effect."[128] Drawing a comparison to the two-year enhancement at issue in *Apprendi*, the Court concluded in *Ring* that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[129]

In 2004, the Supreme Court again considered an *Apprendi*-based challenge to a state sentencing scheme. *Blakely v. Washington* involved a judge's imposition of a sentence in excess of the presumptive sentencing range set forth in Washington State's sentencing guidelines.[130] In *Blakely*, the defendant had pled guilty to second-degree kidnapping involving the use of a firearm.[131] Under Washington State's Sentencing Reform Act (SRA), Blakely's standard range for sentencing, based on the level of his criminal offense and his prior criminal history, was forty-nine to fifty-three months.[132] The SRA, however, allowed a judge to exceed this standard range and impose a higher or lower sentence if he or she found "substantial and compelling reasons justifying an exceptional sentence."[133] While the SRA listed a series of "illustrative" aggravating and mitigating factors, an exceptional sentence based on such factors

124. *Id.* at 592–93 (citing ARIZ. REV. STAT. ANN. § 13-703(C)).

125. *Id.* at 595.

126. *See* Walton v. Arizona, 497 U.S. 639, 649 (1990).

127. *Ring*, 536 U.S. at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

128. *Id.* at 603–09 (quoting *Apprendi*, 530 U.S. at 494).

129. *Id.* at 609.

130. 542 U.S. 296, 298 (2004).

131. *Id.* at 298–99.

132. *Id.* at 299.

133. *Id.* (quoting WASH. REV. CODE § 9.94A.120(2) (2002) (current version at WASH. REV. CODE ANN. § 9.94A.535 (West 2003 & Supp. 2009))).

could only be imposed if "it takes into account factors other than those which are used in computing the standard range sentence for the offense."[134]

Although the State in *Blakely* recommended a sentence within the standard range, the court, after hearing testimony from the complaining witness, imposed an exceptional sentence of ninety months.[135] Blakely appealed, arguing that under the precedent established by *Apprendi* and *Ring* he was entitled to a hearing before a jury in which the basis for the exceptional sentence would have to be established beyond a reasonable doubt.[136] The United States Supreme Court agreed.[137] While Blakely's sentence had not exceeded the ten-year statutory maximum for his offense, the protections outlined in *Apprendi* nonetheless applied because the sentence exceeded the presumptive range set forth in Washington's sentencing guidelines.[138] The Court stated: "Our precedents make 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.*"[139] The Court went on: "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."[140]

The following term, in *United States v. Booker*, the Court considered the impact of *Apprendi* on the Federal Sentencing Guidelines.[141] The lower court had increased Booker's sentence based on the court's finding by a preponderance of the evidence that he had possessed a specified quantity of cocaine and had committed additional, uncharged misconduct.[142] These facts were not considered by the jury and did not

134. *Id.* (quoting State v. Gore, 21 P.3d 262, 277 (Wash. 2001) (en banc)).

135. *Id.* at 300.

136. *See id.* at 301.

137. *Id.* at 301–05.

138. *Id.* at 303–05.

139. *Id.* at 303.

140. *Id.* at 303–04 .

141. 543 U.S. 220, 226–27 (2005).

142. *Id.* at 227. The *Booker* case involved two different defendants, Booker and Fanfan, both of whom had been convicted of possessing with the intent to distribute a given quantity of cocaine. *Id.* at 227–28. Both cases hinged on the fact that each defendant's jury had made a determination that he possessed a specified quantity of cocaine, but at each man's sentencing hearing, the judge concluded by a preponderance of the evidence that each had possessed additional quantities of drugs and had committed additional, uncharged misconduct. *Id.* The jury in Booker's case found he possessed "92.5 grams of cocaine in his duffel bag." *Id.* at 227. The judge, at a sentencing hearing, however, found by a preponderance of the evidence that he possessed an additional "566 grams of crack and that he was guilty of obstructing justice." *Id.* The jury in Fanfan's case found that he possessed at least 500 grams of cocaine, but his judge at a sentencing hearing found by a preponderance of the evidence that he possessed 2.5 kilograms of cocaine and 261.6 grams of crack. *Id.* at 228. The judge also concluded, by a

form the basis for the jury's verdict.[143] Booker challenged his sentence, arguing that *Apprendi*, as refined by *Blakely*, barred the judge from imposing a sentence above that allowed by the jury's verdict based on the judge's findings of additional facts by a preponderance of the evidence.[144]

The Supreme Court concluded that the logic of *Apprendi* and *Blakely* applies with equal force to the Federal Sentencing Guidelines.[145] In doing so, the Court rejected the notion that the departures at issue in the Federal Sentencing Guidelines were constitutional just because, historically, judges had been vested with the authority to increase a defendant's sentence based on "any unusual blameworthiness in the manner employed in committing a crime," and that guidelines set out parameters for the exercise of this authority.[146] The Court emphasized that, regardless of the label provided, any finding of fact that has the effect of increasing the defendant's sentence must be proven to a jury beyond a reasonable doubt, or admitted by the defendant.[147] Booker's sentence was constitutionally problematic because "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact."[148] The Court noted that enhancing a defendant's sentencing range based on a judge's determination of certain facts impermissibly increases the power of the judge over the jury.[149] It allows judges, as opposed to juries, to determine the upper limit of a sentence based on evidence that was never contemplated by the jury or proven by more than a mere preponderance of the evidence.[150]

Two years later, in *Cunningham v. California*,[151] the Court found that California's Determinate Sentencing Law (DSL) did not comport with

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preponderance of the evidence, that Fanfan was an "organizer, leader, manager, or supervisor in the criminal activity." *Id.* At this point, the two cases diverge. Based on his findings, the judge in Booker's case imposed a sentence of thirty years, as opposed to the twenty-one-year and ten-month sentence Booker had expected given his conviction and his criminal history. *Id.* at 227. In contrast, the judge in Fanfan's case concluded that, in light of the Court's ruling in *Blakely*, he could only sentence the defendant based on the jury's verdict. *Id.* at 229. Accordingly, Booker's sentence was enhanced under the guidelines based on the judge's findings, while Fanfan's was not. *See id.* at 227–29. Booker challenged his sentence and the Government appealed Fanfan's sentence. *Id.* at 229.

143. *Id.* at 227.

144. *See id.* at 226–29.

145. *Id.* at 226–27.

146. *Id.* at 235–36.

147. *Id.* at 230–37. In the portion of the opinion of the Court that he authored, Justice Breyer attempted to bring the Sentencing Guidelines within the confines of the *Apprendi* case line by excising the portions of the Guidelines which were mandatory. *Id.* at 244–72. The remaining "discretionary" Sentencing Guidelines, according to Justice Breyer, met constitutional muster. *See id.*

148. *Id.* at 235 (quoting Blakely v. Washington, 542 U.S. 296, 305 (2004)).

149. *Id.* at 235–37.

150. *Id.*

151. 549 U.S. 270 (2007).

the holdings of the *Apprendi* case line because it "expose[d] a defendant to an elevated 'upper term' sentence" based on factual findings made by a judge, not a jury.[152] Cunningham was convicted of "continuous sexual abuse of a child under the age of 14."[153] Under the DSL he could be sentenced to a low, middle, or upper term of sentence based on a judge's findings.[154] The judge was obligated under the DSL to impose the middle term (here, twelve years) unless the judge found by a preponderance of the evidence one or more additional circumstances in aggravation or mitigation to justify imposition of either the upper or lower terms.[155] The non-exhaustive list of aggravating circumstances included "[f]acts relating to the crime, [f]acts relating to the defendant, [a]ny other facts statutorily declared to be circumstances in aggravation."[156] Beyond these enumerated aggravators, the judge was "free to consider any 'additional criteria reasonably related to the decision being made.'"[157] The judge, however, could not consider a "fact that [was] an element of the crime" as a basis for imposing the upper term.[158]

The Supreme Court rejected the State's position that, in "operation and effect," the DSL "simply authorize[d] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" and therefore "the upper term is the 'statutory maximum'" and the guidelines scheme is permissible.[159] The Court noted that it "has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."[160] In the case of the DSL, because the judge could only impose the upper term sentence upon a finding of aggravating circumstances and elements of the offense did not qualify as such a circumstance, the middle term, not the upper term, was the "relevant statutory maximum" for the purpose of *Apprendi* and its progeny.[161] Any system that exposed a defendant to a potentially higher sentence based on findings made by a judge, not a jury,

152. *Id.* at 274.

153. *Id.* at 275.

154. *Id.* at 278 (citing CAL. PENAL CODE § 1170.3(a)(2) (West 1999)).

155. *Id.* at 277 (citing CAL. PENAL CODE § 288.5(a) (setting the lower-term sentence as six years, the middle-term sentence as twelve years, and the upper-term sentence as sixteen years)).

156. *Id.* at 278 (alterations in original) (footnotes omitted) (citations omitted) (quoting CAL. R. CT. 4.421(a)–(c)).

157. *Id.* at 278–79 (quoting People v. Black 113 P.3d 534, 538 (Cal. 2005)).

158. *Id.* at 279 (quoting CAL. R. CT. 4.408(a)).

159. *Id.* at 289 (quoting *Black*, 113 P.3d at 543).

160. *Id.* at 281–82.

161. *Id.* at 288.

"[could not] withstand measurement against our Sixth Amendment precedent."[162] In short:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in a particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.[163]

In each of these holdings, even when faced with troubling fact patterns that would seem to support an "exceptional" sentence, the Supreme Court declined to limit the Sixth and Fourteenth Amendment's protections by altering the label, the nature, or the time frame in which the sentencing court considered the relevant facts. Instead, the Supreme Court returned to the most basic tenet of *Apprendi* time and time again. Regardless of what the state called it, or how subjective the nature of it, or when the judge considered it, any fact which exposed the defendant to a higher sentence triggered Sixth Amendment and due process protections and, therefore, must have been proven to a jury beyond a reasonable doubt. The only exception the Court recognized was the fact of prior convictions, which the Court reasoned had already satisfied due process requirements.[164]

C. DOES *ICE* SIGNAL A CLOSING OF THE DOOR TO *APPRENDI*-LAND?

In 2009, the Supreme Court seemed to take a step back from its previous *Apprendi* case line in *Oregon v. Ice*.[165] There the Court considered the case of Thomas Ice, a man who had been convicted of multiple charges stemming from his sexual assault of an eleven-year-old girl.[166] He was sentenced under a statute that provided for concurrent sentences generally, but allowed a judge to impose a consecutive sentence upon finding "statutorily described facts."[167] Ice challenged the trial court's imposition of a consecutive sentence under *Apprendi*.[168] He argued that because Oregon's statute only permitted the judge to impose a consecutive sentence if the judge found additional facts (beyond those which formed the basis of the jury's verdict), under the *Apprendi* line, such facts had to be proven to a jury using a beyond-a-reasonable-doubt standard.[169] The Court disagreed, holding that the threshold inquiry to determine if *Apprendi* applies is whether the jury played a historical role

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162. *Id.* at 293.
163. *Id.* at 290 (citing Blakely v. Washington, 542 U.S. 296, 305 & n.8 (2004)).
164. *See supra* note 117 and accompanying text.
165. 129 S. Ct. 711 (2009).
166. *Id.* at 715–16.
167. *Id.* at 715–17 (citing OR. REV. STAT. § 137.123(1) (2007)).
168. *See id.* at 716.
169. *See id.* at 715–16.

in the issue to be decided.[170] In Ice's case, the Court concluded that "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently."[171] Accordingly, the judge's decision in *Ice* to impose a consecutive sentence premised on additional factual findings did not implicate the concerns which had prompted the Court's decisions in *Apprendi* and its progeny.[172] This decision did not represent an "encroachment" or "threat to the jury's domain as a bulwark at trial between the State and the accused" but was consistent with the historical practice to grant states authority over the administration of their criminal justice systems.[173] *Ice* did not overrule *Apprendi* or any of the cases that followed. Instead, it attempted to establish a baseline inquiry into the application of *Apprendi*'s procedural protections. The parameters of that baseline remain to be explored, but the Court in *Ice* did not appear to abandon *Apprendi*'s underlying principle that the factual basis for culpability and sentencing must rest with the jury and must be based on findings made using a beyond-a-reasonable-doubt standard.

