The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications

Carl Rixey
NOTE

THE ULTIMATE DISILLUSIONMENT: THE NEED FOR JURY TRIALS IN JUVENILE ADJUDICATIONS

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Juvenile courts were created at the turn of the century to remove juvenile offenders from the harsh grasp of the adult criminal justice system.1 Pioneers of the juvenile court movement sought to treat juvenile offenders the way physicians treat infants: when infants are sick, their illnesses are first diagnosed and then individually treated in a way that best allows them to heal.2 Despite the commendable intentions of newly established juvenile systems, "the informality and private nature of the proceedings resulted in little public oversight and led to arbitrary dispositions with indeterminate and punitive sentences."3 Even before the U.S. Supreme Court extended some of the procedural due process rights to juveniles as a result of the failing juvenile system, critics questioned the applicability and measured success of a distinct juvenile justice system. In 1966, Justice Fortas questioned the juvenile justice system when he noted "that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."4

Although the U.S. Supreme Court has extended nearly all of the procedural due process rights to juveniles, the Court has stopped short of granting juveniles a constitutional right to a jury trial.5 Citing public policy reasons

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3. Fain, supra note 1, at 500.
5. See McKeiver v. Pennsylvania, 403 U.S. 528, 550–51 (1970) (plurality opinion). But see In re Winship, 397 U.S. 358, 368 (1970) (applying a reasonable doubt standard to juvenile delinquency proceedings); In re Gault, 387 U.S. 1, 33–34, 41, 55, 57 (1967) (conferring the due process rights of notice, representation by counsel, freedom from self-incrimination, and the ability to confront and cross-examine witnesses to juveniles); Kent, 383 U.S. at 554 (extending many due process protections, such as a right to counsel and a fair hearing to juvenile waiver proceedings).
concerning the rehabilitative nature of juvenile proceedings, as well as the separate and distinct nature of juvenile adjudications, a divided Court in *McKeiver v. Pennsylvania* declined to extend to juveniles the right to a jury trial during a juvenile adjudication. Although the Court's public policy considerations may have been relevant in 1971, they are now inapposite because of the growing similarity between juvenile and criminal codes as well as the changing nature of juvenile proceedings.

The case of *In re L.M.* came to the Kansas Supreme Court after the Kansas intermediate appellate court applied U.S. and Kansas Supreme Court precedent to affirm the trial court's decision to deny L.M.'s motion for a jury trial. After granting review of the case, the Kansas Supreme Court reversed the lower courts, declining to follow the precedent set forth by the U.S. Supreme Court, the Kansas Supreme Court, and the courts of sister jurisdictions including, Colorado, New York, the District of Columbia, Washington, Arizona, Louisiana, and North Dakota. The Kansas Supreme Court held instead that juveniles do, in fact, have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the U.S. Constitution, as well as the Kansas Constitution.

This Note examines a juvenile's right to a jury trial. It begins by discussing the history of the juvenile justice system, and continues with an exploration of

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8. Id. at 172 (reversing and remanding the case for a jury trial).
11. See *A.C. v. State*, 16 P.3d 240, 241 (Colo. 2001) (en banc) (holding that the trial court's discretion to deny a juvenile a jury trial did not violate the juvenile's due process rights under the Colorado Constitution or the U.S. Constitution).
12. See *In re Janet R.*, 353 N.Y.S.2d 783, 784 (App. Div. 1974) (holding that committing a juvenile to an adult correctional facility after a hearing before a judge, instead of a jury, was not violative of the New York Constitution).
13. In *re J.T.*, 290 A.2d 821, 825 (D.C. 1972) (determining that the statute providing for the adjudication of juvenile cases without a jury does not violate due process or the Sixth Amendment).
15. See *David G. v. Pollard*, 86 P.3d 364, 370 (Ariz. 2004) (en banc) (indicating that a city court judge did not have the authority to mandate that a juvenile be tried by a jury under the Rules of Criminal Procedure).
16. See *State ex rel. D.J.*, 817 So. 2d 26, 34 (La. 2002) (relying on prior case law in holding that juveniles do not enjoy the right to a jury trial in juvenile proceedings under the Due Process Clause).
17. See *In re R.Y.*, 189 N.W.2d 644, 653 (N.D. 1971) (holding that juveniles are not constitutionally entitled to a jury trial under the Due Process Clause).
key U.S. Supreme Court decisions that extended various procedural due process rights to juveniles. Next, this Note discusses the decisions of several state courts that have declined to extend to juveniles the constitutional right to a jury trial. It then analyzes the Kansas Supreme Court's recent decision, In re L.M., which gave juveniles the right to a jury trial based on its interpretation of the Kansas Constitution and the Sixth and Fourteenth Amendments to the U.S. Constitution. Finally, this Note will demonstrate that the Kansas Supreme Court correctly held that the reasoning and public policy considerations of McKeiver v. Pennsylvania no longer apply because of the changing and increasingly punitive nature of juvenile codes.

I. THE RIGHTS OF JUVENILE OFFENDERS IN THE JUVENILE ADJUDICATORY SYSTEM

A. Establishment of Juvenile Courts

Prior to the turn of the twentieth century, juveniles and adults were treated similarly under the criminal common law. However, disadvantaged youths were often imprisoned without having been convicted, or were jailed for offenses not considered severe enough to have resulted in the imprisonment of an adult.

The nineteenth century's "birth of the Progressive movement" ignited passionate pleas for changes to the system of juvenile adjudication. At the end of the nineteenth century, individual states finally began to explore ways to more effectively deal with juveniles by enacting laws directed at treating juvenile offenders differently from their adult counterparts. In 1899, the Illinois legislature created in Cook County, Illinois the first juvenile court in

20. Carla J. Stovall, Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed, 47 U. KAN. L. REV. 1021, 1023 (1999). Julian W. Mack commented that: "The result of it all was that instead of the state's training its bad boys so as to make of them decent citizens, it permitted them to become the outlaws and outcasts of society; it criminalized them by the very methods that it used in dealing with them." Mack, supra note 19, at 107.
21. Tina Chen, Comment, The Sixth Amendment Right to a Jury Trial: Why is it a Fundamental Right for Adults and Not Juveniles?, 28 JUV. L. 1, 2 (2007). Supporters of the Progressive movement stressed that youths were "products of their environments" and "could be controlled if [they] had stability in their homes." Jessica L. Anders, Note, Bad Children or a Bad System: Problems in Federal Interpretation of a Delinquent's Prior Record in Determining the Appropriateness of a Discretionary Judicial Waiver, 50 VILL. L. REV. 227, 231 (2005). Reformers sought the creation of a separate system that would allow the state to act as a guardian for juvenile offenders in order to protect the best interests of the child. See id.
the country in response to complaints that youth offenders were being treated too harshly.23 Adopting a *parens patriae* philosophy,24 the Illinois Act mandated that juvenile records be kept confidential and required that juveniles and adults be incarcerated in separate buildings when detained in the same facility.25 Perhaps most importantly, the new system also instilled objectives of rehabilitation and treatment, and provided for more informal procedures than those required by the criminal court.26

Following the enactment of the Illinois Act in 1899, every state worked to create separate procedures for juvenile offenders.27 States based their newly established juvenile court systems on the theory that children should neither be "punished in the same fashion, nor under the same process and procedures, as adult criminals.,28 The new juvenile laws were designed "to help, not punish, the child"29 and were intended to be beneficial and rehabilitative rather than punitive.30 Advocates for children encouraged the development of a


24. The Latin phrase, *parens patriae*, means “parent of his or her country,” and is defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK’S LAW DICTIONARY 1144 (8th ed. 2004). *Parens patriae* stands for the proposition "that the state is the higher or the ultimate parent of all of the dependents within its borders." See Mack, *supra* note 19, at 104. Furthermore, Justice Fortas explained in *In re Gault* that the Latin phrase “was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.” 387 U.S. 1, 16 (1967).


26. *Id.*


29. State *ex rel.* Miller v. Bryant, 144 N.W. 804, 804 (Neb. 1913). One proponent of the juvenile system explained the goals of the new system:

The creators of the juvenile court envisioned that this special court for children would be less like a court and more like a social welfare agency. Children . . . were to be helped rather than punished. There was to be less concern with determining guilt or innocence and more emphasis on identifying the causes of a child’s misbehavior and prescribing individualized treatment. As stated earlier, children were not to be subjected “to the rigors of formal criminal trials” but were to be handled informally. In exchange for this informality, they were denied the rights and procedural safeguards accorded to adults.


