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Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver* World

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Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver* World

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I. INTRODUCTION

It is well known that a fundamental transformation has occurred within the juvenile court movement, away from its original rehabilitative focus and towards a punitive orientation.¹ This development has raised a variety of constitutional issues, some of which the Supreme Court has already addressed.² The Court has not, however, directly focused on the legal implications of administering the punitive sanction in the juvenile system, but rather has attended only to the system's inability to deliver meaningful rehabilitation. Thus, in its first

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1. See, e.g., Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71–86 (1997) [hereinafter Feld, *Abolish the Juvenile Court*]; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988) [hereinafter Feld, *The Juvenile Court Meets . . . Punishment*]; Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129 (1987); Andrew Walker, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523–33 (1984); see also *infra* section II.C (discussing the shift in juvenile courts from a rehabilitative to a punitive focus).
 2. See *infra* section III.A.

significant consideration of the workings of the juvenile system, the Court expressed serious doubt about whether young people subjected to juvenile court jurisdiction in fact received “the solicitous care and regenerative treatment postulated for children.”³ This disillusionment continued in a line of cases, beginning with *In re Gault*,⁴ recognizing that the system imposed harsh dispositions which offered little meaningful rehabilitation. As a consequence, the Court required as a matter of due process that most of the procedural protections constitutionally required in criminal cases, theretofore foreign to juvenile courts,⁵ be applied to delinquency adjudications⁶ within the juvenile justice system.⁷ However, when it came to jury trials, the Court made a glaring exception in *McKeiver v. Pennsylvania*, holding that young people charged with acts of delinquency do not enjoy a due process right to a trial by jury.⁸ In contrast to its previous disparagement of the rehabilitative potential of the juvenile court movement, the *McKeiver* Court expressed faith that juvenile courts could indeed be functioning components of an effective rehabilitative system in which juries were not constitutionally required and might actually be harmful to the system’s rehabilitative mission if employed.⁹

Despite *McKeiver*’s optimism, the majority of the Court’s opinions clearly reflect disenchantment with the rehabilitative effectiveness of

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3. *Kent v. United States*, 383 U.S. 541, 556 (1966) (holding that juveniles in waiver proceedings from juvenile to criminal court are entitled to a hearing on waiver questions, to access to social records available to the juvenile court, and to a statement of reasons for waiver should the court so decide). For a more detailed discussion of *Kent*, see *infra* notes 28, 96–99 and accompanying text.
 4. *In re Gault*, 387 U.S. 1 (1967). For a detailed discussion of the *Gault* line, see *infra* section III.A.
 5. The juvenile court movement was founded on the ideal of rehabilitating troubled youth by offering individualized dispositions according to the child’s needs without the encumbrances of the adversarial model familiar to the criminal law. MARTIN R. GARDNER, *UNDERSTANDING JUVENILE LAW* 166 (2d ed. 2009) [hereinafter GARDNER, *UNDERSTANDING*]. Under the guise of *parens patriae*, juvenile court operatives were to promote the welfare of the juvenile, rendering unnecessary, indeed counterproductive, the procedural protections of the criminal system with its punitive sanction. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 150–51 (1984). Thus, juvenile courts traditionally operated without juries, lawyers, rules of evidence, and formal procedures. *Id.*
 6. The Court spoke specifically to “delinquency adjudications,” thus leaving open the question of whether or not its procedural requirements also applied to other stages of delinquency proceedings or to matters concerning status offense jurisdiction of juvenile courts. See GARDNER, *UNDERSTANDING*, *supra* note 5, at 251–52 (discussing distinctions drawn by some courts between procedures employed in delinquency cases, on the one hand, and status offense matters on the other).
 7. See *infra* section III.A.
 8. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). For a detailed discussion of *McKeiver*, see *infra* subsection III.A.1.
 9. See *McKeiver*, 403 U.S. at 547, 550.

the juvenile system. This sentiment is shared by policy makers throughout the nation who have increasingly embraced punishment of juvenile offenders.¹⁰ Policy merits aside, however, imposing punitive sanctions raises constitutional issues—yet to be decided by the Court—unique and distinct from those attending rehabilitative dispositions.¹¹ Specifically, punishing juvenile offenders requires recognition of the Sixth Amendment right to public trial by jury, whatever *McKeiver*'s due process validity and assumptions of a rehabilitative model. Yet, despite widespread criticism from commentators,¹² the

10. See *supra* note 1. Some see the Court's actions themselves as being, at least partly, the cause of the emergence of punitive juvenile justice. Chief Justice Burger warned that requiring the procedures of the criminal system would render the juvenile system the functional equivalent of the criminal law, resulting in the eventual merger of the two systems:

What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive

. . . .
 . . . I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.