III. WHAT *APPRENDI* MEANS FOR JUVENILE TRANSFER PROCEEDINGS

The question thus becomes whether *Apprendi* and its progeny create a constitutional guarantee to a jury trial with facts proven beyond a reasonable doubt in juvenile transfer proceedings. While the purpose of the hearing is not to impose a sentence, or even to assess culpability per se, the potential outcome of the hearing, as the *Kent* Court observed, is to greatly increase the offender's sentence from the juvenile limit—usually confinement and/or probation to age twenty-one—to the adult limit.[174] Given that the majority of states' statutes governing transfer address older minors (usually aged fifteen to eighteen) and the most serious offenses (usually violent, serious violent, class A, or first-degree felonies), it is likely that the adult standard range will be significantly higher than any potential juvenile sentence.[175]

In determining the appropriateness of transfer, a court considers specific factors to assess the appropriateness of continued juvenile jurisdiction.[176] In this sense, a transfer hearing fits the most basic criteria

170. *Id.* at 716–19.

171. *Id.* at 717.

172. *Id.* at 718.

173. *Id.* at 717–19.

174. *See* Kent v. United States, 383 U.S. 541, 554–57 (1966).

175. *See generally* HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 102–08 (1999) (summarizing criteria for waiver legislation); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 500–03 (1987); *see also* Feld, *supra* note 6, at 195–243 (discussing state statutory schemes affecting transfer).

176. *See* Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the*

of *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham*—a factfinder engaging in a factual analysis that exposes a criminal offender to a higher sentence than he or she would otherwise face. The rule set forth by the Supreme Court in *Apprendi*, and reiterated in subsequent cases, is clear: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[177] As juvenile transfer decisions typically expose the offender to a sentence well beyond that available in juvenile court, a plain reading of the *Apprendi* case line requires this determination to be made by a jury under a beyond-a-reasonable-doubt standard. A judge's finding of facts to support transfer is distinguishable from the administrative considerations contemplated in *Ice*.[178] Findings to support transfer are not a determination of how a sentence will be served, but rather a determination of the type and length of sentence to be imposed.

Despite *Apprendi*'s apparent applicability to juvenile transfer hearings, courts have overwhelmingly declined to apply the *Apprendi* case line to transfer decisions.[179] Only the Massachusetts Supreme Judicial Court and the New Mexico Court of Appeals have read *Apprendi* to require findings in juvenile transfer hearings to be made by a jury beyond a reasonable doubt.[180] The Massachusetts statute permits juveniles to be transferred to the adult system upon finding certain facts.[181] The court reasoned that these findings had the effect of increasing the juveniles' sentences, if convicted, "beyond the statutory maximum otherwise permitted for juveniles."[182] The court concluded that such determinations were covered by *Apprendi*.[183] Although a juvenile court system is not constitutionally required, once a state creates such a

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Potential Impact of Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 181 (2007) (discussing judges' use of factors to exercise review of transfer); *see also Kent*, 383 U.S. at 566–67 (providing a list of determinative factors a judge should find prior to transfer).

177. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

178. *See* 129 S. Ct. at 715–19.

179. *See infra* Part III.A–C.

180. *See* Commonwealth v. Quincy Q., 753 N.E.2d 781, 789 (Mass. 2001), *overruled on other grounds by* Commonwealth v. King, 834 N.E.2d 1175, 1201 n.28 (Mass. 2005); State v. Rudy B., 2009 NMCA 104, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf.

181. *See Quincy Q.*, 753 N.E.2d at 787. The required findings included: (1) "that the alleged offense was committed when the juvenile was between" fourteen and seventeen years old; (2) that the offense, in the adult system, was punishable by imprisonment; and (3) that the juvenile had previously been "committed to the department of youth services, "or the alleged offense involved certain enumerated firearms violations, or it involved 'the infliction or threat of serious bodily harm.'" *Id.* (quoting MASS. GEN. LAWS ch. 119, § 54 (1996)).

182. *Id.* at 789.

183. *See id.*

system, *Apprendi*'s due process requirements govern decisions to remove a child from the benefits of that system.[184]

In *State v. Rudy B.*, the New Mexico Court of Appeals revisited its prior decision in *State v. Gonzales*[185] that *Apprendi* did not apply to an amenability finding.[186] Under New Mexico's system, when a juvenile is convicted, the judge can sentence him or her as an adult following an amenability hearing in which the judge considers factors eerily similar to those laid out by the Court in *Kent* and *Ring*.[187] In *Gonzales*, the New Mexico Court refused to apply *Apprendi* to amenability proceedings, holding that a determination of amenability is distinct from a determination of guilt.[188] In *Rudy B.*, the court reversed itself, concluding that in light of the Supreme Court's rulings in *Ring*, *Blakely*, *Booker*, and *Cunningham*, such a distinction was disingenuous.[189] As New Mexico's system requires additional findings of fact to justify an adult sentence, it therefore falls squarely within the jurisprudential line of *Apprendi*.[190]

The majority of courts, however, have not followed Massachusetts's and New Mexico's reasoning and have concluded instead that *Apprendi* does not apply to juvenile transfer hearings. Courts have relied on three primary lines of reasoning in refusing to apply *Apprendi*: (1) juvenile transfer hearings merely determine the court's jurisdiction, (2) juvenile transfer hearings do not adjudicate guilt or assess culpability, and (3) fundamental differences between the juvenile and adult court system mandate different constitutional requirements.[191] Under each of these theories, the courts reason that if any of the due process or Sixth Amendment concerns raised by the *Apprendi* case line do arise in the context of transferring a juvenile to the adult court system, the concerns

184. *See id.*

185. 24 P.3d 776, 783–84 (N.M. Ct. App. 2001).

186. State v. Rudy B., 2009 NMCA 104, ¶ 1, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf.

187. *See id.* ¶¶ 19–33; *see also* N.M. STAT. § 32A-2-20 (1993) (granting judges discretion to sentence juvenile offenders as juveniles or adults based on findings of "[whether] the child is not amenable to treatment or rehabilitation as a child in available facilities;" "[whether] the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders," " the seriousness of the alleged offense;" "whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;" "whether a firearm was used to commit the alleged offense;" "whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;" "the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional attitude and pattern of living;" "the record and previous history of the child;" "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available;" "and any other relevant factor, provided that factor is stated on the record").

188. *Gonzales*, 24 P.3d at 783–84.

189. *See Rudy B.*, 2009 NMCA 104, ¶¶ 23–31, 36–44, 49–51.

190. *Id.* ¶¶ 23–34.

191. *See infra* Part III.A–C.

are satisfied in two places: first, in juvenile court when the judge determines the appropriateness of the transfer, and later, in adult court when the juvenile is convicted by a jury of the offense that justified transferring the child to, and sentencing him or her in, adult court.

A. It's Only Jurisdiction (and All the Courts Are Doing It)

The vast majority of courts have held that a judge's decision whether a juvenile should be prosecuted as an adult is a pre-adjudicatory question of jurisdiction and therefore does not implicate the *Apprendi* case line.[192] In their rulings, these courts have reasoned that it is only after the transfer to the adult court system that a juvenile is subject to the higher sentence. In the adult court system, the juvenile already enjoys all of the protections of *Apprendi*—trial by jury using a proof beyond-a-reasonable-doubt standard—when he or she stands trial for the offense and before any sentence can be imposed. Therefore, no additional rights or procedural protections are necessary. This argument is essentially the same as is used to justify suspension of other constitutional rights and due process protections in transfer hearings, such as the Fifth Amendment right against self-incrimination, the Sixth Amendment right to confrontation, and evidentiary rules.[193] This attempt to evade *Apprendi* is flawed on several levels.

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192. *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 district court. The transfer proceeding establishes the district court's jurisdiction over a defendant."); United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000) (concluding that the transfer of a juvenile to an adult court "merely establishes 'a basis for district court jurisdiction'" (quoting United States v. David H., 29 F.3d 489, 491 (9th Cir. 1994))); State v. Kalmakoff, 122 P.3d 224, 227 & n.29 (Alaska Ct. App. 2005) (reasoning that the weight of authority indicates that transfer proceedings are mere determinations of the court's jurisdiction and therefore not governed by *Apprendi*); State v. Rodriguez, 71 P.3d 919, 928 (Ariz. Ct. App. 2003) (holding that the state juvenile transfer statute in question "is not a sentence enhancement scheme and, therefore, does not implicate *Apprendi*... [because it] does not subject [a] juvenile to enhanced punishment; it subjects [a] juvenile to the adult criminal justice system" (citation omitted)); People v. Beltran, 765 N.E.2d 1071, 1076 (Ill. App. Ct. 2002) (holding that transfer merely establishes jurisdiction and therefore is "dispositional, not adjudicatory"); State v. Jones, 47 P.3d 783, 793–98 (Kan. 2002); Caldwell v. Commonwealth, 133 S.W.3d 445, 452–53 (Ky. 2004) (adopting the argument that the decision to transfer a juvenile is merely jurisdictional); *In re* Welfare of J.C.P., 716 N.W.2d 664, 667–70 (Minn. Ct. App. 2006) (holding that as the adult certification procedure "is not in itself a criminal prosecution," *Apprendi* does not bear on such a proceeding); State v. Lopez, 196 S.W.3d 872, 875–76 (Tex. App. 2006) (holding that a decision authorizing "prosecution of a juvenile as an adult" merely "involves the determination of which system will be appropriate for a juvenile offender," thereby not implicating *Apprendi*); *In re* Hegney, 158 P.3d 1193, 1200–01 (Wash. Ct. App. 2007) (echoing the holdings of *Kalmakoff*, 122 P.3d 224, and *State v. H.O.*, 81 P.3d 883 (Wash. Ct. App. 2003), in declining to apply *Apprendi* to state juvenile declination proceedings); *H.O.*, 81 P.3d at 886 (declining to apply *Apprendi* to the state's decline statute because such a determination is a mere "jurisdictional determination"). Scholars have taken this position as well. *See, e.g.*, Feld, *supra* note 11, at 1221 (arguing that because transfer decisions are jurisdictional and do not carry a punishment, *Apprendi* is inapplicable).

193. *See supra* Part I.

Turning first to the question of timing, the fact that transfer hearings occur prior to the adjudication of guilt does not insulate them from the protections of *Apprendi*. *Apprendi* and its progeny focus on the effect of a finding on a defendant's sentence, not on the procedural sequence of the finding.[194] To accept the logic that the protections of *Apprendi* are contingent on the timing of the hearing would mean that New Jersey's sentencing scheme would have withstood constitutional muster had New Jersey allowed the court to consider *prior* to Apprendi's adjudication of guilt whether or not he had acted with racial animus and *then* used that finding to increase his sentence after the jury found him guilty of the underlying offense. Similarly, so long as Arizona's court determined that Ring was eligible for death prior to his trial, or Washington's court had determined that Blakely deserved an "exceptional sentence" prior to his entry of his plea, it would not have mattered that the factors were neither submitted to a jury nor judged using a beyond-a-reasonable-doubt standard. These findings are contrary to the Court's holding that it is the effect, not the form of the factors that trigger Sixth Amendment and due process protections.[195] Considered from another angle, if the juvenile court determined that transfer (and hence a higher adult sentence) was appropriate *after* an adjudication of guilt had occurred within the juvenile system, there is little doubt that *Apprendi* would apply.[196]

In *Cunningham*, the Court spoke in terms of a defendant's exposure to the higher sentence based on the judge's determination of facts by a preponderance of the evidence as the trigger for *Apprendi*'s protections, not of the actual finding of guilt or the subsequent imposition of the sentence.[197] This would seem to suggest that the Court would be unbothered by whether or not the juvenile was ultimately transferred, convicted, or sentenced as an adult, just that he or she was exposed to the risk of an adult sentence and conviction based on the judge's assessment of amenability to remain in the juvenile system. Just as *Cunningham* afforded *Apprendi*'s procedural protections when the sentencing scheme allowed a judge to weigh facts prior to the imposition of the higher sentence,[198] a juvenile should receive the procedural protection of *Apprendi* prior to a judge weighing facts that allow imposition of transfer, and thus potentially conviction and sentencing as an adult. As will be discussed below, such a triggering of procedural protections prior

194. *See supra* Part II.

195. *See* Apprendi v. New Jersey, 530 U.S. 466, 494 (2000) ("[T]he relevant inquiry is one not of form, but of effect . . . .").

196. In fact, this was exactly the conclusion the New Mexico Court of Appeals reached in *State v. Rudy B. See* 2009 NMCA 104, ¶ 53, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf.

197. *See* 549 U.S. 270, 279–81 (2007).

198. *See id.* at 290.

to the imposition of the "harm" is consistent with other, analogous trial procedural protections.