30. See *DeBacker*, 161 N.W.2d at 510. Creators of the new juvenile systems believed it was unwise and inadequate to shuffle children through the criminal system in the same manner as adult offenders, and instead, they striving to portray the judge as a parental figure whose goal was
specialized system in which "courts focused on each child's characteristics, background, and needs, and determined an appropriate treatment plan to heal the child and enable him to participate in society."31

It was not long before Kansas followed the lead of Illinois and adopted legislation specific to the adjudication of juveniles.32 The Kansas legislature adopted a law similar to the Illinois Act that created in each county a juvenile court that exercised jurisdiction over "the care of dependent, neglected and delinquent children."33 As states began adopting special juvenile proceedings, the courts next faced the question of what rights should be extended to juveniles within these unique systems.

B. Procedural Protections Guaranteed Under the Sixth and Fourteenth Amendments to the U.S. Constitution

On appeal before the Kansas Supreme Court, the juvenile in In re L.M. rooted his arguments in the Sixth and Fourteenth Amendments to the U.S. Constitution.34 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State..." The Fourteenth Amendment states in relevant part:

to guide and assist the misguided youths who populated the system. Nabha, supra note 23, at 1560-61.

31. Nabha, supra note 23, at 1561. This focus on "individualized justice" has been described as "the assertion that each juvenile should be appraised and treated according to individual needs." Hill, supra note 22, at 161 (quoting M.A. Bortner, Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice 243 (1982)). Creators of the juvenile system sought to instill in children "powerful lessons about fairness, equality, and justice—the three pillars of our democracy." Nabha, supra note 23, at 1587. As one scholar noted, "[t]he school and court are bound in an intricate public mission: to teach, to care for, to sanction the young." Id. (quoting Bernardine Dohrn, The School, the Child, and the Court, in A Century of Juvenile Justice 267, 267-69 (Margaret K. Rosenheim et al. eds., 2002)).

32. Stovall, supra note 20, at 1025. In 1905, the Governor of Kansas delivered a speech to the State Senate in which he urged the legislature to authorize a "juvenile court system" for the benefit of young people who commit certain offenses against the law. Under this system, where it has been tried, many of these young offenders have been saved the disgrace of a jail experience, and society has been better protected than under the more severe modes of treatment. Id. at 1024 (quoting Larry R. Rute, In the Beginning: The Creation of the Kansas Juvenile Court System, ACT NEWSL. (The Adoptions in Child Time Project, Topeka, Kan.), July 1998, at 11).

33. Id. at 1025 (quoting Act of Mar. 4, 1905, ch. 190, § 1, 1905 Kan. Sess. Laws 264, 264 (repealed 1957)).

34. In re L.M., 186 P.3d 164, 166 (Kan. 2008). L.M.'s three main arguments were that: (1) revisions to the Kansas Juvenile Justice Code had deteriorated the rehabilitative objectives of the juvenile system, thus requiring the court to extend to juveniles the constitutional right to a jury trial; (2) "juveniles are entitled to a jury trial under the Kansas Constitution"; and (3) "regardless of whether all juveniles are constitutionally entitled to a jury [trial under the federal and Kansas Constitutions], he should have received one because he ran the risk of having to register as a sex offender." Id. at 167-68.

35. U.S. CONST. amend. VI.
“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”\(^{36}\) Based on its determination that the system of juvenile adjudication is now more similar to the adult criminal justice system, the Kansas Supreme Court concluded that the Sixth and Fourteenth Amendments require that “juveniles have a constitutional right to a jury trial.”\(^{37}\)

C. Procedural Due Process Rights Extended to Juveniles by the U.S. Supreme Court

The lack of constitutional protections afforded to juvenile offenders “led to a new wave of reform in the 1960s [and was the result of] little progress and significant defects in the juvenile court system.”\(^{38}\) Reformers complained that juveniles did not enjoy the same due process rights in juvenile court that were afforded to defendants in the criminal justice system.\(^{39}\) As a result, over the course of the past half-century, the U.S. Supreme Court has accorded juvenile offenders nearly all of the constitutional rights that are enjoyed by adults who commit similar acts.\(^{40}\) Though the Court has extended to juveniles the rights to confrontation, cross-examination, notice and counsel, as well as the right to protection against self-incrimination and the right for their cases to be tried under a reasonable doubt standard of proof, the Supreme Court has held that youth offenders do not have a constitutional right to a jury trial in juvenile proceedings.\(^{41}\)

\(^{36}\) U.S. CONST. amend. XIV, § 1.

\(^{37}\) In re L.M., 186 P.3d at 170.

\(^{38}\) Courtney R. Clark, Note, Collateral Damage: How Closing Juvenile Delinquency Proceedings Flouts the Constitution and Fails to Benefit the Child, 46 U. LOUISVILLE L. REV. 199, 204 (2007). By the 1960s, problems within the juvenile system began to “demonstrate[] that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” In re Gault, 387 U.S. 1, 18 (1967).


\(^{41}\) Compare Breed, 421 U.S. at 541 (holding that the Fifth Amendment’s Double Jeopardy Clause applies to juvenile adjudications), In re Winship, 397 U.S. at 368 (applying the reasonable doubt standard to juvenile proceedings), In re Gault, 387 U.S. at 31–34, 34–42, 42–57 (granting juveniles the right to counsel, notice, confrontation and cross-examination of witnesses), and Kent, 383 U.S. at 552–53, 562 (extending the protections of the Due Process Clause to waiver hearings in juvenile proceedings), with McKee v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion) (denying youth offenders the right to a jury trial in juvenile adjudications).
1. Kent v. United States: Due Process Applies to Waiver Hearings in Juvenile Court

In Kent v. United States, one of the first cases decided by the U.S. Supreme Court on the issue of the rights of juvenile offenders, the Court dealt narrowly with the process by which youth offenders are transferred to criminal court in order to be tried as adults. \(^{42}\) Noting that a decision on waiver of jurisdiction and transfer can bring hefty differences in sentencing, the Court determined that juveniles are entitled to certain procedures during the transfer process, including a hearing, access by representative counsel to the probation records, as well as a statement by the juvenile court for its decision. \(^ {43}\) The Court's ruling that the Due Process Clause of the U.S. Constitution applied to waiver hearings in juvenile proceedings was especially significant because the Court had not previously applied the Due Process Clause to children in juvenile court. \(^ {44}\)

2. In re Gault: Juveniles Are Afforded Various Procedural Due Process Rights

Less than a year later, the Supreme Court decided In re Gault,\(^ {45}\) still considered one of the most important cases regarding the rights of children in juvenile proceedings. \(^ {46}\) In declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," \(^ {47}\) the Court set a new constitutional

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\(^{42}\) Kent, 383 U.S. at 552. Prior to its decision in Kent, the Court had twice refused to hear cases involving juvenile adjudication practices. See Joseph B. Sanborn, Jr., The Right to a Public Jury Trial: A Need for Today's Juvenile Court, 76 JUDICATURE 230, 231 & n.7 (1993) (citing People v. Lewis, 183 N.E. 353 (N.Y.), cert. denied, 289 U.S. 709 (1932); In re Holmes, 109 A.2d 523 (Pa. 1954), cert. denied, 348 U.S. 973 (1955)).

\(^{43}\) Kent, 383 U.S. at 557. With its decision in Kent, the Court "committed itself to steering a middle course regarding rights in juvenile court." Sanborn, supra note 42, at 232. The Kent Court determined that it "would neither tolerate a totally rights-free juvenile court, because that had produced abuses, nor insist that juvenile court adopt all rights enjoyed in criminal court, because equality of this sort could bring about the demise of juvenile court." Id.

\(^{44}\) See Kent, 383 U.S. at 557; Donna M. Bishop & Hillary B. Farber, Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by In re Gault, 60 RUTGERS L. REV. 125, 133 (2007) (noting that Kent was "the first case [the Supreme Court] had ever decided involving the juvenile court process"). The Court explained in Kent that the juvenile court could not "determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act." Kent, 383 U.S. at 553 (quoting Watkins v. United States, 343 F.2d 278, 282 (D.C. Cir. 1964)).

\(^{45}\) 387 U.S. 1 (1967).