In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting). Some commentators see the movement towards punitive juvenile justice as a realization of Burger's fears. See, e.g., Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 24 (2007) [hereinafter Feld, *Unmitigated Punishment*]; Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 965–66 (2006) (discussing the Court's case law among the factors bringing Burger's fears "close to fruition"). Professor Feld has stated:

[T]he Court's decisions transformed juvenile courts into scaled-down criminal courts. . . . By making explicit the connection between delinquency and criminality, the Court placed the sub-group of delinquents within the larger social problem of criminals. This functional equivalency increased the likelihood that harsher policies aimed at criminals would spill over onto delinquents as well.

Feld, *Unmitigated Punishment*, *supra*, at 24. Other commentators have observed:

[W]hile not the intent of many proponents of greater due process for juveniles, procedural reforms did have a latent impact on the objectives of the juvenile justice system and its correctional interventions. With the advent of rules, generalizable standards, and requirements for procedurally correct decisions, attention began to be focused on *substantive* issues such as the equal and fair treatment of offenders rather than on individualized, situation-specific considerations. As a result, the offense, rather than the offender, came to be a critical factor in juvenile court dispositional decisionmaking.

Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 331 (1991).

11. See *infra* notes 37–44, 76–77 and accompanying text.

12. See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083,

overwhelming majority of courts continue to rely on *McKeiver* as the basis for unjustifiably denying jury trials to delinquents facing punitive sanctions, which would trigger jury trial rights in adult criminal court.¹³

This Article argues that the continued homage to *McKeiver* in an era of punitive juvenile justice is the misguided result of judicial inattention to the distinction between punitive and rehabilitative dispositions. In Part II, I clarify this distinction and demonstrate why understanding it is essential to a sound analysis of whether jury determinations and public proceedings are constitutionally required in delinquency adjudications. I show that the concepts of rehabilitation and punishment are distinct and, for purposes of constitutional analysis, mutually exclusive. From this discussion I derive a conceptual framework, which I apply in Part IV to analyze several cases. These conceptual considerations are framed by a sketch of the movement within juvenile justice from a rehabilitative to a punitive model. In Part III, I examine the Supreme Court's delinquency cases, paying particular attention to *McKeiver*. I then consider the Court's public

1123–26 (1991) [hereinafter Ainsworth, *Abolishing Juvenile Courts*]; Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 943 (1995) [hereinafter Ainsworth, *Youth Justice*]; Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875 (1994–1995); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1136–69 (2003) [hereinafter Feld, *Constitutional Tension*]; Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998); Orman W. Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561 (1972); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230 (1993); Kristin K. Zinsmaster, *In re the Welfare of Due Process*, 94 MINN. L. REV. 168 (2009); Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161 (2004); Cart Rixey, Note, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 CATH. U. L. REV. 885 (2009).

But see Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2000) (arguing for a new paradigm based on “procedural justice theory” rather than the adversarial model); Courtney P. Fain, *What's in a Name? The Worrisome Interchange of Juvenile “Adjudications” with Criminal “Convictions”*, 49 B.C. L. REV. 495 (2008) (explaining that jury trials are a bad idea for juvenile courts because juveniles rarely invoke them, and jury use would make juvenile adjudications “convictions” for adult sentencing purposes); Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955 (2006) (suggesting that the adversarial system and jury determinations may be less suited to juvenile courts than “procedural justice” models).

13. See *infra* section IV.A.

trial and jury trial case law and argue that proceedings must be open to the public when alleged offenders face punishment, and jury trials must be afforded when they face substantial punitive incarceration. I show that, contrary to *McKeiver*, requiring open jury determinations in delinquency adjudications will not detract from the goals of such proceedings but will actually effectuate them. I conclude Part III by arguing that alleged delinquents, unlike adult defendants in the criminal system, are constitutionally entitled to choose a jury or bench trial and an open or closed proceeding in which their identities are kept confidential.