The next argument, that the transfer hearing avoids *Apprendi* because it is merely jurisdictional, is also problematic. First, this argument ignores the critical consequence of the jurisdictional question in the context of transfer hearings, namely that the determination of the appropriate jurisdiction has a direct impact on the juvenile's sentence.[199] If the juvenile court retains jurisdiction over the offender, the offender will be subjected only to the juvenile sentencing scheme, which in most states terminates at the age of majority.[200] If the juvenile court declines to retain jurisdiction and transfers the juvenile to the adult court system, the offender will be subject to the higher adult sentencing range. In the context of the *Apprendi* case line, this would be analogous to a state having a separate "death penalty" court in which, once it was determined that a defendant should be tried there, he or she would automatically receive the death penalty upon conviction. If the defendant were not sent to the death penalty court, he or she could only receive a maximum sentence of life-imprisonment upon conviction. It is implausible that couching this determination as "jurisdictional" would somehow avoid the *Apprendi* due process considerations. As the Court recognized in *Ring*, *Apprendi* would require that any facts used to justify sending a defendant to this hypothetical, standalone death penalty court would have to be proven to a jury beyond a reasonable doubt, because those facts expose the defendant to a higher sentence than he or she would otherwise face.

In its recent decision, the New Mexico Court of Appeals recognized that allowing the judge to essentially postpone determination of transfer until after conviction does not allow evasion of *Apprendi*.[201] The New Mexico Court concluded that despite its prior decision, because determinations of amenability can serve to increase a juvenile's sentence beyond that authorized by the jury's verdict or a plea agreement alone, *Apprendi* must apply regardless of the timing of the determination.[202]

More fundamentally, to exempt juvenile transfer hearings from *Apprendi*'s purview by labeling them "jurisdictional" is to ignore the elemental nature of jurisdiction. Jurisdiction is an element of all offenses and must be found by a jury beyond a reasonable doubt or stipulated to

199. *See* Vannella, *supra* note 19, at 758 (noting that the key issue in determining if *Apprendi* should apply is the effect of the finding on the defendant's sentence).

200. *See, e.g.*, Whitaker v. Estelle, 509 F.2d 194, 197 (5th Cir. 1975) (discussing the limited jurisdiction of juvenile courts); State v. Setala, 536 P.2d 176, 178 (Wash. Ct. App. 1975) (same); State v. Dellinger, 468 S.E.2d 218, 220 (N.C. 1996) (same); Feld, *supra* note 11, at 1219 (discussing limitation on juvenile court jurisdiction which includes limitations on sentencing until the state-designated age of majority).

201. *See Rudy B.*, 2009 NMCA 104, ¶¶ 32–53.

202. *Id.*

by a defendant before any determination of guilt can be made.[203] Without a finding of jurisdiction, the prosecutor lacks the authority to charge a defendant, a jury lacks the authority to consider his or her guilt, and the court lacks the authority to hold or impose sentence upon him or her. A determination of jurisdiction cannot be divorced from any other factual finding a jury must make in order to convict a defendant. The Model Penal Code notes that while there is a distinction between facts which establish criminality and facts which satisfy procedural requirements, both must be proven beyond a reasonable doubt to a jury as both are elements of the offense.[204] There is nothing in the *Apprendi* case line that exempts this particular element. If anything, *Apprendi* would seem to embrace this most fundamental element, as without establishment of jurisdiction no adjudication of guilt, much less sentence, can be imposed.

B. THE COURT IS NOT WEIGHING CRIMINAL CULPABILITY

Similar in nature and only slightly less popular with the courts is the reasoning that the decision to transfer a juvenile to the adult court is immune from *Apprendi* analysis because it does not culminate in a finding of guilt.[205] In defending this position, courts are quick to note that some of the factors considered in deciding whether to transfer a juvenile are different from those traditionally weighed by juries in assessing culpability, or by the adult court system as a whole, and may require a level of expertise that juries would lack.[206] The court's consideration of such factors or the fact that the transfer decision does not, by itself, adjudicate the offender's guilt, however, cannot exempt it from the

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203. *See, e.g.*, Liggins v. Burger, 422 F.3d 642, 649 (8th Cir. 2005) (noting that because jurisdiction is an essential element of the crime, it must be proved beyond a reasonable doubt).

204. The drafters of the Model Penal Code spelled out the reasoning adopted by state and federal courts with regard to the requirement of proving jurisdiction. Without an establishment of jurisdiction, the court cannot exercise sovereignty over the defendant and so cannot seek to hold a defendant criminally accountable for his or her actions. *See* MODEL PENAL CODE § 1.13(9)(e) (1985) (establishing jurisdiction as "an element of an offense"); MODEL PENAL CODE § 1.13 cmt. 1, at 109 (Tentative Draft No. 4, 1955).

205. *See, e.g.*, Alaska v. Kalmakoff, 122 P.3d 224, 227–28 (Alaska Ct. App. 2005) (concluding that juvenile transfer proceedings were distinct from findings of guilt or sentencing and therefore were not addressed by *Apprendi* or its progeny); State v. Jones, 47 P.3d 783, 797–98 (Kan. 2002) (concluding that *Apprendi* did not apply to transfer hearings because they did not strictly decide guilt or innocence); State v. H.O., 81 P.3d 883, 885 (Wash Ct. App. 2003) (holding that a decline hearing "determined not ultimate guilt or innocence, but the forum in which guilt or innocence was to be found").

206. *See, e.g.*, State v. Read, 938 A.2d 953, 960 (N.J. Super. Ct. App. Div. 2008) (analogizing a decision to transfer to a charging decision with the consideration of additional factors to determine both the proper charge and forum for the juvenile offender). This reasoning was rejected in *Rudy B. See* 2009 NMCA 104, ¶¶ 47–50 ("The fact that an amenability determination is apart from the elements of the charged crime has no bearing on whether *Apprendi* applies because the additional facts necessary to determine whether a youthful offender is amenable to treatment have the potential to increase the offender's sentence.").

protections afforded by *Apprendi*. Consider *Ring*, *Blakely*, and *Cunningham*. Under Arizona's sentencing scheme the absence or presence of an aggravator or mitigator did not make Ring, or any other Arizona defendant, more or less guilty of first-degree murder. In fact, in order to reach the question of the existence of such factors, a determination of guilt must already have been reached. The only effect of such findings is to increase the defendant's sentence from life in prison to death, and that is precisely what triggered *Apprendi*.[207] Similarly, in *Blakely* and *Cunningham*, the judges' finding of factors to justify a higher sentence were made after a finding of guilt had been determined.[208] In addition, both Washington's and California's sentencing schemes explicitly required the court to consider factors other than those required for a finding of guilt in order to justify a higher sentence.[209] Finally, the Court addressed this argument in another context in both the *Booker* and *Cunningham* cases. In both cases the Court noted that sentencing schemes were not immune from the analysis of *Apprendi* because the judge had based the defendant's higher sentence on facts which were "ordinarily" not considered in the jury's assessment of culpability.[210] Returning to the tenet of *Blakely*, both cases reiterated that sentences based on a finding of fact beyond those upon which the jury's verdict was based were constitutionally impermissible.[211]

The Court's decision in *Ice* raises an additional, threshold question of whether the decision to transfer a child to the adult court system falls outside the realm of facts that juries have historically considered.[212] One possible reading of *Ice* is that *Apprendi* need not apply to transfer decisions because, historically, the jury has never been asked to make such a decision.[213] The fact that judges have traditionally made the findings that support transfer, however, does not answer the underlying question posed by the Court in *Ice* or, for that matter, *Apprendi*. The *Apprendi* line seeks to reclaim the jury's role as sole arbiter of culpability upon which any criminal sentence can be based.[214] *Apprendi* and its

207. *See* Ring v. Arizona, 536 U.S. 584, 592 (2002) (citing ARIZ. REV. STAT. ANN. § 13-1105(c) (West 2001)).

208. Cunningham v. California, 549 U.S. 270, 277 (2007); Blakely v. Washington, 542 U.S. 296, 298–99 (2004).

209. *See Cunningham*, 549 U.S. at 270 (citing CAL. PENAL CODE § 288.5(a) (West 1999)); *Blakely*, 542 U.S. at 299 (citing WASH. REV. CODE. § 9.94A.120(2) (2002) (current version at WASH. REV. CODE § 9.94A.535 (West 2003 & supp. 2009))).

210. United States v. Booker, 543 U.S. 220, 234–36 (2005); *Cunningham*, 549 U.S. at 279–81.

211. *Booker*, 543 U.S. at 234–36; *Cunningham*, 549 U.S. at 279–81, 290–94.

212. *See* 129 S. Ct. 711, 718–19 (2009).

213. This is in fact the argument the State made unsuccessfully in *State v. Rudy B. See* 2009 NMCA 104, ¶¶ 23–34, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf.

214. *See Booker*, 543 U.S. at 236–37.

progeny, including *Ice*, admonish courts to look beyond the State's self-serving classifications of findings to the effect of such findings on the defendant's sentence.[215] If the finding increases the defendant's sentence, it is an element of the offense and it must be made by the jury.[216] While the fact in question may bear some label besides "element," if it is to serve as a basis for the defendant's sentence it must be rooted in an assessment of culpability and its pronouncement must emanate from the jury (or, in the case of a plea from the defendant, him- or herself).[217] Such an understanding of *Apprendi*'s underlying principle produces a reading of the holding in *Ice* consistent with the Court's prior *Apprendi* holdings: that Ice's jury *had* found the facts upon which his sentence was based. The sentencing court's later decision to run such sentences consecutively, as opposed to the time-saving, statutorily presumed method of imposing sentences concurrently, did not increase Ice's total sentence, it merely altered its administration.[218] This finding by Ice's judge did not implicate additional culpability, nor did it increase the length of Ice's sentence. It only altered the way he served the sentence (one after another as opposed to simultaneously under the temporal legal fiction of concurrent time).[219]

In contrast, the facts which would support a decision to transfer a juvenile to the adult court system do more than determine the manner in which the juvenile will serve his or her sentence upon conviction. The determination of these facts alters the sentence itself, increasing its nature, length, and collateral consequences.

The conclusion that *Ice* does not preclude application of *Apprendi* to juvenile transfer decisions is consistent with the Court's holding in other cases. In fact, the factors considered by the Court in *Ring*, *Blakely*, *Booker*, and *Cunningham* mirror some of the *Kent* factors that often govern juvenile transfer decisions.[220] Under the scheme at issue in *Ring*, the Court considered the following statutory aggravators in deciding whether to impose the death penalty: whether the defendant had been convicted of another offense for which he or she could be sentenced to either life imprisonment or death; whether the defendant had been "previously convicted of a serious offense";[221] whether, in the commission

215. *See Ice*, 129 S. Ct. at 718–19; *Booker*, 543 U.S. at 230–32; *Cunningham*, 549 U.S. at 290–94; Blakely v. Washington, 542 U.S. 296, 303 (2004); Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

216. *See, e.g.*, *Apprendi*, 542 U.S. at 303.

217. *See, e.g.*, *Ice*, 129 S. Ct. at 716–17.

218. *See id.* at 716–20.

219. *See id.* at 715–16.

220. *See* Kent v. United States, 383 U.S. 541, 566–67 (1966).

221. ARIZ. REV. STAT. ANN. § 13-604(w)(4) (West 2001) (repealed 2007). This statute defines a "serious offense" as

of the offense, the defendant "knowingly created a grave risk of death to another person or persons in addition to the person murdered"; whether the defendant committed the murder for remuneration; whether the murder was especially "heinous, cruel or depraved"; whether "[t]he defendant committed the offense while in custody" or on unauthorized release; whether the defendant was convicted of multiple homicides in the commission of the offense; whether "[t]he defendant was an adult" when he or she committed the offense "or was tried as an adult" and the victim was either under fifteen or over seventy years of age; and whether the victim "was an on duty peace officer" killed in the course of his or her official duties.[222] Under the scheme at issue in *Blakely*, the sentencing court was allowed to consider factors such as the defendant's deliberate cruelty to the victim, the vulnerability of the victim, and the history of domestic violence (whether adjudicated or not) between the defendant and the victim.[223] In *Booker*, the court assessed the defendant's degree of culpability, and so his appropriate sentence, based on his apparent involvement in a drug trafficking scheme which extended beyond his mere possession of the drugs, the crime for which he was convicted.[224] Under the scheme at issue in *Cunningham*, the court considered similar factors, including the vulnerability of the victim, the effect of the crime on the victim's family, and the defendant's relationship to the victim.[225] In all of these cases, the Supreme Court applied *Apprendi* to require that such findings be made by a jury beyond a reasonable doubt.[226]

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any of the following offenses if committed in this state or any offense committed outside this state which if committed in this state would constitute one of the following offenses:

(a) First degree murder.