\(^{46}\) See Irene Merker Rosenberg, Gault Turns 40: Reflections on Ambiguity, 44 No. 3 CRIM. L. BULL. 330, 331 (2008) (describing Gault as "an extraordinary case that changed the legal landscape by imposing constitutional fetters on the lawless juvenile court system that prevailed in this country in 1967").

Among the rights afforded to juvenile offenders in *Gault* were the rights to notice of the charges brought against them, representation by counsel, the right to confrontation and cross-examination of witnesses, and the right to protection against self-incrimination. In essence, the *Gault* Court sought to strike a fair balance in maintaining the commitment to rehabilitation and treatment of juveniles, while expanding the protective rights available to children in juvenile proceedings.

3. In re Winship: The Right for Juveniles to Have Their Cases Tried under the Beyond a Reasonable Doubt Standard of Proof

In 1970, the Court examined the standard of proof required in juvenile proceedings in *In re Winship*. Concluding that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure," the Court "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Court explained that the reasonable doubt standard was essential to protect society from questioning whether those condemned were actually guilty, a likely result from a less-stringent standard.

4. McKeiver v. Pennsylvania: The U.S. Supreme Court Does Not Extend the Right to a Jury Trial to Juvenile Offenders

The Court’s drastic expansion of juveniles’ constitutional rights in the preceding five years encountered a major setback with the Court’s 1971
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decision in *McKeiver v. Pennsylvania*.\(^{57}\) Noting that the jury is not a necessary component of accurate fact-finding, the Court held, in a plurality opinion, that a jury trial in a juvenile proceeding is not a constitutional right.\(^{58}\) Though the divided court could not agree on the reasoning to support its holding, four of the justices supported the decision, citing numerous policy considerations and speculations about the impact of jury trials on juvenile proceedings.\(^{59}\)

The plurality observed that historically the Court had abstained from affirming outright that all constitutional rights conferred upon adult offenders should be afforded to juveniles.\(^{60}\) The Justices also contemplated the possibility that a constitutionally mandated jury trial would "remake the juvenile proceeding into a fully adversary process," thereby eliminating the "idealistic prospect of an intimate, informal protective proceeding."\(^{61}\)

In addition to citing three published procedural guides that "stopp[ed] short of proposing the jury trial for juvenile proceedings,"\(^{62}\) the Court also noted that a recent Task Force Report released by the President's Commission on Law Enforcement and Administration of Justice did not suggest that jury trials

\(^{57}\) 403 U.S. 528 (1971).

\(^{58}\) Id. at 545 (plurality opinion) ("Despite all these disappointments [with the juvenile system], all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."). In his dissent, Justice Douglas maintained that "where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order 'confinement' until the child reaches 21 years of age . . . then he is entitled to the same procedural protection as an adult." Id. at 559 (Douglas, J., dissenting).

\(^{59}\) Id. at 545–51 (plurality opinion). Two concurring Justices relied on other reasoning to deny juveniles the right of a jury trial. Justice White focused on the differences between criminal and juvenile courts, finding those distinctions, standing alone, to be dispositive. Id. at 553 (White, J., concurring). Justice Brennan relied on due process, reasoning that the particular characteristics of the juvenile system provided the juvenile with adequate protection against governmental oppression and therefore, satisfied the Sixth Amendment. Id. at 553–54 (Brennan, J., concurring). Justice Harlan also concurred with the plurality's holding, but based his reasoning on his belief that in state proceedings, jury trials, even in criminal cases, were not required under the Sixth Amendment or the Due Process Clause. Id. at 557 (Harlan, J., concurring). Conversely, the three dissenting Justices found support in Justice Fortas's assertion in *In re Gault* that "'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'" Id. at 559 (Douglas, J., dissenting) (quoting *In re Gault*, 387 U.S. 1, 13 (1967)). The dissenting Justices maintained that juveniles charged with and prosecuted for criminal acts involving a potential loss of liberty should be afforded the same constitutional protections as adults accused of similar crimes. Id. at 559–60.

\(^{60}\) Id. at 545 (plurality opinion) ("It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system.") (quoting Commonwealth v. Johnson, 234 A.2d 9, 15 (Pa. Super. Ct. 1967)).

\(^{61}\) Id.

\(^{62}\) Id. at 549–50. The Court cited the Uniform Juvenile Court Act, § 24(a), approved by the National Conference of Commissioners on Uniform State Laws in July 1968; the Standard Juvenile Court Act, Article V, § 19, proposed by the National Council on Crime and Delinquency; and the Legislative Guide for Drafting Family and Juvenile Court Acts, § 29(a). Id.
should be instituted in the juvenile adjudicative process.\textsuperscript{63} Acknowledging recommendations by a Senate Committee, the Court hypothesized that the imposition of jury trials on the juvenile system would lead to "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."\textsuperscript{64}

Noting that the Court, in dicta in \textit{Duncan v. Louisiana}, a mere three years before, had proposed that a jury is not a mandatory component of every "fair and equitable" criminal proceeding,\textsuperscript{65} the Court pointed to thirteen states that, when dealing with similar issues, concluded that \textit{In re Gault} and \textit{Duncan} "do not compel trial by jury in the juvenile court."\textsuperscript{66}

The Court hypothesized that instituting a jury trial into juvenile adjudications would hinder, rather than strengthen, "the fact-finding function, and would . . . place the juvenile squarely in the routine of the criminal process."\textsuperscript{67} Despite recognizing dissatisfaction with the juvenile system,\textsuperscript{68} the Court refused to acknowledge that any existing abuses within the system were "of constitutional dimension"\textsuperscript{69} and noted its willingness to permit states to explore new ways to deal with the detrimental issues that permeated the
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juvenile adjudicatory process.\textsuperscript{70} In addition to its observation that juvenile court judges are not prevented from using advisory juries,\textsuperscript{71} the Court also noted that (at the time) thirty-four states and the District of Columbia had either statutes or case law that effectively denied juveniles the right to a jury trial in similar cases.\textsuperscript{72} The Court acknowledged, yet seemed inclined to dismiss, the fact that an additional ten states provided a jury trial to juveniles in certain circumstances.\textsuperscript{73}

Lastly, the Court expressed concern over the possibility that prejudgment by a juvenile judge who has had prior access to the juvenile, his record, and his social files could disregard certain aspects of fairness in the juvenile adjudicatory system.\textsuperscript{74} After laying out the various policy considerations concerning the potential impact of juvenile jury trials, the Court concluded that if the jury procedures of the adult criminal justice process were injected into the juvenile system, there would be no need for a separate juvenile system.\textsuperscript{75}

D. Treatment by State Courts

In the nearly forty years since the U.S. Supreme Court decided \textit{McKeiver v. Pennsylvania}, many state courts have determined that the disallowance of the right to a jury trial in juvenile proceedings does not violate a juvenile’s rights

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 547 (“If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature.”).
\item \textsuperscript{71} \textit{Id.} at 548. The federal rules, as well as the rules of some states, allow for the use of advisory juries “in actions which are not triable of right by a jury.” 47 AM. JUR. 2D Jury § 92 (2008). The court is not bound by a decision of an advisory jury, but instead “may accept or reject the advisory jury’s verdict.” BLACK’S LAW DICTIONARY 873 (8th ed. 2004).
\item \textsuperscript{72} \textit{McKeiver}, 403 U.S. at 548-49 & nn.7-8 (plurality opinion). However, the Court correctly recognized that “‘[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . .’” \textit{Id.} at 548 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).
\item \textsuperscript{73} \textit{Id.} at 549 & n.9.
\item \textsuperscript{74} \textit{Id.} at 550. The Court asserted that these concerns, and their presence in the juvenile system, “ignore . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.” \textit{Id.}
\item \textsuperscript{75} \textit{Id.} at 551. One critic of \textit{McKeiver} points out that the \textit{McKeiver} Court did not analyze the crucial distinctions between treatment in juvenile courts and punishment in criminal courts that justified different procedural safeguards for each forum. No factual record of dispositional practices or conditions of confinement was reviewed by the Court in its deliberation over whether juvenile court intervention was punishment or treatment. The Court simply noted that the ideal juvenile court system is an “intimate, informal protective proceeding,” even while acknowledging that the “ideal” is seldom, if ever, realized.
\end{itemize}

under either the U.S. Constitution or the applicable state constitution. To support their holdings, state courts have relied on stare decisis, rooting their decisions in the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as similar clauses in applicable state constitutions. The following four cases provide examples of the various bases on which state courts have relied in denying juveniles the constitutional right to a jury trial.