In Part IV, I examine a sample of lower court cases considering whether jury trials are required in the new punitive juvenile justice. I demonstrate that the courts, with very few exceptions, make three kinds of mistakes in assessing jury trial rights in juvenile cases. Some courts simply beg the constitutional question by assuming without analysis that a given disposition is nonpunitive. Others apply overly broad definitions of rehabilitation, thereby conflating the concept of punishment into that of rehabilitation. A third group makes the opposite mistake by applying the “impact theory,” an overly broad definition of punishment, which conflates the concept of rehabilitation and other coercive sanctions into that of punishment. After illustrating these mistakes with examples from the case law, I contrast the faulty decisions with a rare example of a soundly analyzed case as a recommended model for clarification of the muddled situation created by the lower courts.

Finally, in Part V, I briefly address the argument of some leading commentators that the complete criminalization of juvenile courts—by the recognition of public trial and jury trial rights—makes the existence of a juvenile court system separate from the criminal justice system unnecessary and unwise. Rather than merging it into the criminal system, I argue to the contrary that the emergence of punitive juvenile justice with full procedural protections actually provides a new rationale for retaining a separate juvenile court system. I take no position on whether juvenile courts should punish delinquents, but focus only on the Sixth Amendment implications that follow when punishment occurs.

II. JUVENILE JUSTICE: FROM REHABILITATION TO PUNISHMENT

In this Part, I will describe the original rehabilitative orientation of the juvenile justice movement as a prelude to discussing the increasing emergence of the punitive sanction currently utilized in many juvenile systems around the nation. To better understand this transformation of juvenile justice, I will then clarify the distinction between rehabilitative and punitive dispositions and explain the legal

significance of the distinction. Finally, I will document the emergence of punishment in modern juvenile justice.

A. The Rehabilitative Premise of Original Juvenile Justice

Until the late nineteenth century, no separate court system existed to process juveniles who committed criminal offenses or who simply were in need of care or supervision.¹⁴ Prior to that time, young people committing criminal offenses were dealt with through the same criminal court system and were subject to the same array of punishments as were adult offenders.¹⁵ The common law did provide, however, an infancy defense which reflected the understanding that children are less capable than adults of appreciating the wrongfulness of their actions, thus rendering them less culpable and less deterrable than their adult counterparts.¹⁶ This defense constituted a series of presumptions: first, children under the age of seven were conclusively presumed incapable of possessing criminal responsibility and were thus outside the jurisdiction of the criminal law; second, children between ages seven and fourteen were subject to a rebuttable presumption of non-responsibility;¹⁷ and third, adolescents over the age of fourteen were treated as adults.¹⁸

However, at the dawn of the twentieth century—with the emerging science of psychology providing new perceptions into the nature of crime and an appreciation of the differences between young people and adults—progressive reformers established a court system unique to juveniles, aimed at rehabilitating those committing criminal offenses as well as those exhibiting problematic behavior not proscribed by the criminal law.¹⁹ After its initial implementation in 1899 in Illinois,²⁰ the movement quickly spread to every United States jurisdiction and to most European nations.²¹ This movement was predicated

14. The establishment of the first juvenile court occurred in Cook County, Illinois in 1899. SAMUEL M. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* 1 (2d ed. 2011). Prior to that time legal reformers established “houses of refuge” in the early nineteenth century to protect orphans, paupers, and juveniles convicted of offenses in criminal courts. *Id.* at 1–2.

15. Walkover, *supra* note 1, at 509.

16. *Id.* at 509–12.

17. The presumption could be overcome if the state could show that the young defendant in fact appreciated the wrongfulness of his or her actions. *Id.* at 510–11.

18. *Id.*

19. See Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 822–25; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997).

20. DAVIS, *supra* note 14, at 1.

21. See Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

on the view that young people are by their nature malleable, and thus prime candidates for rehabilitation.²² At the same time, the movement also saw juveniles as unfit subjects for punishment because their immaturity rendered them neither culpable²³ nor deterrable.²⁴ Thus, as a manifestation of *parens patriae* power,²⁵ the juvenile court movement sought to meet the needs of youthful offenders rather than sanction them for their offenses.²⁶ Dispositions were “indeterminate,” possibly extending throughout the period of minority and based on the best interests of the offender, rather than “determinate” in proportion to the minor’s offenses.²⁷

Consistent with its rehabilitative ideals, the juvenile justice system traditionally eschewed procedural formalities in favor of closed