(b) Second degree murder.

(c) Manslaughter;

(d) Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Armed robbery.

(i) Burglary in the first degree.

(j) Kidnapping

(k) Sexual conduct with a minor under fifteen years of age.

Id.

222. Ring v. Arizona, 536 U.S. 584, 592 & n.1 (2002) (citing ARIZ. REV. STAT. ANN. § 13-703(G) (West Supp. 2001)).

223. Blakely v. Washington, 542 U.S. 296, 299–300 (2004) (citing WASH. REV. CODE § 9.94A.390(2) (2003)).

224. United States v. Booker, 543 U.S. 220, 227–29 (2005).

225. Cunningham v. California, 549 U.S. 270, 277 (2007) (citing CAL. PENAL CODE § 1170(b) (West 1999)).

226. *See supra* Part II.

The factors governing juvenile transfer decisions are remarkably similar. Using the *Kent* factors, a juvenile court considers the following in deciding whether to waive juvenile jurisdiction: the seriousness of the offense and "whether protection of the community requires waiver"; whether the offense was "committed in an aggressive, violent, premeditated or willful manner"; whether the alleged offense was committed against a person with injury resulting; "the prosecutive merit of the case"; judicial efficiency if there were adult codefendants; the sophistication of the offender; whether he or she had prior adjudications and/or commitments to juvenile facilities; and "the likelihood of reasonable rehabilitation of the juvenile."[227] Just like the schemes at issue in *Ring*, *Blakely*, *Booker*, and *Cunningham*, juvenile transfer decisions examine not only the crime committed, with an eye toward future community safety, but also the offender him- or herself. In short, each of these schemes considers factors which are subjective, divorced from the offense itself, and may be difficult for jurors to weigh both intellectually and morally. These similarities suggest that the protections and rights afforded by *Apprendi* are no less applicable. As the Court noted in *Booker*, it is irrelevant whether the findings reflect a heightened level of guilt on the part of the defendant or are facts traditionally beyond the consideration of the jury.[228] In all of these examples, the findings increase the defendant's sentence, and it is this effect on the ultimate sentence that triggers the protections of *Apprendi*.[229] In this sense, the protections of *Apprendi* do not hinge on whether the hearing involves a determination of guilt, but on what effect the determination of the factors would have on the defendant's sentence.

As will be discussed further in Part IV, the holdings in the *Apprendi* case line suggest something else as well—that the lines between notions of "guilt" and "punishment" are blurring. Factors that allow courts or juries to mete out appropriate punishment cannot be divorced from the factual findings necessary to establish the basis for that punishment—a defendant's guilt. The *Apprendi* line would define this concept of the defendant's guilt as encompassing more than the acts he or she committed, but also "facts" about the defendant him- or herself.

C. Juvenile Court Is Different

The final argument that most courts, and indeed scholars, invoke when refusing to apply *Apprendi* to juvenile transfer hearings is that there is a fundamental difference between the juvenile and the adult

227. Kent v. United States, 383 U.S. 541, 566–67 (1966).

228. *See Booker*, 543 U.S. at 230–37.

229. *See* Apprendi v. New Jersey, 530 U.S. 466, 494 (2000) ("[T]he relevant inquiry is one not of form, but of effect . . . .").

criminal justice systems.[230] These courts reason that the Due Process Clause requires "fundamental fairness" in juvenile proceedings; but this concept of "fundamental fairness" is not the same as that guaranteed in the adult court system, and may not even derive from the same constitutional basis.[231] Therefore, even though the transfer hearing may expose the juvenile to a greater sentence, *Kent*'s requirement of "fundamental fairness" in juvenile court is satisfied when a judge makes a transfer decision using a preponderance-of-the-evidence standard.[232]

This line of reasoning is problematic for several reasons. First, it begs the question of precisely how different *is* the juvenile system? Certainly the juvenile justice system encompasses goals of rehabilitation and redemption not normally found in the adult system. In addition, the origins of the juvenile justice system as discussed in Part I draw from a tradition which is distinct from that of the adult court system. But in reality, is there something inherent in a state's adjudication of juvenile offenders that reduces, alters, or abrogates due process protections? This is the question the courts have struggled with in attempting to define the precise protections necessary to avoid arbitrary application of the law while still achieving the lofty, and well-placed, policy goals that prompted the states to create juvenile justice systems in the first place.

At its most fundamental level, a juvenile justice system is a state-sanctioned recognition that there is and ought to be a difference between the criminal adjudication of adults and children. This is evident in the differences between the factors considered in *Kent* and those considered in *Ring*, *Blakely*, and *Cunningham*. The biggest difference is *Kent*'s consideration of the juvenile's ability to be rehabilitated.[233] But such differences do not exempt juvenile systems from constitutional obligations. In *Gault*, the Court recognized that the good intentions of the juvenile court system had, in practice, paved the road to hell for many juveniles who suffered under arbitrary enforcement and sentences, meted out in a system void of procedural safeguards.[234] And while the

230. *See, e.g.*, Feld, *supra* note 11, at 1221–22 (concluding that *Apprendi* should not be applied to juvenile transfer because to do so would radically and irredeemably alter the nature of the juvenile court system).

231. *See, e.g.*, *In re* Welfare of J.C.P., Jr., 716 N.W.2d 664, 668 (Minn. Ct. App. 2006) ("[F]undamental fairness under the Due Process Clause does not guarantee juveniles every right criminal defendants enjoy, such as the right to a jury trial.").

232. People v. Beltran, 765 N.E.2d 1071, 1076 (Ill. App. Ct. 2002) ("It is well established that, in a juvenile proceeding, due process does not require a jury.... [A]lthough the juvenile court made findings that exposed [the offender] to a greater sanction, [the] defendant had no due process right to have a jury make those findings beyond a reasonable doubt." (citations omitted)).

233. *See* Kent v. United States, 383 U.S. 541, 552–55 (1966).

234. *In re* Gault, 387 U.S. 1, 24, 27–28 (1967) (noting that the concept of the kindly juvenile court judge and the system that operates in the best interest of the child was more "rhetoric than reality" and "the condition of being a boy does not justify a kangaroo court" with no procedural protections).

Court's decision in *McKeiver* backed off the procedural reform that had begun in *Gault*,[235] the Court continued to recognize that while an independent juvenile justice system is not constitutionally mandated, once statutorily created, the state cannot deny a juvenile constitutionally sanctioned due process protections in that system.[236] It is illogical, therefore, to claim that because a transfer analysis occurs while an offender is still within the context of the juvenile court system, that somehow the transfer decision is exempt from *Apprendi*'s protections. To do so overlooks the recognized need for due process within the context of juvenile proceedings and, more fundamentally, ignores that the proceeding in question occurs when the state wishes to *remove* the juvenile from the benefits or protections of the juvenile court system and place him or her in the adult system.[237]

Kent makes clear that once juvenile jurisdiction is created, not only must transfer of a juvenile out of that system to the adult system comport with basic principles of due process, but these protections must trigger prior to the transfer.[238] Because a juvenile court's jurisdiction is limited by the offender's age, its statutory sentencing range is likewise restricted in most jurisdictions to either the legal age of majority or twenty-one.[239] In this sense, a transfer hearing conducted in the juvenile court system is not dissimilar to the sentencing schemes addressed in *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham*. Just as a minor is not entitled to trial or sentencing in a juvenile court, neither Apprendi, Ring, Blakely, Booker, nor Cunningham were entitled to a specific sentence for the crimes they allegedly committed, outside of the general protection against cruel and unusual punishment. The holdings in *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* establish that once there is a statutorily-defined sentencing range, however, a defendant is entitled to be sentenced within that range. *Blakely* and *Cunningham* go even one step further, holding that a defendant is entitled to whatever sentence the

235. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971) (plurality opinion).

236. The exception, of course, is the right to a jury, which scholars have argued must now be provided to juveniles under *Apprendi*. *See, e.g.*, Feld, *supra* note 11, at 1223–24 (arguing that *Apprendi* requires the overturn of *McKeiver*, allowing juveniles to enjoy the right to a jury trial even in juvenile court).

237. The Court of Appeals for the State of New Mexico noted this irony in *Rudy B.*, indicating it seems illogical to say that a juvenile should be denied a jury to assess amenability because juvenile court has no place for such procedure. *See* 2009 NMCA 104, ¶¶ 23–24, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.pdf. This is because the point of such a finding is to remove the juvenile to the adult system where he or she would be "afforded the constitutional rights of an adult, presumably including the jury trial right, and . . . the attendant *Apprendi* protections" upon sentencing. *Id.* ¶ 24.

238. *Kent*, 383 U.S. at 552–53.

239. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 64–89.

state has defined as applicable to him or her under the presumptive sentencing guidelines. Efforts to exceed this range, whether for two additional years (as in *Apprendi*) or for a death sentence (as in *Ring*), trigger the same constitutional protection as an effort to implement any other sentence—proof of a factual basis for that sentence to a jury beyond a reasonable doubt. In the same sense, once the state has created a juvenile court system with lower sentencing ranges, efforts to remove a juvenile from that system and subject him or her to the adult court system and its higher maximum sentencing ranges must trigger equally stringent protections. Essentially, such a system creates two crimes—a standard juvenile crime, punishable only by incarceration within the juvenile system, and an "aggravated" juvenile crime, punishable by a much larger adult sentence. As in *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham*, the facts that justify the longer sentence must be proven to a jury beyond a reasonable doubt. To evade such protections by labeling a juvenile system fundamentally different would violate *Apprendi*'s most basic admonition that a sentencing court must consider what effect its finding would have on an offender's potential sentence. If that effect is to increase his or her sentence beyond what would otherwise be permissible, the fact must go to a jury to be proven beyond a reasonable doubt—regardless of how the state chooses to label that finding or whether the state would prefer a different process for making that finding.

A subtext present in many court opinions rejecting the application of *Apprendi* to transfer proceedings is the normative premise that there is some inherent benefit to a juvenile-court judge reviewing the factors relevant for transfer that cannot be duplicated with presentation to the jury.[240] This argument assumes that juvenile court judges are uniquely attuned both to the abilities of the juvenile court system, and to the circumstances and lives that bring juvenile offenders before them. Such acumen is acquired only by practice and knowledge of the juvenile system and cannot be readily demonstrated by the average citizen that populates a jury. This position, however, seems to give too much credit to juvenile court judges, while belittling jurors. Juvenile court judges are no more or less immune to the politics and cynicism that often affect their adult court comrades. As the Supreme Court noted in *McKeiver*,

240. Feld, *supra* note 11, at 1221–22 (referencing *People v. Beltran*, 765 N.E.2d 1071 (Ill. App. Ct. 2002), *State v. Jones*, 47 P.3d 783 (Kan. 2002), and *State v. Gonzales*, 24 P.3d 776 (N.M. Ct. App. 2001), and arguing that the juvenile's best interests are served by allowing judges, not juries, to make transfer decisions given the complexity of the decision and the factors that affect it). Despite repeated claims that the juvenile court tradition offers benefits beyond those of the adult court system, the Supreme Court has repeatedly imposed constitutional protections on the system. *See* Vannella, *supra* note 19, at 754 (citing *In re* Winship, 397 U.S. 358, 365 (1970); *In re* Gault, 387 U.S. 1, 26, 33–34 (1967); *Kent*, 383 U.S. at 562).

"too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."[241]

As for the jury, the Court's ruling in *Ring* entrusts the jury with the most important decision a person can make—whether to allow the State to deliberately kill another as a punishment for a crime.[242] Juries are frequently asked to review and weigh complex matters. The whole notion of admitting the testimony of expert witnesses and allowing jurors to consider their testimony in adjudicating guilt is a testament to the system's reliance on jurors' ability to sort through complex matters to reach a just conclusion. *Apprendi* seizes on this notion, exalting juries as not only reliable fact finders, but constitutionally-mandated ones.[243] The *Apprendi* case line has been read as a move to temper the relatively novel sentencing procedures with the due process protections of the common law—i.e., a right to have one's peers ascertain the extent of one's guilt.[244] Even if one agrees that a juvenile-court judge is somehow better equipped to examine the factors pertinent to a transfer consideration, there is nothing inherent about that sensitivity that would justify suspension of the Fourteenth Amendment's standard-of-proof protection in transfer hearings.