1. Disallowing Juveniles the Right to a Jury Trial Does Not Violate the Due Process Clause or the Sixth Amendment to the U.S. Constitution

One of the first lower-level courts to interpret and apply the McKeiver decision was the District of Columbia Court of Appeals. In 1972, the District of Columbia Court of Appeals held, in In re J.T., that a statute mandating that all delinquency proceedings be heard without a jury trial before the Family Division of the Superior Court of the District of Columbia did not violate the Due Process Clause or the Sixth Amendment to the Constitution.

The court of appeals relied heavily on McKeiver in determining that the District of Columbia Court Reform and Criminal Procedure Act of 1970 met "the due process standard of fundamental fairness." The court explained that


77. See, e.g., A.C., 16 P.3d at 243–44; In re J.T., 290 A.2d at 824–25; In re J.H., 978 P.2d at 1131.

78. In re J.T., 290 A.2d at 822. Several state courts ruled on whether a juvenile had a right to a jury trial prior to the Supreme Court's decision in McKeiver. See, e.g., DeBacker v. Brainard, 161 N.W.2d 508, 513 (Neb. 1968) (dismissing a juvenile offender's petition alleging that a relevant section of the Juvenile Court Act was unconstitutional because it denied him the right to a jury trial); In re R.Y., 189 N.W.2d 644, 653 (N.D. 1971) (holding that youth offenders are not entitled to a jury trial in juvenile proceedings). Interestingly, four of the seven Nebraska Supreme Court judges in DeBacker were of the opinion that the specific section of the statute was in fact unconstitutional in that it denied the juvenile offender the right to a jury trial. DeBacker, 161 N.W.2d at 513. Although only three judges found the statute constitutional, the Nebraska Constitution provided in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges." Neb. Const. art. V, § 2. Thus, even though only a minority of the judges found the statute constitutional, the court was required to affirm the judgment dismissing the youth's petition regarding his fight to a jury trial. DeBacker, 161 N.W.2d at 513.

79. In re J.T., 290 A.2d at 825. In re J.T. included the consolidation of several appeals involving defendants who were charged with the commission of "non-petty criminal offenses." Id. at 821. The trial judge in each case denied the defendants' motion requesting a jury trial, before ultimately deciding in a bench trial that the defendants had committed the acts as charged. Id. at 821–22.

80. Id. at 825. The District of Columbia Court Reform and Criminal Procedure Act of 1970 was mirrored after a provision of the Uniform Juvenile Court Act (UJCA). Id. at 822. The National Conference of Commissioners on Uniform State Laws drafted the UJCA and recommended it for enactment by all fifty states in 1968. Id. at 822 & n.3. The Act was almost immediately endorsed by the American Bar Association and states in relevant part: "The Division shall, without a jury, hear and adjudicate cases involving delinquency . . . ." D.C. Code § 16-2316(a) (Supp. IV 1971) (emphasis added).
although the D.C. Code did not give juveniles the right to a jury trial, it incorporated other elements that the justice system acknowledged as essential predicates to a juvenile’s fair hearing, and the court noted that those rights served to protect the child’s due process rights. The court noted that it had “no good reason to believe that the full imposition of all the procedures and requirements of an adult criminal trial would benefit either the child or the community.”

2. Denying Juveniles the Right to a Jury Trial Does Not Violate State and Federal Guarantees of Equal Protection

In comparison, despite the creation of and numerous subsequent alterations to Washington’s Juvenile Justice Code, Washington state courts have continually relied on McKeiver and prior state court precedent in holding that juveniles do not have a constitutional right to a jury trial. For example, in In re J.H., the Washington Court of Appeals relied on the state’s prior precedent in affirming that statutes disallowing juveniles the right to a jury trial do not violate the guarantees of equal protection under the state and federal constitutions. The court explained that the lack of a jury trial contributes to the “unique rehabilitative nature of juvenile proceedings” and does not infringe upon the child’s equal protection guarantees.

81. In re J.T., 290 A.2d at 825. The District of Columbia’s Juvenile Code afforded a child and his parents the right to notice and a copy of the petition, as well as the right to counsel. Id. at app. 825–26. The Code also provided the child with the right to be present at the fact-finding hearing, the right to confrontation and the right to cross-examine witnesses. See id.

82. Id. at 825; see also State ex rel. D.J., 817 So. 2d 26, 34 (La. 2002) (holding that a jury trial in a juvenile adjudication is “not constitutionally required under the applicable due process standard in juvenile proceedings”).

83. See, e.g., State v. Schaaf, 743 P.2d 240, 250 (Wash. 1987) (en banc) (“[T]he legislature’s statutory denial of jury trials to juveniles is rationally related to its desire to preserve some of the unique aspects of the juvenile court system.”); State v. Lawley, 591 P.2d 772, 773–74 (Wash. 1979) (en banc) (relying on McKeiver); Estes v. Hopp, 438 P.2d 205, 208 (Wash. 1968) (en banc) (“One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of the jury.”). In Lawley, the court provided three reasons why it believed that the state legislature had not intended to treat juvenile offenders the same as adults. Lawley, 591 P.2d at 773. First, the court explained that the legislature determined that holding juvenile offenders accountable as a group for their criminal behavior rehabilitated them roughly as effectively as efforts focused on the particular characteristics of each youth. See id. Second, the court also maintained that the legislature had included several provisions providing guidance on the administration of its treatment of juvenile offenders. Id. Third, the court concluded that the U.S. Supreme Court determined that a jury trial is not mandated under the U.S. Constitution. Id. at 773–74.


85. Id. at 1131. Despite the court’s recognition that juvenile adjudications are increasingly similar to adult criminal proceedings, the court concluded that the two systems remain distinct enough to allow for the denial of the right to a jury trial in juvenile proceedings. Id. at 1130. Satisfied with the protections afforded to youth offenders under the present juvenile system, the
Similarly, the Colorado Supreme Court determined in *A.C. v. State* that juveniles are not entitled to a jury trial under the federal and state constitutions, and that treating juveniles and adults differently with respect to the right to a jury trial does not constitute a violation of equal protection.  

In upholding the decisions of the lower courts, the Colorado Supreme Court articulated that the state statute only required a jury trial when the juvenile was charged with a violent crime or charged as an aggravated offender. The court relied on *McKeiver v. Pennsylvania* in support of its conclusion that because the statute provided the trial judge with discretion to grant or deny the juvenile a jury trial, the trial judge did not err in his decision, and did not deprive the juvenile of his guarantees under the Equal Protection Clause, given the charges filed against the juvenile.

3. A Judge Cannot Mandate a Jury Trial for a Juvenile Offender under the Federal Rules of Criminal Procedure

The Supreme Court of Arizona took a different approach. In response to the state’s assertion that the Arizona Rules of Criminal Procedure apply in juvenile proceedings, the court held that a city court judge, sitting as a juvenile hearing officer, could not apply the Federal Rules of Criminal Procedure and mandate a jury trial. The court reasoned that requiring a juvenile to be tried by a jury court reasoned that it did not need to compromise those special protections by fully aligning juvenile adjudications with adult criminal proceedings. *Id.* at 1129.

86. *A.C. v. State*, 16 P.3d 240, 243, 245 (Colo. 2001). After the state filed a delinquency petition accusing the juvenile of an act, which if committed by an adult would have been a felony of reckless manslaughter, the juvenile moved for a jury trial under an applicable section of the Children’s Code. *Id.* at 241.

87. The trial court had determined that the statute did not create a jury trial right and denied subsequent motions filed by A.C. claiming that he had a right to a jury trial under Colorado law and the U.S. Constitution. *Id.* The court of appeals affirmed the trial court’s decision, holding that under the State and Federal Constitutions a juvenile is not afforded the right to a jury trial in juvenile proceedings. *Id.* at 242.

88. *Id.* at 242–43.

89. *Id.* at 243–45 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion)). The court also dictated that because “a jury trial is not a fundamental right for juveniles in delinquency proceedings, an equal protection violation occurs only if the legislative classification is unreasonable and bears no rational relationship to legitimate state objectives.” *Id.* at 245.