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22. Scott & Grisso, *supra* note 19, at 142. Young people were not the sole subjects of the “rehabilitative ideal.” Progressive reformers had come to believe that all criminal conduct was determined by underlying conditions affecting the offender rather than the product of his free choices. *Id.* at 141. Thus, treatment rather than punishment was also the preferred disposition for adult offenders, although perhaps not as effectively employed as in the case of their more malleable juvenile counterparts. *See infra* note 36 and accompanying text.
23. *See* Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 661–64 (1970). While juvenile courts assumed jurisdiction over troubled youths in general, not just those committing criminal offenses, the discussion throughout this Article will focus only on those committing offenses that would be crimes if committed by an adult. Such offenders are generally characterized as “delinquents” in juvenile justice parlance. *See* GARDNER, UNDERSTANDING, *supra* note 5, at 167.
24. Scott & Grisso, *supra* note 19, at 143. The juvenile court movement thus extended the underlying predicates of the infancy defense not just to children under the age of fourteen but to all young people under the age of majority.
25. The original English concept of *parens patriae*, applied historically by chancery courts, permitted courts to exercise the Crown’s paternal prerogative to declare a child a ward of the Crown when the parents had failed to maintain the child’s welfare. *See generally* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).
26. The fundamental concern of juvenile courts towards child offenders was with “what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.” Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909). In adopting reformation as its goal, the juvenile court movement eschewed retributivist notions of guilt and blameworthiness. Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 207 (1977).
27. The rehabilitative objectives of the juvenile system were characterized by a system of indeterminate sentencing in which the type and duration of sanction were dictated by the “best interests” of the offender rather than the seriousness of the offense. Stephan Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1121 (1977). “Indeterminate” meant that the disposition had no set limit and could continue until adulthood. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 196 n.37 (2007) [hereinafter Feld, *A Century of Juvenile Justice*].

proceedings without defense lawyers or juries.²⁸ The proceedings were themselves deemed rehabilitative, with the judge acting as a father figure ready to sit next to the youth and “on occasion put his arm around his shoulders and draw the lad to him” in a show of “care and solicitude.”²⁹ In order to dispense needed rehabilitation on a case-by-case basis, the proceedings were nonadversarial, with judges often acting more as social workers than legal officials,³⁰ and with lawyers replaced by an array of sociologists, social workers, and mental health professionals who provided the court with input thought necessary to “save children from a life of crime”³¹ and “develop [the accused into] a worthy citizen.”³²

28. One commentator summarized the matter as follows:

Not only was the aim of a court for children to differ from that of the criminal court; its way of going about things was to be changed as well. Procedure had to be socialized. The purpose of the juvenile court is to prevent the child's being tried and treated as a criminal; all means should be taken to prevent the child and his parents from forming the conception that the child is being tried for a crime. The respondent to a petition filed in his own interest replaced the defendant to a criminal charge filed in the interest of the state. Trials by jury should be permitted under no circumstances, because they are inconsistent with both the law and the theory upon which children's codes are founded. Hearings were not to be public trials lest youngsters be damaged by publicity. Little or no need would be found for the respondent to have a lawyer; the judge represents both parties and the law. The proceedings were to be informal The rules of evidence governing criminal cases were not to be strictly followed. In part, they were to be rejected because the inquiry was to be broader than the relatively simple question: Did the child do it? The inquiry was also to consider medical and psychological information, the impressions of trained observers, in order to understand the Reason Why. . . . In short, the ordinary protections of a person accused of crime were hindrances to the achievement of juvenile court goals, not milestones on the path of human advancement.

Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 170–71 (footnotes and internal quotation marks omitted).

29. Mack, *supra* note 26, at 120.

30. In the early days of the juvenile court movement, judges were sometimes not even trained in the law. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 544 n.4 (1971) (internal quotation marks omitted) (“A recent study of juvenile court judges . . . revealed that half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar.”); L. Mara Dodge, “*Our Juvenile Court Has Become More Like a Criminal Court*”: *A Century of Reform at the Cook County (Chicago) Juvenile Court*, 26 MICH. HIST. REV. 51, 58 n.25 (2000) (noting that as of 1973 only 85% of juvenile court judges had law degrees). See generally Kathleen Coulborn Faller & Frank E. Vander-vort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121, 123 n.5 (2007).