A final possibility, as noted by the Kansas court in *Jones*, may be a hesitance to attach new federal constitutional rights and protections to the state-created juvenile court systems without a clear ruling by the Supreme Court requiring such an attachment.[245] This reluctance, while understandable, is indefensible in the face of what is at stake—the removal of a child from the juvenile system into an adult court system that, if the child is found guilty, will impose an adult sentence on the child that will punish but will not seek to rehabilitate.

IV. UNCONSTITUTIONAL AVOIDANCE: EXPLAINING COURTS' RELUCTANCE TO APPLY *APPRENDI*

For the reasons described above, the principle of *Apprendi* and its progeny boils down to effect over form—if the defendant could not receive a particular sentence without the finding of an additional fact, then that additional fact must be proven to a jury beyond a reasonable doubt.[246] This principle applies to findings that justify a juvenile transfer decision, which are necessary prerequisites to subjecting a juvenile to

241. 403 U.S. 528, 544 (1971) (plurality opinion).

242. *See* Ring v. Arizona, 536 U.S. 584, 603–09 (2002); Vannella, *supra* note 19, at 760 (arguing that if juries can decide death, they can decide juvenile transfer).

243. *See* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).

244. *See* Vannella, *supra* note 19, at 759 (arguing that requiring juries to consider factors under the sentencing guidelines "temper[s]" the novelty of the sentencing procedures).

245. State v. Jones, 47 P.3d 783, 795 (Kan. 2002).

246. *See supra* Part II.

higher adult sentences, and the justifications courts have offered for avoiding *Apprendi* in this context fail to withstand scrutiny.[247] Why, then, do so many courts decline to follow the *Apprendi* case line when confronted with the prospect of transferring a juvenile to the adult court system where he or she will face greater deprivations of liberty?

There are several possibilities. The most obvious is that for the vast majority of systems, requiring jury findings under a beyond-a-reasonable-doubt standard would so radically alter the process that the court has known that it is simply too much for courts to contemplate.[248] Having said this, juries are not unheard of in juvenile court. Ten jurisdictions allow juries to adjudicate guilt in juvenile court in some form or under certain circumstances.[249] These jurisdictions, however, are the exception, not the rule. Even within these jurisdictions, juries seem underutilized compared to their use in the adult court system.[250] But there are other possibilities as well. First, the *Apprendi* case line challenges the segregation between elements that support a finding of guilt and other facts or findings that justify a particular sentence.[251] This is a hard concept to embrace in a system that has striven to separate the two. One goal of the American criminal justice system is to convict only for the crime charged, and to punish based solely on one's culpability for that crime. It is well established, for example, that evidence regarding prior misconduct, even that for which a defendant has been convicted, or uncharged misconduct, can only be admitted in the guilt phase of a proceeding under limited circumstances.[252] This is not a bad thing. It is not only a commentary on the questionable quality of this evidence, but

247. *See supra* Part III.

248. *See* Feld, *supra* note 11, at 1211.

249. *See* ALASKA STAT. § 47.12.110 (2008) (allowing juries in juvenile court if the juvenile is charged with a crime that if committed by an adult could result in incarceration); ARK. CODE ANN. § 9-27-505 (2008) (allowing juries in juvenile court if the juvenile is charged as an "extended juvenile jurisdiction offender"); COLO. REV. STAT. ANN. § 19-2-107 (West 2005) (allowing juries in juvenile court if the juvenile is charged with a crime that would make him or her an "aggravated juvenile offender" or charged with what would be classified as a "crime of violence" if committed by an adult); MASS. GEN. LAWS ANN. ch. 119, § 56 (West 2008); N.M. STAT. § 32A-2-16 (2008); OKLA. STAT. ANN. tit. 10, § 7303-4.1 (West 2007); TEX. FAM. CODE ANN. § 54.03 (Vernon 2008); W. VA. CODE ANN. § 49-5-6 (LexisNexis 2004 & Supp. 2008); WYO. STAT. ANN. § 14-6-223 (2009); *In re* L.M., 186 P.3d 164, 170 (Kan. 2008) (stating that juveniles have a right to a jury trial under the state constitution).

250. *See* CLEMENS BARTOLLAS, JUVENILE DELINQUENCY 474 (5th ed. 2000) (noting that juveniles rarely request jury trials in states that allow juries in juvenile court).

251. *See* Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."); *id.* at 501 (Thomas, J., concurring) ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment . . . .").

252. *See generally* David Culberg, Note, *The Accused's Bad Character: Theory and Practice*, 84 NOTRE DAME L. REV. 1343, 1344–46 (2009) (discussing the history and development of Federal Rule of Evidence 404, which controls the use and introduction of character and propensity evidence).

on its relevance to the ultimate question before the jury: whether the defendant committed the crime for which he or she stands accused. It supports the notion that defendants should not be convicted because they are generally "bad" people or because they have had a checkered past, but because the State has presented sufficient evidence to show that at a particular moment in time the defendant broke the law. It separates the concept of the defendant's identity, which may be relevant for sentencing, from the crime he or she is accused of committing, which is relevant for a determination of guilt.

On its face, *Apprendi* seems to adhere to this long-held notion. Consider the facts of *Apprendi* itself, in which Charles Apprendi received a "hate crime" enhancement for acting with racial animus.[253] Apprendi's racial animus at the time of his crime, while certainly part of who he is or was as a person, is also intertwined with the crime he was accused of committing. In establishing a sentencing enhancement system that increased a defendant's sentence if he acted out of racial hatred, the State of New Jersey did not criminalize racism itself, but rather criminalized racism when it is a motive for some underlying crime—here, attempting to shoot up his neighbor's trailer and brandishing a weapon.[254] In other words, New Jersey tacked two extra years onto Apprendi's sentence not because he was a racist, but because he acted on his racism and committed a crime in the process. The Supreme Court in the *Apprendi* decision recognized that racism became an element of Apprendi's crime when it was used to increase his sentence beyond the otherwise applicable statutory maximum. It thus became something that the state needed to prove to a jury beyond a reasonable doubt in order to justify punishing Apprendi for it. In this sense, *Apprendi* barely crossed a line between factors traditionally reserved for the sentencing phase and those routinely contemplated by juries.

But this distinction between facts that indicate a defendant's guilt and those that dictate the appropriate sentence for that guilt has never been perfect. The enhancements imposed by the sentencing judges in *Ring*, *Blakely*, and *Cunningham* based the defendant's punishment both on facts inherent to the crime and on facts that had little or nothing to do with the crime itself. These cases' application of *Apprendi* makes clear that even those aggravators that are unrelated to the crime itself must be proven to the jury using a beyond-a-reasonable-doubt standard.

While some of the factors considered by the courts to justify the sentences in each of the cases were linked—like Apprendi's—to the crime itself, some were not. In *Ring*, the court considered aggravators such as the defendant's prior criminal history, his age, and whether he

253. *Apprendi*, 530 U.S. at 470–71.
254. *Id.* at 469.

had acted in a heinous, cruel, or depraved manner.[255] In *Blakely*, in addition to weighing whether the defendant had acted in an especially cruel manner, the court weighed the defendant's history of domestic violence with the victim, including some incidents that had not been adjudicated.[256] In *Cunningham*, the court weighed not only the defendant's past conduct, but the "particular vulnerability of [his] victim," his "violent conduct," and the future danger he posed to society.[257] These factors are judgments about the defendant as a person and how who the defendant *is* should affect not only his punishment but also his guilt for the crime. The court is asked to look beyond the moment of the crime itself and consider the defendant's life as a continuum, judging if the moment that brought him before the court was an aberration or part of the very fabric of the defendant as a person. In these opinions, the Supreme Court recognized that if a state would seek to increase a defendant's punishment for these factors, such factors become elements of the crime the defendant has committed.[258] Timothy Ring was guilty of capital murder and so could be sentenced to death not only because he was involved in a crime that ultimately resulted in another's death, but also because he, Timothy Ring, was an adult, he had "committed the offense in expectation of receiving something of 'pecuniary value,'" and he acted in a depraved, cruel and heinous manner.[259] Ralph Blakely, Jr.'s sentence was increased not only because he was guilty of kidnapping his estranged wife, but also because he had acted in an especially cruel manner.[260] John Cunningham was sentenced to the upper term of the DSL not only because he abused a child, but also because his victim was particularly vulnerable, he was violent, and he posed a future danger to society.[261]

The Supreme Court recognized that the findings of these facts as a means to assess appropriate punishment rendered them inseparably linked to the underlying crimes. The men, and their particular histories and lives, became part of the crimes for which they were convicted. And while the Supreme Court did not require that the men's prior criminal convictions be proven to a jury beyond a reasonable doubt,[262] it did subject these other facts to the full rigors of proof to a jury beyond a reasonable doubt if the defendant's sentence were to rest upon them.

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255. Ring v. Arizona, 536 U.S. 584, 594–96 (2002).

256. Blakely v. Washington, 542 U.S. 296, 300–01 & n.4 (2004).

257. Cunningham v. California, 549 U.S. 270, 274–76 & n.1 (2007).

258. *See Cunningham*, 549 U.S. at 873; *Blakely*, 542 U.S. at 303–04; *Ring*, 536 U.S. at 609.

259. *Ring*, 536 U.S. at 594–95.

260. *Blakely*, 542 U.S. at 299–300.

261. *Cunningham*, 549 U.S. at 275.

262. *See* Almendarez-Torres v. United States, 523 U.S 224, 239–47 (1998) (exempting prior convictions from the requirements of *Apprendi*).

Applying *Apprendi* to juvenile transfer hearings will further blur the line separating factors that traditionally are considered in the context of "guilt," and those that are weighed for sentencing. Factors such as protection of the community, judicial efficiency, the sophistication of the offender, prior commitments to juvenile facilities, and the likelihood of rehabilitation all focus the court on facts that are external to the crime itself and that, at least in part, are linked to the *person* accused of the crime. They ask a court to judge the offender's person—his or her history, not only criminally, but also in terms of who he or she is and how the crime for which he or she stands accused falls in the continuum of his or her life and within the society to which he or she may one day return. There is something off-putting about placing this judgment of the person before a jury who is asked to decide that person's guilt, but failing to do so is logically inconsistent with the very notion that *Apprendi*, and indeed the judicial system itself, seeks to promote. Individuals receive sentences for their crimes. The length or severity of a sentence is weighed and justified based on the crime for which the individual is convicted. In order to contemplate sentencing a child as an adult, and even judging him or her guilty as an adult, there must first be a finding that the child warrants adult adjudication. In this sense, children who are transferred to the adult court system are being adjudicated not only for their criminal acts, but for their person—a person that, while occupying a body that is biologically and chronologically a child's, is judicially guilty of failing to remain a child and acting as an adult. In short, transferred children are adjudicated guilty of both having broken the law and having lost the identity and protections of childhood. As a result of this adjudication, these children can be treated and sentenced beyond their biological identity. Therefore, after *Apprendi*, this adjudication must occur before a jury and must be proven beyond a reasonable doubt.

Another insight about courts' aversion to applying *Apprendi* to juvenile transfer decisions is suggested by those courts' eagerness to label transfer as merely "jurisdictional."[263] This is a neutral label. It speaks to the power of the court to weigh a case and reach a conclusion. It conjures images of a physical place—a room in a particular city or state, where a court, having been properly convened, can pass judgment on the individuals who stand before it. Men and women are not sentenced or harmed by a designation of jurisdiction alone. Whatever harm may befall a defendant as a result of a criminal charge comes later, long after the establishment of jurisdiction, with conviction and sentencing. Jurisdiction, for all its importance, is a starting place that is frequently uncontested and barely noted in a proceeding.

263. *See supra* part III.A.

Applying *Apprendi* to juvenile transfer decisions removes it from this neutral realm and changes the game by placing the findings necessary for transfer before a jury as elements of the offense. To the extent that *Apprendi* lays bare what courts do when they enhance a defendant's sentence, applying *Apprendi* to juvenile transfer hearings lays bare what a judge does when he or she removes a child from the juvenile court system; the judge strips the child of his or her identity and shrouds him or her in a legal fiction whereby he or she ceases to be who he or she is and becomes an adult, subject to all the responsibilities, rigors, and consequences of adulthood with none of the benefits. This is a hard thing for even the most stalwart of judges to face.