90. *David G. v. Pollard*, 86 P.3d 364, 370 (Ariz. 2004) (en banc). After being charged with two criminal offenses related to his involvement in a high-speed chase, fourteen-year-old David G. filed a motion to dismiss the charges claiming that his due process rights had been violated because the trial court judge refused to comply with the Arizona Rules of Juvenile Procedure. *Id.* at 364–65. Denying the juvenile’s motion, the trial court set the matter for a jury trial, concluding “[t]hat the Rules of Criminal Procedure in so far as they do not conflict with the Rules of Juvenile Procedure guarantee the protection of due process rights.” *Id.* at 365 (quoting the trial court decision). When the case was appealed, David G. argued that “only the Juvenile Rules of Procedure” should apply, while the State took the position that trial courts could deviate from the Rules of Juvenile Procedure and “fill the gap by applying the Rules of Criminal Procedure.” *Id.*
instead of the bench "does not promote the informality and flexibility that the juvenile courts strive to achieve and subjects the juvenile to the very stigma the legislature sought to prevent."

E. Prior Treatment by the Kansas Supreme Court in Findlay v. State

Prior to 2008, the precedent in Kansas on the constitutionality of jury trials in juvenile proceedings was similar to that of sister states: juveniles did not enjoy the right to a jury trial in juvenile adjudications. In 1984, the Kansas Supreme Court held, in Findlay v. State, that under the Kansas Juvenile Offenders Code (KJOC), there was no federal or state constitutional right to a jury trial in juvenile adjudications.

Relying on section 38-1601 of the KJOC, the court determined that there was no constitutional right, either federal or state, to a jury trial in juvenile proceedings. The court noted that its holding was consistent with its own prior decisions made before the 1982 adoption of the KJOC.
The court also determined that in the context of juvenile proceedings, section 38-1656 of the KJOC did not automatically grant the juvenile the right to request a jury trial.\(^9\) Explaining that the statute merely provided the judge the option of having a jury serve as the fact finder, the court determined that the trial judge was not required to state a reason for choosing to grant or deny the request.\(^9\) The Findlay court concluded that granting or denying a request for a jury trial in a juvenile proceeding under section 38-1656: “(1) is entirely at the district court’s option; (2) involves no rights of either the State or the respondent; and (3) is not subject to appellate review.”\(^10\) The holding in Findlay remained good law in the state of Kansas until 2008.\(^10\)

II. *In re L.M.* GIVES JUVENILES THE RIGHT TO A JURY TRIAL IN JUVENILE ADJUDICATIONS

In June 2008, the Kansas Supreme Court reversed the appellate court in *In re L.M.*, holding that juveniles have a constitutional right to a jury trial under the Kansas Constitution, as well as the Sixth and Fourteenth Amendments to the U.S. Constitution.\(^10\)

The facts of the case are as follows: L.M., sixteen years of age,\(^10\) came in contact with the victim, a female neighbor, late at night when she was walking home.\(^10\) Upon his request, she gave L.M. a cigarette; he “then grabbed or

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98. *Findlay*, 681 P.2d at 22. In addition to his contention that the trial court erred in denying him a jury trial as a matter of constitutional right, the juvenile also argued that the denial of his request for a jury trial amounted to an abuse of discretion. *Id.* at 21–22. In relevant part, the KJOC states:

In all cases involving offenses committed by a juvenile which, if done by an adult, would make the person liable to be arrested and prosecuted for the commission of a felony, the judge may order that the juvenile be afforded a trial by jury. Upon an adjudication, the court shall proceed with disposition.

KAN. STAT. ANN. § 38-1656 (repealed 2006).

Findlay argued that this statute provided him the right to request a jury trial, reasoning that granting or denying the request was an issue of judicial discretion. *Findlay*, 681 P.2d at 22. Findlay went on to argue that the judge was required to provide reasons for denying the defendant's request, so that proper appellate review could occur on the issue of whether the judge had abused his discretion. *Id.*


100. *Id.* at 24.


102. *Id.* at 171–72.

103. *Id.* at 165.

hugged [her], requesting a kiss.\footnote{105} When she refused his request, he "allegedly kissed and licked her on the cheek," holding her in an embrace as she attempted to walk away.\footnote{106} Shortly thereafter, the victim’s boyfriend arrived, she told him what had happened, and he called the police.\footnote{107} As a result, "L.M. was subsequently arrested."\footnote{108}

During the court’s proceedings, L.M. motioned for a jury trial, which the judge denied.\footnote{109} When L.M. was found guilty in a bench trial, he was required to register as a sex offender,\footnote{110} and was ordered to spend eighteen months in a juvenile correctional facility, followed by a twelve-month aftercare term.\footnote{111}

Though L.M.’s placement at the juvenile correctional facility was stayed, he was ordered to be placed on probation until he reached the age of twenty.\footnote{112}

\footnotemark[105] \footnotetext{105}{Id. When the victim was asked whether L.M. “grabbed any part of her body in a sexual way the victim stated, ‘He just had his arms around me.’” Brief of Appellant at 3, In re L.M., No. 06-96197-A (Kan. Ct. App. May 1, 2006).}

\footnotemark[106] \footnotetext{106}{In re L.M., 2006 WL 3775275, at *1. He also recalled that the victim “stated that she didn’t want to call the police” because “she didn’t feel it necessary” and that the victim also agreed that L.M. had merely been “making a ‘pass’ at her.” Brief of Appellant, supra note 105, at 2–4.}

\footnotemark[110] \footnotetext{110}{In re L.M., 2006 WL 3775275, at *1. He was then “taken to a hospital for a medical evaluation because he had been drinking alcohol.” Id.}

\footnotemark[111] \footnotetext{111}{Brief of Appellant, supra note 105, at 2.

\footnotemark[112] \footnotetext{112}{Id. Interestingly, the U.S. Supreme Court has held that requiring sex offenders to register with law enforcement authorities is considered a civil, non-punitive remedy geared towards public safety, rather than a sanction designed to punish the offender. See Smith v. Doe, 538 U.S. 84, 102–03 (2003). But see Bob Egelko, Court: Sex-Offender Law Unfairly Restrictive, S.F. CHRON., Nov. 21, 2008, at B2, available at www.Sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/21/BAER14966O.DTL (discussing a recent California ruling in which the court held that residency restrictions placed on sex offenders “are not just public safety measures but also would punish ex-offenders by forcing them out of their homes”). Justice Ginsburg made a compelling argument against the rehabilitative merits of sex offender registration in her dissent in Smith: “And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.” Smith, 538 U.S. at 117 (Ginsburg, J., dissenting). Justice Ginsburg’s concern hints at the conflict inherent in a process by which a system that prides itself on rehabilitation and treatment is able to order a juvenile to register as a sex offender even though he has not been afforded the same rights as similar adult offenders. See Phoebe Geer, Justice Served? The High Cost of Juvenile Sex Offender Registration, 27 DEV. MENTAL HEALTH L. 33, 47 (2008) (“Operating directly contrary to the rehabilitative goals of the juvenile justice system, sex offender registration and notification laws can publicly and permanently mark juvenile sex offenders as deviant criminals . . . . The state’s interest in and responsibility for a juvenile’s well-being and rehabilitation is not promoted by a practice that makes a juvenile’s sex offenses public.” (footnotes omitted)).

\footnotemark[113] \footnotetext{112}{Id.}
L.M. appealed his sentence and his appeal was "taken directly to the Court of
Appeals for the State of Kansas." 113

Before the Kansas Court of Appeals, L.M. argued that the Due Process
Clause of the U.S. Constitution and certain provisions of the Kansas
Constitution required that the court provide him with a jury trial. 114
The appellate court declared that it was "duty bound to follow Kansas Supreme
Court precedent, absent some indication that the court is departing from its
previous position," 115 and that it believed the Kansas Supreme Court "has
remained steadfast in its belief that juvenile offender proceedings in this State
are constitutionally sound notwithstanding the absence of a right to a jury
trial." 116 Although the appellate court recognized "some rather good
arguments [made by the respondent] as to why the rationale of the Findlay
decision [was] no longer compelling under the current juvenile offender
system," it ultimately sided with the State in holding that juveniles do not have
a constitutional right to a jury trial under the Kansas and U.S. Constitutions
and affirmed the trial court's denial of L.M.'s motion for a trial by jury. 117

L.M. subsequently filed a petition for review with the Kansas Supreme
Court on the issue of "whether he had a constitutional right to a jury trial
[during his] juvenile offender proceeding." 118 The Supreme Court of Kansas
granted his petition.