31. SAMUEL M. DAVIS, *CHILDREN'S RIGHTS UNDER THE LAW* 225 (2011).

32. Mack, *supra* note 26, at 107.

As a “civil” system aimed at avoiding the stigma attached to the criminal justice system, the juvenile court movement adopted a set of euphemisms to replace the terminology of the criminal law. Juvenile proceedings were thus triggered by “petitions” rather than “indictments” or “informations”; juveniles committed acts of “delinquency” rather than “crimes”; they were subject to “adjudications” rather than “trials”; and if adjudicated a delinquent, they discovered their fate in “disposition” rather than “sentencing” proceedings, which could lead to commitment to a “training school” rather than a “prison” or “penitentiary.”³³

While juvenile courts were meant to function as rehabilitative alternatives to the criminal system, the juvenile justice system—virtually from its inception—provided mechanisms to waive juvenile court jurisdiction to adult criminal court in certain cases.³⁴ Once waived to criminal court, juveniles enjoyed all the protections of the criminal process but became subject to the same array of punishments imposed upon convicted adults.³⁵ Notwithstanding the possibility of waiver to criminal court, however, the reformers believed as a fundamental matter of public policy that juveniles generally should not be punished for their offenses but instead rehabilitated.

The new “civil” rehabilitative system was thus promoted as a desirable nonpunitive alternative to the criminal system. In choosing between systems that punish and those that rehabilitate, the reformers were not merely making an important policy decision,³⁶ but also one of

33. GARDNER, UNDERSTANDING, *supra* note 5, at 167.

34. “In 1903, only four years after its establishment, the Chicago juvenile court transferred fourteen children to the adult criminal system.” Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41, 42 (1984). Such a trend continued into the 1970s, when every American jurisdiction had laws authorizing or requiring criminal prosecution of certain minors in adult courts. *Id.*; see also Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 n.5 (1978) (discussing the varied terminology used to describe the juvenile waiver procedure). Waiver is generally reserved for those youths whose “highly visible, serious, or repetitive criminality raises legitimate concern for public safety or community outrage.” Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal”*, 65 MINN. L. REV. 167, 171 (1980). However, many youths committing minor offenses are also dealt with in criminal court, perhaps because of the unavailability of fines as a juvenile court sanction. See Wizner, *supra*, at 44–45.

35. DAVIS, *supra* note 14, at 213. Recently, however, the Supreme Court has found that certain punishments constitute cruel and unusual punishment under the Eighth Amendment when applied to offenders who commit their crimes while under eighteen years of age. See *Graham v. Florida*, 130 S. Ct. 2011 (2010) (life sentence without parole for non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty).

36. At the same time the rehabilitative ideal was being embodied in the new juvenile movement, similar policies were enacted in the criminal law as indeterminate

constitutional significance. Punitive systems are governed by constitutional requirements, some substantive³⁷ and others procedural, under various Bill of Rights provisions applicable to “criminal” cases³⁸ and “prosecutions.”³⁹ Among these requirements is that defendants must be afforded public trials with rights to jury determinations.⁴⁰ On the other hand, such rights do not necessarily apply to proceedings dispensing nonpunitive sanctions, such as coerced rehabilitation.⁴¹ Moreover, distinguishing punishment from rehabilitation is constitutionally necessary in light of the Court’s proclamation in *Robinson v. California*⁴² that a person may never be “punished” under the Eighth

sentencing emerged in the attempt to rehabilitate adult offenders within prisons, if possible, and restrain them therein if dangerous but not able to be rehabilitated. ANDREW VON HIRSCH, *DOING JUSTICE* 9–10 (1976).

37. The presence of punishment is a necessary predicate for relief under the Bill of Attainder and Ex Post Facto Clause. U.S. CONST. art. I, § 9, cl. 3. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84 (2003) (finding that requiring registration of convicted sex offenders with law enforcement authorities is “nonpunitive” and thus not a violation of the Ex Post Facto Clause); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (finding state Sexually Violent Predator Act “nonpunitive” under Ex Post Facto Clause); *Flemming v. Nestor*, 363 U.S. 603 (1960) (holding termination of social security benefits not “punishment” for purposes of the Ex Post Facto Clause).

“Punishment” is also necessary for violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 670 n.39 (1976) (“[A]n imposition must be ‘punishment’ for the Cruel and Unusual Punishments Clause to apply.”).