This recasting of a defendant into another identity is not done in any other context. Women are not "transferred" to be tried as men when their crimes fly in the face of what society expects from women.[264] The wealthy are not "transferred" to be tried as the underprivileged when their crimes seem uncharacteristic of their social class. Anglos are not "transferred" to be tried as persons of color when their crimes are statistically anomalous to their race. Instead we try the defendant as he or she comes—man or woman, rich or poor, black or white. We thus recognize that social expectations or statistics are not always accurate, that all people are capable of crime and punishment and redemption and that the system must recognize it all.[265] The criminalization of the act is not linked to the expectations of the actor. In theory, at least, criminal acts incur equal culpability no matter who commits them.[266] Their racial, socioeconomic, or gender identity is a distinction that makes no difference to the criminal court. But because the states have created a separate judicial system that acknowledges and embraces a difference in

264. *See generally, e.g.*, Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413 (1997).

265. This is not to say that there is not inequity in the system. Certain defendants are more likely to be stopped, arrested, charged, prosecuted, convicted, and sentenced in certain ways based on their gender, socioeconomic, or racial status. Studies confirm that justice, for all its characterizations, is not blind but highly cognizant of the men and women who appear before it. *See* EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME 15–16 (2000), *available at* http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf (noting racial disparities throughout the criminal justice process and the disproportionate representation of racial minorities in the criminal system). But that discussion is for another article.

266. There are certainly disparities in the application of criminal statutes, and it could also be argued that the very decision to criminalize particular acts is frequently motivated by social expectations about race, class, and/or gender. As Justice Stevens famously noted, the brunt of federal penalties fall on black defendants. *See* United States v. Armstrong, 517 U.S. 456, 479–80 (1995) (Stevens, J., dissenting) (noting that while sixty-five percent of those who use crack cocaine are white, they represent only four percent of federal offenders, leaving persons of color to absorb the significantly higher federal sentences for possession and distribution of crack cocaine). A full exploration of these issues is beyond the scope of this Article.

culpability for the identity of child versus that of adult, to transfer a child out of the juvenile system, the court must do more than designate the physical place where the trial will take place. It must actually alter who the defendant—the child—is. Placing this process in the context of the *Apprendi* case line forces the court to face the fiction it has internalized and for which it has become the vehicle.[267] It forces the court to acknowledge not only what it is doing—taking a child and throwing him or her into a system that is not designed to accommodate his or her immaturity—but also what the consequences of that action will be; the "child" will cease to exist and in his or her place a legally constructed "adult-child" will face an adult charge and an adult sentence. It acknowledges that there is a significance to the child's identity, as child or adult, that the court fails to attach to any other identity.

The creation of this legal fiction takes on another dimension because it involves a child. We as a society, after all, value childhood enough to create, constitutionally unbidden, separate systems to adjudicate the guilt of children. To transfer children out of that system is to acknowledge not only that the system has failed but that we must create a new identity for these people we can no longer embrace as a child. Is it easier for judges to ignore all of this by refusing to apply *Apprendi* and, instead, couching the question of transfer in the almost physical terms of jurisdiction? Is the question more constitutionally and socially palatable if the judge is merely deciding what room this child should stand trial in, not what the consequences of standing in that room will be?

Yet another possible explanation for the reluctance of courts to apply *Apprendi* to juvenile transfer hearings is that such an application creates a conflict for the courts. The "element" such a court would add to justify the higher sentence is the element of being a child who is incapable of reform. This suggests not only that the system to handle juvenile offenders is deficient (something many would readily acknowledge), but also that what the court is "criminalizing" is the condition of being an unruly or irredeemable child. Courts are, after all, basing decisions to transfer juveniles on factors including their lack of amenability to the juvenile rehabilitative process and the shocking nature of the crime they are alleged to have committed.[268] This criminalization of a child's personality or his or her condition would not sit well constitutionally. In 1962, the Supreme Court made clear that mere conditions, no matter the "vicious evils" which may accompany them,

267. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (discussing the need for judges to insulate themselves from the violence they mete out).

268. *See* Kent v. United States, 383 U.S. 541, 566–67 (1966) (laying out factual findings to support transfer of juveniles to the adult court system, including the seriousness and violent nature of the offense and the prospects of rehabilitation of the juvenile).

cannot be criminalized.[269] Transfer, however, would seem to do just that, insofar as it allows a child to be tried and punished as an adult because he or she can no longer be accommodated within a system that is designed to treat and rehabilitate children.[270]

V. OUTSTANDING QUESTIONS

There is no coherent way to evade *Apprendi*'s requirements where a juvenile transferred to adult court receives a sentence in excess of what he or she could have received in juvenile court.[271] This is not to say that application of *Apprendi* to the juvenile system is not without its pitfalls and risks. Beyond those noted by other scholars and courts regarding the dangers juries may pose to juvenile offenders,[272] other aspects of the juvenile justice system raise difficult questions that are not necessarily resolved by the Supreme Court's current case law.

A. NO HARM, NO FOUL?

One question is the precise role of *Apprendi* in situations where the offender may be exposed to a potentially higher sentence as a result of transfer but where the actual sentence imposed upon conviction in adult court is within the juvenile standard sentencing range. New Mexico's statutory scheme, for example, provides that even if a juvenile is transferred to adult court, the sentencing judge still has the option to sentence him or her under the juvenile sentencing structure if the judge finds that such a sentence more appropriately addresses either the

269. *See* Robinson v. California, 370 U.S. 660, 667–68 (1962) (striking down a California statute that attempted to combat the "vicious evils" that accompany narcotics trafficking by criminalizing the condition of being a drug addict).

270. Ironically, in the Supreme Court's recent decision in *Roper v. Simmons*, 543 U.S. 551, 560–75 (2005), the Court examined the significance of the identity of being a minor on a defendant's eligibility for a death sentence. The Court concluded that, given the fundamental biological and neurobiological differences between adults and children, a defendant could not be found to be sufficiently culpable to receive the death penalty for crimes he or she committed as a child. *See id.* To do so would be to impose an unconstitutionally cruel and unusual punishment on the child for a condition he or she could not avoid—youth. *See id.* In this sense, the identity of being a child, regardless of how unruly the child, was immutable and could not be circumvented for the sake of the highest sentence possible. Again, this may raise questions regarding the constitutionality of transfer hearings in general, which not only seek to alter the identity of childhood and punish the condition of being an unruly child but may also constitute a cruel and unusual punishment as raised in *Roper*. *See* Adam Liptak, *Defining 'Cruel and Unusual Punishment' When the Offender Is 13*, N.Y. TIMES, Feb. 3, 2009, at A12 (discussing case of Joe Sullivan, who at thirteen was sentenced to life without the possibility of parole after conviction in an adult court; Sullivan is challenging the sentence and conviction under the Eighth Amendment's prohibition on cruel and unusual punishment).

271. *See* State v. Rudy B., 2009 NMCA 104, ¶ 67, 216 P.3d 810 (N.M. Ct. App. 2009) (Sutin, J., specially concurring), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104 (concluding that other courts' decisions refusing to apply *Apprendi* to juvenile transfer hearings cannot be distinguished "on any rationale other than that the cases were not correctly decided" (citing this Article)).

272. *See, e.g.*, Feld, *supra* note 11, at 1221–22.

offense itself or the needs or circumstances of the offender.[273] At least hypothetically, it would also be possible for an adult court judge, acting within the adult sentencing guidelines, to sentence a minor offender to a sentence that does not fall outside the maximum sentence contemplated by the juvenile sentencing scheme. In either of these two scenarios, the offender has not received a sentence beyond the otherwise applicable statutory maximum and, therefore, *Apprendi* arguably has not been violated.[274]

Where no higher sentence is imposed, is there nonetheless a harm that results from the transfer itself sufficient to warrant increased procedural protections? If Apprendi's total sentence with the hate-crime enhancement had been within the ten-year maximum for the underlying offense, or if Ring were not sentenced to death despite the finding of a statutory aggravator, or if Blakely or Cunningham had not ultimately received an exceptional sentence, would the exposure to these higher sentences—the mere risk—be sufficient to warrant due process protections of a jury and a requirement of proof beyond a reasonable doubt?

This question of what degree of exposure to a higher sentence triggers *Apprendi*-style protections has not been explicitly reached by the Supreme Court, and it is unlikely to see review given the fact that a defendant who ultimately evades the higher sentence *despite* the use of sub-*Apprendi* procedures has little reason to complain to any higher court. In *Cunningham*, the Court spoke in terms of exposure as opposed to only the imposed sentence,[275] but of course the Court was considering a case in which a higher sentence had in fact been imposed. Despite this arguable ambiguity, consideration of other procedural protections suggest that the mere exposure, no matter how tenuous, is sufficient to trigger the protections.[276] In the context of other procedural protections, the end result of the process does not, by itself, eliminate the need for protections. A defendant's rights to timely appointment of counsel or a speedy trial, for example, trigger prior to the defendant's conviction. To hinge such procedural rights on the outcome of the hearing would not

273. *See Rudy B.*, 2009 NMCA 104, ¶¶ 42–44.

274. Vannella, *supra* note 19, at 763 (correctly noting that factors that reduce a defendant's sentence are not covered by *Apprendi*).

275. Cunningham v. California, 549 U.S. 270, 279–82 (2007)

276. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009) (providing the latest in a long line of pronouncements that "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings"). Interrogation by the State is such a stage. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 204–07 (1964); *see also, e.g.*, United States v. Gouveia, 467 U.S. 180, 190 (1984) ("Our speedy trial cases hold that that Sixth Amendment right may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge . . . .'" (quoting United States v. MacDonald, 456 U.S. 1, 6–7 (1982))).

only seem illogical, but would seem to create judicial inefficiency, particularly if the procedure had to be revisited as a result of the conviction. In the context of juvenile transfer hearings, the question is slightly more nuanced: when is a defendant entitled to raise *Apprendi* in the context of a series of hearings whose effect on the defendant's overall sentence will not be realized until well after the conclusion of the hearing itself and potentially in another court? Given the Court's admonition in *Kent* that procedural protections must be triggered *before* transfer,[277] there is a strong argument that *Apprendi*-style protections must be realized during the transfer proceeding for they are "too little too late" after transfer has occurred.

B. *APPRENDI* AND THE COLLATERAL CONSEQUENCES OF ADULT CONVICTIONS

A second outstanding question is whether *Apprendi* is triggered by the collateral consequences that adult convictions can have on sentences for future crimes. This returns us to the question whether there is something unique about the juvenile system, such that mere exposure to the adult system, or conviction or sentence in that system, is sufficient to trigger increased due process protections regardless of whether the incarceration portion of the minor's sentence following transfer is within that contemplated by the juvenile sentencing structure. There are certainly differences between juvenile and adult convictions that extend beyond "mere" incarceration. In nearly all jurisdictions, juvenile adjudications do not "score" as severely as adult convictions in determining placement on the sentencing grid for future offenses—if they score at all.[278] In real terms, this means that juveniles who are transferred to adult court and are subsequently convicted of additional crimes will receive higher sentences than juveniles who were not transferred. In addition, many jurisdictions have "once transferred, always transferred" statutes.[279] These statutes require that once a juvenile is transferred to adult court, any subsequent proceedings against that offender must also occur in adult court, regardless of whether the subsequent offense is independently suitable for transfer and regardless

277. *See* Kent v. United States, 383 U.S. 541, 557 (1966).

278. Joseph B. Sanborn Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 8–17 (2000) (noting that, in most jurisdictions, adjudication of guilt in juvenile court either does not count as a "criminal" conviction and therefore is not scored for adult sentencing purposes, or is scored at a lower or "capped" rate in adult court).

279. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 5 (1996) (noting that eighteen states have "once transferred, always transferred" statutes that prevent offenders from returning to juvenile court once they have been transferred to adult court regardless of whether the adult court transfer resulted in an actual conviction).

of whether the offense for which the juvenile was originally transferred ultimately resulted in a conviction.[280]

Thus, the mere fact of transfer can close the juvenile system forever to a child offender. The specter of indeterminate sentencing and three-strikes sentencing enhancements, which loom in many jurisdictions' adult sentencing guidelines,[281] further complicates the calculus. Few jurisdictions score juvenile adjudications of guilt toward a defendant's strike count.[282] In addition, indeterminate sentencing statutes provide that even when a judge sentences an offender within the adult sentencing guidelines below or at the same level as the offender would have received in the juvenile system, a parole or subsequent sentencing board may determine at a later date that an increased sentence for an indeterminate length is appropriate for those sentenced under the adult system only.[283] While most juvenile sentencing schemes allow the juvenile facility to determine the appropriate length of the sentence within a designated range, few jurisdictions extend such sentences beyond the age of majority or age twenty-one.[284] In this sense, adult convictions that appear to conform to the juvenile sentencing range may in fact subject

280. *See id.*

281. *See* Caleb Durling, Comment, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 353–56 (2006) (discussing the rising use and impact of indeterminate sentencing); Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709, 723–24 (2009) (discussing trends towards harsher sentencing through the use of three-strike provisions and indeterminate sentencing); Brendan O'Flaherty & Rajiv Sethi, *Why Have Robberies Become Less Frequent but More Violent?*, 25 J.L. ECON. & ORG. 518, 526 (2009) (quantifying the rise of three-strike provisions state by state).