In his case before the Kansas Supreme Court, L.M. challenged the
constitutionality of several sections of the Kansas Juvenile Justice Code
(KJJC), 119 and claimed that certain changes implemented in 2006 "eroded the

113. Id.; see also KAN. STAT. ANN. § 38-1683 (1993) (repealed 2006) ("An appeal from an
order entered by a district magistrate judge shall be to a district judge. The appeal shall be heard
de novo within 30 days from the date the notice of appeal was filed.").
115. Id. (citing In re A.C.W., 988 P.2d 742, 745 (Kan. Ct. App. 1999)). In In re A.C.W., the
juvenile offender argued that the juvenile adjudication system "[had] become more punitive than
paternal since changes were made [to the system] in 1984." In In re A.C.W., 988 P.2d at 745. He
claimed that a jury trial was necessary because the consequences of his adjudication were akin to
a felony conviction. Id. Despite acknowledging that the juvenile's argument was "not without
merit," the court determined that it was "duty bound to follow Kansas Supreme Court precedent"
and ultimately held that it did not have jurisdiction to hear the juvenile's argument concerning his
right to a jury trial. Id.
117. Id.
118. Id.
119. Id. The KJJC is codified at KAN. STAT. ANN. § 38-2301 et seq. (2006). Section 38-
2344(d) states that "[i]f the juvenile pleads not guilty, the court shall schedule a time and date for
trial to the court." Id. § 38-2344(d) (Supp. 2007). He also challenged section 38-2357, which
provides:
In all cases involving offenses committed by a juvenile which, if done by an adult,
would make the person liable to be arrested and prosecuted for the commission of a
felony, the judge may upon motion, order that the juvenile be afforded a trial by jury.
Upon the juvenile being adjudged to be a juvenile offender, the court shall proceed with
sentencing.
child-cognizant, paternal, and rehabilitative purposes of the juvenile offender process,” which, L.M. argued, should require the court to certify a juvenile’s right to a jury trial under the U.S. Constitution.\textsuperscript{120}

In response to L.M.’s argument, the court began its analysis by acknowledging that the state legislature had made significant alterations to the Kansas children’s code since the \textit{Findlay} court decided similar issues in 1984.\textsuperscript{121} One of the most notable changes is apparent in section 38-2301, which sets forth the “goals of the code” and states in relevant part: “The primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community.”\textsuperscript{122}

When originally enacted in 1982, the KJOC was aimed at rehabilitating troubled youths and promoting the state’s parental role in providing guidance and discipline.\textsuperscript{123} However, a significant shift in focus was recognized in the new KJJC,\textsuperscript{124} which emphasized the importance of protecting the public, holding juveniles accountable for their decisions and actions, and promoting the productivity and responsibility of juvenile offenders.\textsuperscript{125} The court explained that the KJJC also integrated statutory language similar to the language of the Kansas Criminal Code, noting that the purposes and goals of the updated code “are more aligned with the legislative intent [behind] the adult [criminal] sentencing statutes.”\textsuperscript{126}

\textsuperscript{120} In re L.M., 186 P.3d 164, 167–68 (Kan. 2008). In its brief supporting the State, the Kansas County and District Attorneys Association (KCDAA) sought to persuade the Kansas Supreme Court that adopting L.M.’s position would “not cure an alleged deficiency in fundamental due process for juvenile offenders,” but instead, the result would “be as though no action was taken at all.” Brief of Amicus Curiae, Kansas County and District Attorneys Association (KCDAA) in Support of the State of Kansas, Plaintiff-Appellee at 10–11, In re L.M., 186 P.3d 164 (No. 06-96197-AS). The KCDAA took the position that “little to no realization of any perceived benefit [would arise] from a right to juvenile juries.” Id. at 10. However, the mere fact that juveniles may not request jury trials as often as adult criminal defendants, provides little in the way of support for the argument that they should not have the constitutional right to request a jury trial when applicable.

\textsuperscript{121} In re L.M., 186 P.3d at 168.

\textsuperscript{122} Id. (quoting KAN. STAT. ANN. § 38-2301 (emphasis omitted)).

\textsuperscript{123} See KAN. STAT. ANN. § 38-1601 (1993) (repealed 2006) (“Each juvenile coming within its provisions shall receive the care, custody, guidance, control and discipline, preferably in the juvenile’s own home, as will best serve the juvenile’s rehabilitation and the protection of society. In no case shall any order ... be deemed or held to import a criminal act on the part of any juvenile; but all proceedings ... shall be deemed to have been taken and done in the exercise of the parental power of the state.”).

\textsuperscript{124} In 2006, the name of the code was changed from the Kansas Juvenile Offenders Code (KJOC) to the Kansas Juvenile Justice Code (KJJC). In re L.M., 186 P.3d at 168.

\textsuperscript{125} Id.; see also KAN. STAT. ANN. § 38-2301 (Supp. 2007).

\textsuperscript{126} In re L.M., 186 P.3d at 168. For example, under the KJOC, a juvenile was required to admit or deny the charges against him or plead nolo contendere; however, under the KJJC, a juvenile is now forced to plead guilty, not guilty, or nolo contendere (the same as is required of
For example, what the KJOC once referred to as a “state youth center,”\(^{127}\) the KJJC now calls a “[j]uvenile correctional facility,”\(^{128}\) which mirrors the language of the Kansas Criminal Code’s adult “[c]orrectional institution.”\(^{129}\) The language of the KJJC is also similar to the language of the Kansas Criminal Code in its reference to the term of commitment to a juvenile correctional facility as a “term of incarceration.”\(^{130}\) Thus, the \textit{L.M.} court determined that the overall language of the KJJC “stresses the similarities between child and adult offenders far more than it does their differences.”\(^{131}\)

The court also recognized that the state legislature modeled the KJJC after the structure of the Kansas Sentencing Guidelines when it promulgated “a sentencing matrix for juveniles based on the level of the offense committed,” as well as the juvenile’s history of past adjudications.\(^{132}\) Similar to adult sentencing guidelines, “the KJJC allows the sentencing judge to depart from the juvenile placement matrix upon a motion by the State or the sentencing judge.”\(^{133}\) Although juvenile sentences that remain within the suggested sentencing range are not subject to appeal, a juvenile sentence that falls outside the sentencing range may be appealed, just as a departure from the adult sentencing guidelines may be appealed.\(^{134}\)

The \textit{L.M.} court also observed that the Kansas Legislature removed several “protective provisions that made the juvenile system more child-cognizant and confidential,” provisions which were important factors in the \textit{McKeiver} decision.\(^{135}\) For example, under the KJJC, court records for juvenile offenders over the age of thirteen are now subject to the same disclosure requirements as adults.\(^{136}\)

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\(^{127}\) \textit{KAN. STAT. ANN.} § 38-1602(g) (1993) (repealed 2006).

\(^{128}\) \textit{Id.} § 38-2302(j) (Supp. 2007).

\(^{129}\) \textit{Id.} § 21-4602(e) (2007).

\(^{130}\) \textit{See id.} § 38-2374(a); \textit{see also id.} § 21-4603(b) (referring to confinement terms).

\(^{131}\) \textit{In re L.M.}, 186 P.3d at 169.


\(^{133}\) \textit{Id. at 170}; \textit{see also KAN. STAT. ANN.} § 38-2310(c). The state legislature has removed the presumption of confidentiality for youth offender hearings by opening them to the public,
The \textit{L.M.} court ultimately concluded that "because the juvenile justice system is now patterned after the adult criminal system" and because the Kansas juvenile system "has become more akin to an adult criminal prosecution," the changes made in the KJJC "have superseded the McKeiver and Findlay Courts' reasoning."\textsuperscript{137} Despite recognizing that many sister states do not extend the right to a jury trial to juvenile offenders, the \textit{L.M.} court asserted that it was "undaunted in [its] belief that juveniles are entitled to the right to a jury trial guaranteed to all citizens under the Sixth and Fourteenth Amendments to the United States Constitution."\textsuperscript{138}

III. THE RIGHT TO A JURY TRIAL IN JUVENILE ADJUDICATIONS: \textit{McKeiver v. Pennsylvania} Policy Considerations Are No Longer Applicable

However sound the U.S. Supreme Court's reasoning in \textit{McKeiver v. Pennsylvania} may have been in 1971, it is no longer applicable because it portrays "a picture of [a] juvenile court that does not meet today's reality."\textsuperscript{139} "[P]ublic safety and the need for accountability" have led to sweeping changes in the juvenile justice system, leaving juvenile codes more aligned with adult criminal codes than ever before.\textsuperscript{140}

\textbf{A. Changes in Purpose, Vocabulary, and Placement of State Juvenile Justice Codes}

Historically, proponents of the juvenile court system have justified the lack of procedural safeguards afforded to juvenile offenders on several grounds. Advocates of the original juvenile system argued, and the plurality in \textit{McKeiver} stressed, that because the juvenile proceedings were designed to rehabilitate rather than punish, the juvenile did not need rights to shelter him from "the court's desire to protect [him]."\textsuperscript{141} However, many juvenile courts now place more emphasis on protection of the public than rehabilitation of the minor.\textsuperscript{142} The sweeping changes made to Kansas's juvenile code provide a prime example of the changes made to juvenile codes nationwide in response

unless the juvenile is under the age of sixteen or the judge finds that an open hearing would not serve the youth's best interests. \textit{See KAN. STAT. ANN.} \S 38-2353(a).