Moreover, administering “punishment” prior to conviction or guilty plea constitutes a violation of due process. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (stating that “under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt,” but holding there was no “punishment” of pretrial detainees where confinement was imposed for nonpunitive purposes).

38. Among other things, the Fifth Amendment requires grand jury indictments in charging infamous “crime[s]” and forbids compelling persons to be witnesses against themselves in any “criminal case.” U.S. CONST. amend. V.
39. 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 and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

40. *See id.*

41. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 428 (1979) (holding that civil commitment proceedings are not “punitive” in purpose, and hence are not “criminal cases” uniquely requiring proof “beyond a reasonable doubt”—proof by “clear and convincing evidence” therefore was sufficient in civil commitment matters). For a comprehensive discussion of the variety of legal consequences of the punitive/nonpunitive distinction, see generally J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

42. *Robinson v. California*, 370 U.S. 660 (1962).

Amendment for undesirable status conditions, which may, however, spawn compulsory rehabilitation or medical “treatment.”⁴³ Thus, if a juvenile justice system were in fact “punitive,” even if nominally “rehabilitative,” it would become a “criminal” legal system subject to those requirements unique to state dispensations of punishment.⁴⁴

Later in this Part, I will show that juvenile justice has become increasingly punitive. Before examining this development, however, it is necessary to provide an analytical framework for differentiating between punitive and rehabilitative dispositions. Without a clear understanding of the difference between punishment and rehabilitation, it is impossible to appreciate the extent of the metamorphosis of juvenile justice and to assess whether in its current form Sixth Amendment jury and public trial rights apply to delinquency adjudications.

43. *Id.* at 666–68 (holding state may require drug addict to undergo compulsory treatment, but may not punish him for the status of drug addiction). See *In re De La O*, 378 P.2d 793 (Cal. 1963) (holding that a confinement of petitioner for six months to five years for drug addiction constituted permissible treatment and rehabilitation rather than impermissible punishment under *Robinson*).

For my assessment of *Robinson* as a due process rather than an Eighth Amendment case, see Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the “Demise of the Criminal Law” by Attending to “Punishment”*, 98 J. CRIM. L. & CRIMINOLOGY 429 (2008) [hereinafter Gardner, *Rethinking*].

44. “Criminal” is distinguished from “civil” law by the former’s imposition of punishment. Professor George Fletcher explains:

The best candidate for a conceptual proposition about the criminal law is that the infliction of “punishment” is sufficient to render a legal process criminal in nature. In the United States, the labeling of a process as “criminal” triggers certain basic constitutional guarantees, such as the right to counsel and the right to a jury trial. As a test for when processes are criminal, the Supreme Court unhesitatingly invokes the concept of “punishment” as the relevant criterion. That a sanction is inflicted in the criminal courts for a violation of the criminal code is sufficient to classify the sanction as “punitive,” but there are recurrent problems in assessing the punitive nature of other sanctions, such as administrative commitment, expatriation, deportation, fines for custom violations and the deprivation of social security benefits. That the legislature has identified these sanctions as civil in nature does not control the constitutional issue, for if the sanction is “punitive,” if it constitutes “punishment,” then regardless of the legislative label, the process is criminal and the constitutional guarantees apply. If we wish to understand the criminal law, we must first understand its most prominent feature: the infliction of punishment.

GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 408–09 (1978) (footnotes omitted).

B. Punitive vs. Rehabilitative Dispositions: The Conceptual Distinction

1. Punishment

Notwithstanding the unique legal significance of governmental imposition of punishment,⁴⁵ the Supreme Court has struggled to provide a precise definition of the punitive sanction.⁴⁶ Elsewhere, I have examined in detail the Court's cases determining whether a given governmental action constitutes "punishment."⁴⁷ From these cases, it is possible to make the following general observations: a sanction is punitive if a legislature labels it punitive,⁴⁸ and the Court will otherwise defer to the legislature if it labels a sanction nonpunitive and civil unless a party challenging the sanction shows by the "clearest proof" that it is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."⁴⁹ Moreover, in addressing the question of punitive purpose or effect, the Court routinely appeals to the "useful guideposts"⁵⁰ established in *Kennedy v. Mendoza-Martinez*,⁵¹ where

45. See *supra* notes 37–44 and accompanying text.

46. The Court first attempted to define punishment in mid-nineteenth century cases arising under the Bill of Attainder and Ex Post Facto Clauses. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (finding that a teacher–priest was unconstitutionally punished by imposition of a \$500 fine for continuing to teach without taking a required oath of allegiance to the Union under a state constitutional provision enacted after the teacher had begun teaching). For a detailed discussion of *Cummings*, see Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 798–800 (1982) [hereinafter Gardner, *Punishment and Juvenile Justice*].