282. California's "Three Strikes" sentencing law is one of the few that allows juvenile adjudications to count as strike offenses, even though such adjudications occur without a jury. *See* CAL. PENAL CODE § 667 (West 1999); Feld, *supra* note 11, at 1208–09 (discussing California's willingness to rely on juvenile adjudications to serve as a basis for three-strike sentencing); Sanborn, *supra* note 278, at 24 (noting that only California, Louisiana, and Texas allow juvenile adjudications to serve as "strikes" and even these states do not allow a juvenile to acquire a final strike prior to transfer to adult court). It is interesting to note that in *People v. Nguyen*, 209 P.3d 946, 951–55 (Cal. 2009), the defendant did not dispute that his prior juvenile conviction qualified as a strike under California's statute but he claimed that use of such a conviction to secure his life sentence, which he would not have been eligible for without considering the juvenile conviction, violated his Sixth Amendment right as the juvenile conviction was secured without a jury in juvenile court. The California court rejected this argument and allowed the conviction to stand undisturbed. *Id.* at 951–55.

283. *See generally* Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89 (1990) (providing a broad discussion of indeterminate sentencing in the adult court system).

284. Mary M. Prescott, *Another Option for Older, Nonviolent Juveniles: Statutory Retention of Juvenile Court Jurisdiction Past the Age of Majority*, 85 IOWA L. REV. 997, 1006 (2000) (noting that while individual states set their own age of majority, most states set juvenile court jurisdiction between seventeen and twenty-one years of age); Lisa S. Beresford, Note, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State by State Assessment*, 37 SAN DIEGO L. REV. 783, 799 (2000) (noting that the juvenile court's capacity to punish is limited by the jurisdictional limitation of the age of the offender).

the offender to a higher sentence under an indeterminate sentencing scheme. In addition, as explained above, adult convictions may have long-term effects on future sentencings that juvenile adjudications do not, regardless of whether the sentence the offender receives as a result of the transfer is in fact longer than the sentence that he or she might have received in juvenile court.[285]

Juvenile adjudications also differ from adult convictions in terms of other collateral consequences. In forty-seven jurisdictions, an adult felony conviction will result in the suspension of the right to vote but forty-five of those jurisdictions hold that juvenile adjudications do not affect suffrage.[286] Other collateral consequences may vary from jurisdiction to jurisdiction but if recent trends in sentencing hold true, it is clear that while sentencing commissions may be willing to reduce periods of confinement and increase good time allotments, they are also imposing greater collateral restrictions on felons convicted in adult court, as opposed to offenders adjudicated in juvenile court.[287] In *Witkowski v. M.D.N.*, the North Dakota Supreme Court noted: "Trying a juvenile as an adult is a severe sanction with harsh consequences. The status of 'juvenile' carries a shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults, and guarantees that confinement will not exceed the age of twenty."[288] The North Dakota court added that, just as with adults convicted as felons, juveniles convicted as adults are disqualified from public employment and may have restrictions placed on other legitimate opportunities.[289]

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285. Beresford, *supra* note 284, at 817–18 (noting that it is common for juveniles to receive less confinement once transferred to adult court than they would have received had the juvenile court retained jurisdiction).

286. Sanborn, *supra* note 278, at 8–11; *see* C. Victor Lander, *Racism in the Criminal Justice System* 2 Ann. 2000 ATLA-CLE 1801 (2000) (commenting that while juvenile adjudications do not result in disenfranchisement, once a juvenile is convicted of a felony offense, if sentenced as an adult as a result of transfer, the juvenile loses his or her right to vote before he or she has even gained that right); Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDAM URB. L.J. 1519, 1520–21 (2003) (noting that forty-eight states either restrict or entirely revoke the right of felons to vote); *see also* United States Department of Justice Civil Rights Division, Regaining Your Right to Vote, http://www.usdoj.gov/crt/voting/restore_vote.php (last visited Oct. 4, 2009) (providing state-by-state analysis of disenfranchisement statutes); MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996) (same).

287. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 701–02 & n.155 (2008) ("In conjunction with the exponential increase in the number and length of incarcerative sentences during the last two decades, collateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences." (quoting Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999))).

288. 493 N.W.2d 680, 683 (N.D. 1992).

289. *Id.* For a more general discussion, see also Marsha B. Freeman, *Bringing Up Baby*

From the perspective of *Apprendi*, the question becomes whether these collateral losses of liberty interests are worthy of heightened due process protection. In other words, do they warrant the same level of protection afforded the ultimate liberty—physical freedom? While *Apprendi* and its progeny consider "liberty" in terms of heightened physical impositions (additional years of incarceration in *Apprendi*, *Blakely*, *Booker*, and *Cunningham*, and execution in *Rings*), nothing in the rulings themselves explicitly requires that a defendant must be subjected to a "greater punishment" in terms of confinement in order to warrant the due process protections of a jury and proof beyond a reasonable doubt. While some collateral interests may not rise to a constitutional level, it seems difficult to distinguish the "collateral" suspension of the right to vote from physical confinement on a constitutional scale of worth. In this sense, even if an offender's ultimate period of confinement following an adult conviction after transfer is not greater than that he or she would have received if adjudicated guilty in juvenile court, the mere fact of the adult conviction and the collateral consequences it carries arguably require the protections provided by *Apprendi* because these consequences cannot be imposed without the factual finding that led to the transfer.

C. How Would an *Apprendi* Hearing Look in Juvenile Court?

Assuming that courts begin to enforce (or are compelled by higher courts to enforce) *Apprendi* in the context of juvenile transfer hearings, legitimate questions remain about precisely what such hearings would look like. *Apprendi* answers the basic question that the burden of proof must be beyond a reasonable doubt, but what of the jury requirement? Given that juries do not preside over the ultimate question of guilt in the juvenile system,[290] are they required to preside over the question of whether an offender should remain in the system?[291] Do juveniles gain or lose something in allowing a judge, not a jury (which by definition could not contain the offender's peers, at least not in terms of age), to review

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(Criminals): The Failure of Zero Tolerance and the Need for a Multidisciplinary Approach to State Actions Involving Children, 21 Quinnipiac L. Rev. 533, 555–56 (2002), which notes that offenders transferred to adult court suffer collateral consequences of the transfer. These consequences can include the loss of confidentiality, which in some jurisdictions accompanies juvenile adjudications, and disqualification from public employment. *Id.*

290. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 560 (1971) (Douglas, J., dissenting) (noting that there is no constitutional requirement of a jury in juvenile cases).

291. This issue was addressed by the New Mexico Court of Appeals in *Rudy B.*, where the court concluded that *Apprendi* applied to juvenile amenability determinations despite the absence of juries in juvenile court because such a determination sought to transfer the juvenile to the adult court system, where the juvenile would enjoy the procedural rights of an adult, "including the jury trial right." *See* 2009 NMCA 104, ¶ 24, 216 P.3d 810 (N.M. Ct. App. 2009), *cert. granted*, No. 31,909 (N.M. Sept. 15, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/2009/09ca-104.

such factors as their amenability to rehabilitation?[292] Such an argument—that juveniles may actually be worse off if a jury is allowed to determine transfer—is often put forth not only in the juvenile context, but also by those who believe that a jury should not make a determination of death in capital cases.[293] On this line of reasoning, there is a risk that, in the face of the horrific crime for which the defendant is charged—or in the case of juveniles, the youth of the offender coupled with the horrific crime—juries will overlook or minimize the social considerations that a sentencer should take into account.

In the context of juvenile transfer hearings there is also the additional complication that, unlike capital cases, a jury weighing the question of juvenile transfer would potentially do so before the offender was actually judged guilty—at the time the State sought to transfer him or her to adult court. If the same jury weighs both transfer and guilt, this question of timing would raise two primary quandaries for the offender in presenting his or her case. First, much of the "social" evidence presented in the context of the transfer hearing would likely be excluded for the adjudicatory portion of the proceeding because it has little or no relevance to the offender's guilt, even though such evidence may be relevant to the juvenile's propensity for the crime or the need for punishment. Factors such as the offender's criminal history, history of learning disabilities or mental illness, lack of appropriate role models, or history of foster homes may serve a juvenile well in the context of a transfer hearing to persuade a fact finder that, if given a chance, he or

292. *See* Feld, *supra* note 11, at 1222.

293. *See id.* at 1161–69 (discussing the differences between judicial determination of facts and jury determination of facts); *id.* at 1222 (concluding that one unwanted consequence of allowing juveniles juries in the transfer context would be "to exclude more categories of offenses from juvenile court jurisdictions" in the interests of streamlining the process). The analogy in capital cases is race studies of juries, which find that juries that contain few or no representatives of the of the defendant's race are far more likely to sentence the defendant to death. *See, e.g.*, Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 327 (2009) (concluding that prosecutors make charging decisions based on, among other things, the racial composition of the jury pool, with pools containing large percentages of people of color being less likely to impose death sentences); Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the "Will of the People,"* 3 PSYCHOL. PUB. POL'Y & L. 303, 330 (1997) (noting that white jurors are far more likely to impose death sentences on African American defendants than on white defendants). The larger question of whether judges or juries generally are more likely to impose death remains in dispute. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–95 (1995) (discussing studies that show a correlation between upcoming elections and judicial overrides of jury recommendations against imposing the death penalty); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039–44 (same). The question whether juveniles would actually be better off with a jury or a judge deciding transfer is a different question than whether they enjoy the right to such a jury under the *Apprendi* case line. It is a question certainly worthy of examination, but sadly not in this Article.

she is redeemable—but the same factors may prejudice a jury against the same juvenile in the context of adjudication by suggesting that he or she has little direction other than lawlessness. Coupled with recent trends that move juvenile justice systems away from a rehabilitative model and towards a punitive one that requires the offender to accept "responsibility," presentation of such factors may have a significant impact on the jury's decision to transfer and/or on decisions of guilt.[294]

Second, if asked to present evidence to the same jury regarding transfer and guilt, an offender may have to choose between inconsistent theories of defense. In capital proceedings, for example, it is not unusual for defendants to argue their lack of guilt to a jury in the guilt phase of a proceeding and then, upon conviction, to present evidence of their remorse following the crime or to suggest that their mental health or intellect affected their decision-making process, thereby warranting mercy in the sentencing phase. Such inconsistent theories would not be possible if the sequence of the hearings were reversed. In capital cases, a defendant can argue that the jury, having found him or her guilty, should now consider the factors surrounding the crime itself and the defendant to arrive at the appropriate sentence. In a transfer hearing, however, the offender has not yet been found guilty but may want the fact finder to consider such facts as his or her ability to understand the alleged crime or his or her behavior following the alleged crime, while later arguing that the state either cannot prove his or her guilt or that he or she is in fact not guilty.

The most obvious response to these concerns is that the right to a jury is distinct from a defendant's decision to exercise that right. The fact that a defendant may ultimately chose to waive his or her right to a jury does not diminish the constitutional guarantee to that jury. Just as adult defendants waive jury trial when they believe that a jury may be unable or unwilling to provide them with a fair trial,[295] a juvenile could employ the same calculus in determining whether or not he or she wanted a jury to decide transfer. The waiver of the jury on this particular issue would not preclude the same juvenile offender from seeking a jury to adjudicate guilt if he or she was ultimately transferred.[296]

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294. Prescott, *supra* note 284, at 1008 (noting recent trends away from leniency in juvenile courts including increasing numbers of transferable cases).

295. *See generally*, Patton v. United States, 281 U.S. 276, 312 (1930) (permitting waiver of jury trial in federal criminal cases). Such a right of waiver could be conditioned on the consent of the prosecuting attorney or judge. *See* Singer v. United States, 380 U.S. 24, 36 (1965). *Singer* did not reach the question of whether a defendant's reasons for wanting to be tried by judge alone could be "so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id.* at 37.