\textsuperscript{137} \textit{In re L.M.}, 186 P.3d at 170.
\textsuperscript{138} \textit{Id.} at 171.
\textsuperscript{139} Sanborn, \textit{supra} note 42, at 231.
\textsuperscript{140} \textit{See} Henning, \textit{supra} note 39, at 533.
\textsuperscript{141} Sanborn, \textit{supra} note 42, at 231; \textit{see also} McKeiver \textit{v. Pennsylvania}, 403 U.S. 528, 547 (1971) (plurality opinion).
\textsuperscript{142} \textit{See, e.g., WASH. REV. CODE ANN.} \S 13.40.010(2)(a) (West Supp. 2009). Prior to 1977, juvenile law in Washington focused "on the offender and the factors which brought him before the court, rather than on his offense." \textit{See State v. Lawley}, 591 P.2d 772, 775 (Wash. 1979) (en banc) (Rosellini, J., dissenting). However, in 1977 the Washington legislature revised its juvenile code, establishing the Juvenile Justice Act of 1977. \textit{WASH. REV. CODE ANN.} \S 13.40.010(1)-(2). The legislature strived to "[p]rotect the citizenry from criminal behavior" and to "[m]ake the juvenile offender accountable for his or her criminal behavior . . . ." \textit{Id.} \S 13.40.010(2)(a), (c).
to the high number of violent crimes committed by juveniles.\textsuperscript{143} The KJJJC shifted its focus away from rehabilitation and instead centered on protecting the public, holding juveniles more accountable for their actions, and promoting their responsibility.\textsuperscript{144} Increasingly, the McKeiver Court’s reliance on the strictly rehabilitative nature of the juvenile system no longer applies.

Furthermore, proponents traditionally advocated that constitutional rights were associated with “words like arrest, prosecution, conviction, and punishment,” and that because the juvenile system made use of an entirely different vocabulary from that of the adult criminal justice system, constitutional rights afforded to adults did not apply in juvenile proceedings.\textsuperscript{145} However, the KJJJC’s updated vocabulary exemplifies the trend toward embedding more criminal-like terms into juvenile codes. For example, juvenile codes now use such phrases as “term of incarceration,”\textsuperscript{146} “sentence...
and committed,'"147 and "juvenile detention facility.""148 Clearly, juvenile codes have begun to incorporate language that was historically reserved for criminal codes. An argument against extending to juveniles the constitutional rights afforded adults based on a line of reasoning pertaining to a distinct and separate vocabulary is now irrelevant.

Justice Ann Walsh Bradley, a justice of the Wisconsin Supreme Court, has suggested that in moving the Juvenile Justice Code from the Children's Code portion of the Wisconsin statutes to a position adjoining the criminal code, the legislature intended to indicate "a change in direction from the unbalanced approach of the Children's Code, which has the paramount purpose of promoting the 'best interests of the child' to a balanced approach akin to the criminal code, which balances rehabilitative interests along with protection of the public and accountability of the offender."149 Citing Justice Blackmun's suggestion that the day may come when the issue of the constitutionality of jury trials for juveniles will again require discussion,150 Justice Bradley warned against "blindly rely[ing] on" McKeiver, a case that speaks to "fundamental fairness challenges" to juvenile laws that have undergone substantial changes and shifts in focus since McKeiver was decided.151

B. States Respond to Changing Juvenile Codes

In response to changing juvenile codes, several states have enacted statutes and decided cases in favor of affording juveniles the right to a jury trial. In 2006, the West Virginia legislature provided juveniles with a statutory right to

147. See VA. CODE ANN. § 16.1-278.7.
149. In re Hezzie R., 580 N.W.2d 660, 679 (Wis. 1998) (Bradley, J., dissenting). Justice Bradley acknowledged that the juvenile justice system was originally focused on rehabilitating juvenile offenders; however, she recognized that the goals of the system were markedly altered when the legislature revised the juvenile system in 1996, making substantial changes to the way in which juveniles are adjudicated. Id. at 680. Such modifications to the children's code included stricter provisions governing the confinement of juvenile offenders. See, e.g., WIS. STAT. ANN. §§ 938.34(4m)(b), 938.355(4)(b) (West 2000). The goals behind the Wisconsin legislature's modifications to the Children's Code included "protect[ing] citizens from juvenile crime [and] hold[ing] each juvenile offender directly accountable for his acts or her acts." See id. § 938.01(2) (West Supp. 2008). The legislature relied on recommendations from the Juvenile Justice Study Committee, whose report stated in part:

"Both codes [the JJC and the Criminal Code] deal with the same kinds of behavior, even though there are distinctions in the ages of the perpetrators and the potential dispositions available. Young offenders would be reminded that while society does not yet classify their actions as criminal, they are 'almost there.'"

In re Hezzie R., 580 N.W.2d at 682 (Bradley, J., dissenting) (alterations in original) (quoting JUVENILE JUSTICE STUDY COMM., JUVENILE JUSTICE: A WISCONSIN BLUEPRINT FOR CHANGE 11 (1995)).
151. In re Hezzie R., 580 N.W.2d at 681.
a jury trial when accused of committing acts that, if committed by an adult, would be considered a crime punishable by incarceration. Additionally, the Texas legislature has enacted a statute that provides juveniles with the right to a jury trial during the adjudication phase and mandates that the jury be selected "in accordance with the requirements in criminal cases." Although Texas did not statutorily provide juveniles with a jury at the dispositional phase, the Texas Court of Appeals has held that if a new offense is adjudicated, even at a dispositional hearing, a juvenile will have the right to a jury trial.

New Mexico also enacted a statute that gives juveniles the right to a jury trial in limited circumstances. The statute provides in relevant part: "A jury trial on the issues of alleged delinquent acts may be demanded by the child . . . when the offense alleged would be triable by jury if committed by an adult." The New Mexico Court of Appeals has explained that juveniles should be treated in the same manner as adult defendants when determining whether a juvenile offender's right to a jury trial should apply.

C. The Juvenile System is No Longer Entirely Distinct from the Adult Criminal Justice System

The McKeiver plurality relied on the argument that imposing jury trials in the juvenile court system would hinder the juvenile court's ability to function as a system entirely distinct from the adult criminal court system. However, much has changed since 1971: the juvenile adjudication system has increasingly become more akin to the criminal system.

152. See W. VA. CODE § 49-5-6(a) (Supp. 2008) ("[T]he juvenile . . . may demand, or the judge on his or her own motion may order a jury trial on any question of fact, in which the juvenile is accused of any act or acts of delinquency which, if committed by an adult would expose the adult to incarceration.").

153. See TEX. FAM. CODE ANN. § 54.03(b)(6), (c) (Vernon 2008) ("At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child . . . the child's right to trial by jury.").

154. In re S.H., 846 S.W.2d 103, 105 (Tex. App. 1992) ("Appellant also argues . . . that the trial court adjudicated him guilty of new offenses and that it may not do so without affording appellant a jury trial. In this regard, we agree with appellant. A juvenile must waive a jury or be afforded a jury at an adjudication hearing.").


156. Id.

157. State v. Benjamin C., 781 P.2d 795, 799 (N.M. Ct. App. 1989) (holding that the juvenile defendant has the right to a jury trial because an adult facing the same charges would be entitled to a jury trial).