47. See Gardner, *Punishment and Juvenile Justice*, *supra* note 46, at 797–822; Gardner, *Rethinking*, *supra* note 43, at 466–73.

48. The Court has characterized the framework described immediately hereafter in the text as the "well established" basis for determining the presence of punishment. *Smith v. Doe*, 538 U.S. 84, 92 (2003). The framework has been followed explicitly by the Court in the following cases: *id.* at 92 (holding mandatory registration by sex offenders not to be punishment for purposes of the Ex Post Facto Clause); *Hudson v. United States*, 522 U.S. 93 (1997) (holding monetary penalties and occupational debarment not to be punishment for purposes of the Double Jeopardy Clause); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding commitment of sex offender at completion of prison sentence not to be punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses); *United States v. Ursery*, 518 U.S. 267 (1996) (holding forfeiture of property not to be punishment for purposes of the Double Jeopardy Clause); *Allen v. Illinois*, 478 U.S. 364, 373–74 (1986) (holding commitment as a "sexually dangerous person[]" not punishment for purposes of the privilege against self-incrimination); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding under the Due Process Clause that pretrial detention was not punishment "prior to an adjudication of guilt").

49. *Smith*, 538 U.S. at 92 (alteration in original) (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).

50. *Id.* at 97 (quoting *Hudson*, 522 U.S. at 99).

51. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (holding that forfeiture of citizenship rights for fleeing the United States to avoid the draft constituted

the Court articulated “the tests traditionally applied to determine whether [a sanction] is penal . . . in character.”⁵² These “tests” include the following:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.⁵³

These considerations demonstrate that punishment entails the purposeful imposition by the state of unpleasantness (“an affirmative disability or restraint”) upon one engaging in undesirable “behavior” for purposes of exacting “retribution” and achieving “deterrence.” So understood, punishment imposes unpleasantness upon a person as a response to his or her commission of an undesirable act.⁵⁴ Furthermore, the Court’s attention to “*scienter*” in *Mendoza-Martinez* sug-

“punishment,” thus triggering the protections of the Fifth, Sixth, and Eighth Amendments). For an insightful discussion of the *Mendoza-Martinez* decision, see George Fletcher, Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290 (1965).

52. *Mendoza-Martinez*, 372 U.S. at 168.

53. *Id.* at 168–69 (footnotes omitted). While the *Mendoza-Martinez* factors have proven useful in determining punishment and distinguishing it from nonpunitive coercive sanctions, the Court’s reference to whether a sanction “appears excessive in relation to the alternative [nonpunitive] purpose[s] assigned” has proven problematic. *Id.* at 169. The Court has suggested that a sanction is punitive if it is excessive in light of articulated nonpunitive purposes. In discussing the issue of whether pretrial detention constituted punishment (unconstitutional unless it follows conviction), the Court observed: “[I]f a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Arbitrary or purposeless coercive actions by the government do not necessarily constitute punishment, however. See, e.g., *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding guard brutality of jail inmate not “punishment” under Eighth Amendment’s Cruel and Unusual Punishments Clause but rather a “spontaneous attack” likely in violation of the Due Process Clause). I have argued elsewhere that unless the sanction is imposed “for an offense” however arbitrary or purposeless it may be, it is not “punishment.” See Gardner, *Rethinking*, *supra* note 43, at 464–66, 473–81.

54. This view of the Court’s conception tracks fairly closely to H.L.A. Hart’s famous characterization of the “standard case” of legal punishment:

- (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be of an actual or supposed offender for his offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

gests that punishment is characteristically imposed on those believed blameworthy for their undesirable actions.⁵⁵ Thus, the state punishes when it purposely visits unpleasant consequences upon blameworthy offenders who have violated legal rules.