296. In discussing the right to waive jury trial, the Court in *Patton* acknowledged the ability of defendants to engage in partial waiver of the jury. 281 U.S. at 312. This partial waiver frequently

Another solution to this dilemma would be to separate the juries—have one jury consider the offender's guilt and a separate jury consider his or her suitability to transfer. This is consistent with some capital sentencing schemes, which allow separate juries to consider guilt and punishment.[297] Another possible solution would be to allow a judge to make an initial decision regarding the appropriateness of transfer and then, if a juvenile is both transferred and convicted in adult court, allow the jury to consider either whether or not the original transfer was appropriate or, similar to the New Mexico model, to consider whether the offender should be sentenced within the adult or juvenile sentencing schemes.

This second solution, arguably, complies with the literal holding of *Apprendi*, in that increased procedural protections would be triggered once the juvenile was actually facing a higher sentence, i.e. after he or she had already been both transferred to and convicted in adult court. This solution, however, is not without faults. First, it is judicially inefficient. One of the *Kent* factors is judicial efficiency, which might be served, for example, by permitting transfer when the juvenile's case is joined with those of adult codefendants.[298] In this sense, conducting two proceedings to determine the appropriateness of transfer makes little sense and seems a poor use of judicial resources.

Second, this solution requires presentation of social factors to a jury that has just found the offender guilty of the crime. It is not clear what effect this finding might have on the jury's subsequent proceedings. What is clear is that there is a risk that jurors would allow information from the guilt phase of the trial to impermissibly bleed into their decisions about either transfer or the appropriate sentencing system for the juvenile.[299] An additional concern is that a jury, hearing that a judge had already determined that transfer was appropriate or simply assuming that

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manifests in the context of capital cases, in which a defendant may waive trial by jury for the guilt portion of his proceeding, but decline to waive jury for the punishment portion. *See* Commonwealth v. O'Donnell, 740 A.2d 198, 213 (Pa. 1999) (acknowledging the right of capital defendants to waive their right to jury trial for a portion of the proceedings); Commonwealth v. Michael, 674 A.2d 1044, 1046 n.4 (Pa. 1996).

297. *E.g.*, 18 U.S.C. § 3593(b)(2)(C) (2006) (allowing a defendant a separate sentencing jury under certain circumstances in capital cases); IDAHO CODE ANN. § 19-2515(5)(b) (2004) (same); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 2005 & Supp. 2009) (same); N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney 2005) (same); *see also* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1060–61 (2001) (arguing that there should always be separate sentencing juries in capital cases given that a jury only reaches sentencing after having already committed to the prosecutor's version of the facts).

298. Kent v. United States, 383 U.S. 541, 566–68 (1966).

299. *See* Casey Laffey, Note, *The Death Penalty and the Sixth Amendment: How Will the System Look After* Ring v. Arizona*?*, 77 ST. JOHN'S L. REV. 371, 398 (2003) ("[A] jury might be more likely than a judge to impose the death penalty improperly based on emotion.").

someone had already determined that transfer was appropriate, might treat that previous determination with inappropriate deference in making their own decision about either transfer or sentencing.[300]

Third, adopting the New Mexico model, which would allow the jury to decide whether the offender should be sentenced in the adult or juvenile systems, ignores the collateral consequences that may stem from an adult conviction. If the State can argue that the length of incarceration is the sole trigger for *Apprendi*-style protections, can the State agree not to seek a sentence in excess of the maximum term of incarceration allowed under the juvenile sentencing scheme, while still requesting a transfer to adult court in order to achieve collateral consequences (such as a higher offender score or sentencing under a three-strike provision from the adult conviction) that it could not achieve via a juvenile adjudication? If so, the State could do an end run around the procedural protections afforded by *Apprendi* simply by limiting itself on the requested period of incarceration. Moreover, there would remain the possibility that the court would decline to follow the State's recommendation and proceed to sentence a transferred juvenile above the sentence he or she would have received in juvenile court, in which case the entire conviction might have to be thrown out under *Apprendi* because the offender had received a higher sentence without due process protections. *Blakely* makes clear that *Apprendi* is implicated even if the state promises not to pursue a higher sentence because the court might nonetheless impose one.[301] In other words, it would not have made a difference if the State at sentencing asked the court to find Apprendi guilty of a hate crime but to sentence him within the basic statutory maximum of ten years because the judge could still have imposed a sentence above ten years under the sentencing guidelines. A defendant

300. Arguably this risk of inappropriate deference could be diminished with a jury instruction, similar to those given to jurors advising that the state's decision to charge a defendant should not weigh in their determination of guilt, or that a judge's ruling on evidentiary issues should not affect their decision. The curative effect of such instructions, however, is difficult to judge, particularly given that in this instance, unlike the examples given, the question before the jury is exactly, not approximately, the issue previously decided—whether this juvenile should be transferred and treated as an adult in the eyes of the law.

It is also possible that, unless a jury was told that a judge had already made a determination on transfer, the jury would have no idea that the issue was already decided. In this sense, a risk of deference might be avoided by simply not informing a jury of the judge's previous decision. Another safeguard against deference would be to present the relevant transfer factors as sentencing factors. The risk in this is it assumes to some extent that a jury is ignorant of the system, a difficult assumption to test, but an important one if the defense wishes to avoid impermissible deference by the jury. It might be possible to deal with this issue during the voir dire process by questioning jurors' knowledge of the system, or of the defendant's age, but even if such questions were posed in the form of a confidential questionnaire, it would still pose the risk of inadvertently educating the jury about the very information the defense is seeking to avoid.

301. *See* Blakely v. Washington, 542 U.S. 296, 303 (2004).

does not have to wait for the violation to occur for his or her Sixth and Fourteenth Amendment rights to trigger.

A fourth dilemma raised by allowing a jury to consider the appropriateness of transfer after the fact is suggested by the Court's decision in *Kent*: due process rights provided after a juvenile has already been removed from the juvenile system are not sufficient because the juvenile has already suffered a harm by virtue of the removal itself. In *Kent*, the Court noted that juvenile court is fundamentally different than adult court and may offer services and protections that cannot be duplicated in adult court even if due process protections are met with respect to the ultimate duration of the criminal sentence.[302] Later, in *McKeiver*, the Supreme Court distinguished the juvenile court system from the adult court system as providing a more protective and rehabilitative environment, both pre- *and* postadjudication.[303] For purposes of *Apprendi*, the question remains whether these benefits warrant the same level of due process protections as a higher sentence.

While *Kent* holds that an offender is entitled to his or her transfer hearing prior to removal from juvenile court,[304] the Court does not assign a specific constitutional value to the juvenile court experience. Despite the *Kent* Court's lack of guidance, this question seems to hinge on whether juvenile court is unique and, once statutorily created, creates some level of expectation for adjudication that cannot be denied without an appropriate level of constitutional protections. Any effort to remove the minor from the juvenile system, in and of itself, represents an effort to achieve a higher and more retributive, as opposed to rehabilitative, sentence, thereby triggering the protections articulated in *Apprendi*. A hearing following this removal would therefore be insufficient, as it would be merely a post-hoc effort to ameliorate a harm already exacted on the offender when he or she was removed from the juvenile system. This is, admittedly, a more difficult argument to make under *Apprendi* because it assumes that pre-adjudicatory effects of transfer rise to the same level as a sentence in excess of the otherwise applicable statutory maximum. The Court has yet to resolve this issue.

CONCLUSION

The application of *Apprendi* to juvenile transfer hearings raises a number of unique considerations, particularly in light of the fact that transfer hearings have a variety of consequences for their juvenile subjects. One such impact is to potentially expose the offender to a higher sentence in the adult system than he or she would receive in the

302. 383 U.S. at 563–64.
303. 403 U.S. 528, 539–40, 544 (1971) (plurality opinion).
304. 383 U.S. 541, 552–53 (1966).

juvenile system. In its most basic application, *Apprendi* requires that findings resulting in such higher sanctions be supported by a jury determination made beyond a reasonable doubt. But *Apprendi*'s impact on other consequences of juvenile transfer proceedings is not as obvious. Clearly, transfer hearings have a variety of collateral consequences, both procedural and substantive, even if they do not result in an increased period of incarceration for the offender. It is less clear whether *Apprendi*'s protections apply to such collateral impacts. Arguably, *Apprendi* requires heightened procedural protections whenever a liberty interest is at stake, although it is not clear under current Supreme Court case law what particular protections are necessary when the liberty interest is not physical detention.

Thus, the holding in *Apprendi* does not directly undermine *Kent*, except to the extent that the result of a *Kent* hearing is to impose on an offender a sentence beyond the statutory maximum he or she would otherwise face. However, by making "effect" rather than "form" the focus of the constitutional inquiry, *Apprendi* and its progeny set a new standard for procedural protections, requiring a jury and proof beyond a reasonable doubt whenever the particular findings considered result in a higher sentence, regardless of the context in which those findings occur. In defining an appropriate level of process, the Court in *Kent* was loath to attach specific parameters to the fundamental due process it required in transfer hearings. The Court's subsequent decisions in *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham*, however, may demand that due process protections in juvenile transfer hearings take on specific form—determination by a jury beyond a reasonable doubt—that every state but two currently fails to provide.

As the debate over the contours of *Apprendi* rages on, so inevitably do questions about the formal role and function of the jury.[305] And as courts at all levels struggle to define the outer limits of *Apprendi*, questions about the effect, or even the wisdom, of expanding the jury's role into the ever-widening sphere of sentencing inevitably emerge.[306] At a minimum, *Apprendi* seeks to impose some of the constitutional protections of determinations of guilt on the more consequential findings of sentencing.[307] In the process, it reopens questions about the status of constitutional procedural protections in juvenile court. As the Court has struggled since *Gault* to find a proper balance between the reformist

305. For the latest in this debate see generally W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893 (2009).

306. *See* Douglas A. Berman, *Should Juries Be the Guide for Adventures Through* Apprendi-*Land?*, 109 COLUM. L. REV. SIDEBAR 65, 65–72 (2009), http://www.columbialawreview.org/articles/should-juries-be-the-guide-for-adventures-through-i-apprendi-i--land.

307. *Id.* at 70–71.

goals of the juvenile justice system and the procedural protections of the Constitution, the stakes have grown higher. Children, particularly underprivileged children and children of color, are being transferred out of the juvenile court systems at alarming rates and with shocking ease.[308] In the adult court system, they are facing longer sentences, harsher conditions of incarceration, and greater collateral consequences. Given the enormous consequences that flow from transfer, a greater level of procedural protection seems warranted. The Court's decision in *Roper v. Simmons*[309] and acceptance of the petitions for certiorari in *Sullivan v. State*[310] and *Graham v. State*[311] suggest an increased willingness to reconsider the recasting of juveniles as adults for the purposes of criminal sentencing. While none of these cases have been based on *Apprendi*'s analysis, they suggest increased scrutiny over juvenile transfer and the accompanying sentencing process. It seems constitutionally implausible that a higher standard of proof is required to convict a juvenile for a misdemeanor offense than to send him or her out of the juvenile court system to face an adult conviction and sentence. Yet failing to apply *Apprendi* to juvenile transfer hearings has just such an effect. *Apprendi* could not have been clearer: when determining the scope of the Sixth and Fourteenth Amendments' protections, "the relevant inquiry is one not of form, but of effect."[312] This command leaves courts no choice but to extend those protections to juvenile transfer hearings.

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308. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 59 (indicating that in states studied, African American children charged with violent offenses are transferred at 1.8 to 3.1 times the rate of white children charged with these crimes); Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 577 (2009) ("Nationwide studies also show that while '[Blacks] represent 15% of the population, [they represent] 26% of juvenile arrests, 44% of youth who are detained, 46% of the youth who are judicially waived to [adult] criminal court, and 58% of the youth admitted to state prisons.' . . . One study of eighteen jurisdictions found that eighty-two percent of transfers to the adult system were of minority youth and seventy percent of the transferred youth in particular were Black." (alterations in original) (footnote omitted) (quoting CTR. ON JUVENILE & CRIMINAL JUSTICE, RACE AND THE JUVENILE JUSTICE SYSTEM); Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 989 (2006)); Marcy Rasmussen Pokopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 109–11 (1995) (examining the effect of race on Minnesota's transfer statute). *See generally* Cynthia Conward, *There Is No Justice, There Is "Just Us": A Look at Overrepresentation of Minority Youth in the Juvenile Justice and Criminal Justice System*, 4 WHITTIER J. CHILD & FAM. ADVOC. 35 (2004) (discussing increasing trends to transfer children of color). *But see* Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) (acknowledging racially disparate waiver rates but concluding that "race effects disappeared when other variables were controlled").

309. 543 U.S. 551 (2005).

310. 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7621).

311. 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7412).

312. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

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