158. See McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.").

159. See, e.g., Jenny B. Davis, Juries for Juveniles?, 1 No. 3 A.B.A. J. E-REPORT 3 (2002) (explaining significant changes made to the Louisiana juvenile justice system including counting
courts allow juvenile adjudications to be factored into an adult’s subsequent criminal court sentencing, despite the fact that the relevant juvenile adjudications were tried to the bench because juveniles are not constitutionally guaranteed a jury trial. 160

D. Early Skepticism of the Juvenile System

In 1966, the Kent Court admitted that “there can be no doubt of the original laudable purposes of juvenile courts,” yet recognized that critics have “raise[d] serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.” 161 The Court also noted that “some juvenile courts...lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity...” 162 Thus, despite the Court’s retreat from this skepticism in McKeiver only five years later, the flaws inherent in the juvenile justice system were evident early on in the Court’s juvenile adjudication jurisprudence.

E. What Can Juries Offer that Judges Cannot?

It is of vital importance to recognize that juries can provide a clean slate in a way that may be difficult for juvenile court judges. 163 Juries are more likely to acquit on evidence that does not satisfy the standard of beyond a reasonable

juvenile adjudications toward adult sentence enhancements and allowing the public greater access to information about juvenile offenders).

160. Sanborn, supra note 42, at 237. In 2005, the Court of Appeals of Washington held that a defendant’s prior juvenile adjudications could properly be considered prior convictions for purposes of sentence enhancement. State v. Weber, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005), aff’d, 149 P.3d 646 (Wash. 2006). The Minnesota and Indiana Supreme Courts have also determined that non-jury juvenile adjudications can be taken into consideration for purposes of increasing adult sentences. See Molly Gulland Gaston, Note, Never Efficient, But Always Free: How the Juvenile Adjudication Question is the Latest Sign that Almendarez-Torres v. United States Should Be Overturned, 45 AM. CRIM. L. REV. 1167, 1176 (2008); see also Redi Kasolija, First Circuit Upholds Constitutionality of Juvenile Convictions as Predicate Offenses Under the Armed Career Criminal Act, 41 SUFFOLK U. L. REV. 369, 373 (2008) (discussing an emerging circuit split regarding the constitutionality of taking prior juvenile adjudications into account under the Armed Career Criminal Act’s sentencing enhancement provision).

161. Kent v. United States, 383 U.S. 541, 555 (1966); see also Breed v. Jones, 421 U.S. 519, 529 (1975) (“We believe it is simply too late in the day to conclude...that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.”).


163. Sanborn, supra note 42, at 236. Juries, unlike judges, do not have access to the juvenile offender’s prior records and are not familiar with the juvenile from prior stages in the court process or prior adjudications. See id. Furthermore, juries are not presented with prejudicial and inadmissible evidence that is often presented at preliminary hearings, and juries do not know which prosecutors deal solely with repeat juvenile offenders. Id.
doubt because they have no vested interest in punishing a particular juvenile, they are not "easily vulnerable to prosecutorial pressures to adjudicate delinquents," and they have an "overall tendency to acquit more frequently than judges." In a famous study of criminal trials in the 1950s, Harry Kalven, Jr. and Hans Zeisel, relying on judges’ questionnaire responses, determined that juries were more inclined to acquit "when judges would convict much more often than juries tended to convict when judges would acquit." Using a criminal case database to partially replicate Kalven and Zeisel’s study, similar results were reached in 2005; the study further found that overall, "judges tend to convict more than juries."

Juries often "show greater lenity and thereby give our criminal justice system more flexibility [by allowing] a more humane imposition and distribution of punishment." It has been argued that providing juries in juvenile adjudications "would allow the child to be judged as an individual, rather than as just another member of a disreputable class who had previously appeared in juvenile court." Thus, jury trials provide a method of adjudication that comports with the original ambition of the juvenile system, which was to provide individualized treatment to each youth offender.

F. Jury Trials Are Central to the Criminal Justice System

Less than five years before the decision in *McKeiver v. Pennsylvania*, the Supreme Court articulated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." A year later, the Court concluded that "trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." Thus, the *McKeiver* Court’s decision denying juveniles the right to a jury trial seems entirely inconsistent with the Court’s prior and subsequent discussions regarding the importance of jury trials in adult adjudications.

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164. *Id.*

165. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s* The American Jury, 2 J. EMPIRICAL L. STUD. 171, 172 (2005) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 (1966)). Kalven and Zeisel’s study “is acknowledged to be the first large-scale systematic study of the jury” and though it is nearly fifty years old, the study “remains in many scholars’ minds the most significant.” *Id.*

166. *Id.* at 173. The 2005 study compiled the views concerning the “closeness of the case” of four different categories of participants, including “judges, jurors, prosecutors, and defense attorneys.” *Id.*


168. *Id.*


172. Moreover, the right to a jury trial is rooted in English common law and aims "'[t]o guard against a spirit of oppression and tyranny on the part of rulers . . . .'" *Apprendi v. New*
For decades, the Sixth Amendment’s right to a jury trial has been considered a fundamental right.173 The U.S. Supreme Court has reiterated on numerous occasions the necessity of providing criminal defendants with the right to a jury of their peers, and has explained that the right to a jury trial mandates that the defendant be provided with a “fair trial by a panel of impartial, ‘indifferent’ jurors.”174 Additionally, the Court has affirmed that “[t]he right to a jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment’s guarantees as [the Court] interpret[s] them.”175 The Supreme Court’s rich history of interpreting and applying the Sixth Amendment right to a jury trial discloses “a long tradition attaching great importance to the concept of relying on a body of one’s peers to determine guilt or innocence as a safeguard against arbitrary law enforcement.”176 Thus, the Court’s decision in McKeiver, denying juvenile offenders the right to a jury trial under the U.S. Constitution, is in direct contrast to the Court’s numerous decisions detailing the immense importance of the concept of trial by jury to our legal system.

IV. CONCLUSION

A distinguished trial court judge once noted that “[w]hen evaluating the importance of a proceeding and the constitutional rights which attach at that moment, the test is not what label is applied to the proceeding, it is the potential consequences that could flow from it.”177 A lingering concern among

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173. See Duncan, 391 U.S. at 149 (“[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . .”). The Supreme Court noted that the jury trial’s function of safeguarding against unreasoned law enforcement “lies at the core of [the Court’s] dedication to the principles of jury determination of guilt or innocence.” Johnson v. Louisiana, 406 U.S. 356, 373-74 (1972).

174. See Irvin v. Dowd, 366 U.S. 717, 722 (1961). The Irvin Court explained that the right to a fair trial extends to all criminal defendants “regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.” Id.

175. Schriro v. Summerlin, 542 U.S. 348, 358 (2004); see also Duncan, 391 U.S. at 155 (asserting that the right to a jury trial “reflect[s] a profound judgment about the way in which law should be enforced and justice administered”).

176. Williams v. Florida, 399 U.S. 78, 87 (1970); see also Neb. Press Ass’n v. Stuart, 427 U.S. 539, 551 (1976) (“In the ultimate analysis, only the jury can strip a man of his liberty or his life.”) (quoting Irvin, 366 U.S. at 722); Duncan, 391 U.S. at 149 (“[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . .”); In re Murchison, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

those in favor of extending a constitutional right to a jury trial to youth offenders is the importance and often lack of recognition that the overarching consideration is whether the juvenile stands to suffer a deprivation of his rights.178 If we continue, as the recent trend suggests, to close the gap between juvenile and criminal codes, then we must extend to juveniles all procedural due process rights enjoyed by adult defendants—most importantly the right to a jury trial.

Justice Harry Blackmun concluded his opinion for the McKeiver plurality with the following acknowledgment: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps the ultimate disillusionment will come one day . . . ."179 Since the mid-1990s, states have toughened their stance on juvenile offenders and state juvenile systems have focused on accountability and public safety.180 The day that Justice Blackmun predicted has arrived.

178. See id.
180. See John Gibeaut, A Jury Question: Jurors Should Judge Youths in Juvenile Court, Some Say, 85 A.B.A. J. 24, 24 (July 1999). After striking down on state due process grounds a 1997 Louisiana law that allowed a juvenile who was determined delinquent, yet not convicted of a crime, to be transferred to an adult prison, Louisiana Chief Justice Pascal F. Calogero noted: ""The issue now becomes how much of the unique nature of the juvenile procedures can be eroded before due process requires that the juveniles be afforded all the guarantees of adult criminals under the Constitution, including the right to trial by jury."" Id.