Although the Court has not focused on the matter, philosophical literature on the subject has emphasized an additional factor central to the concept of punishment. Because punishment is a response to a past action, it is “determinate” in the sense that its intensity and duration is determined by the seriousness of the action to which it responds.⁵⁶ As one commentator puts it, “we would be punishing someone” if, in addition to imposing unpleasantness upon an offender by virtue of the fact that he or she culpably acted, “we determined—within at least some limits—at the time of our decision to punish what the nature and magnitude of the [inflicted] unpleasantness would be.”⁵⁷

In summary, the Court’s cases and the philosophical literature reveal the following framework for determining whether a given sanction is punitive:

- (1) If the sanction is labeled punitive by the legislature, it is conclusively presumed to be so.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4–5 (1969).

55. This focus on blameworthiness as a fundamental precondition for punishment is also emphasized by Richard Wasserstrom, who defines punishment as follows:

I think that we would be punishing someone if:

1. We believed that he or she had done some action; and
2. We believed that he or she was responsible at the time he or she acted; and
3. We believed that his or her action was blameworthy; and
4. We publicly inflicted some unpleasantness upon him or her; and
5. We publicly inflicted that unpleasantness upon him or her in virtue of the fact that he or she did the action in question, that he or she was responsible when he or she acted, and that he or she was blameworthy for having so acted

Richard Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT 173, 179 (J.B. Cederblom & William L. Blizek eds., 1977).

56. Punitive sentences are thus in a sense “fixed” or determined by principles of proportionality between offense and punishment. See, e.g., Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CALIF. L. REV. 463, 507 (1967). Justice Scalia has identified judicial imposition of fixed periods of incarceration on uncooperative litigants as the basis for distinguishing “criminal” contempt from “civil” contempt, which is characterized as confinement until a litigant complies with a specific order of the court. *Int’l Union, United Mine Workers v. Bagwell*, 521 U.S. 821, 840 (1994) (Scalia, J., concurring).
57. Wasserstrom, *supra* note 55, at 179; see also Herbert Morris, *Persons and Punishment*, in PUNISHMENT 74, 78 (Joel Feinberg & Hyman Gross eds., 1975) (noting that “with punishment there is an attempt at some equivalence between the advantage gained by the wrongdoer—partly based upon the seriousness of the interest invaded, partly on the state of mind with which the wrongful act was performed—and the punishment meted out”).

- (2) If the legislative label or intent indicates that the sanction is “civil,” it will be presumed to be so unless it is shown “by the clearest proof” to be punitive under the following conception of punishment:
- (a) The sanction involves an unpleasant restraint purposely imposed by the state;
 - (b) The sanction is imposed upon a person because of an offense;
 - (c) The sanction is imposed to achieve the purposes of punishment—retribution and deterrence;
 - (d) The extent and duration of the unpleasant restraint is known, within some possible limits, at the time of its imposition; and
 - (e) The sanction is generally imposed upon offenders deemed to be blameworthy.⁵⁸

As noted above, it is necessary to distinguish punitive and rehabilitative dispositions in order to sort out a variety of constitutional issues, including the public trial and jury trial questions.⁵⁹ Therefore, an understanding of how coercive rehabilitation differs from punishment is essential.

58. Unlike provisions (2)(a)–(d), a finding of blameworthiness is not a necessary condition for the definition of punishment given the Supreme Court’s recognition of the validity of strict liability crimes. *See, e.g.*, *United States v. Balint*, 258 U.S. 250 (1922). The relationship between punishment and responsibility is thus not a logical one. As recognized by H.L.A. Hart, it is logically possible—although not justifiable—for the state to knowingly punish a person who is known to be innocent of the offense for which he is punished. *See Hart, supra* note 54; *see also* JOHN KLEINIG, *PUNISHMENT AND DESERT* 12–13 (1973) (discussing the utility definition of punishment and its relation to the innocent). For a discussion of the Hart view, *see Gardner, Rethinking, supra* note 43, at 464–65.

Not everyone agrees, however, that blameworthiness is not a necessary condition for the definition of punishment. Some argue that the power of punishment to express social disapprobation toward morally blameworthy offenders is the central characteristic that distinguishes punishment from nonpunitive sanctions. *See, e.g.*, Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.”); *see also* Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970) (arguing that judgments of disapproval and reprobation are part of the definition of legal punishment).

59. *See supra* notes 37–44 and accompanying text. Leading theorists have noted the significance of distinguishing rehabilitation, often characterized as “treatment” or “therapy,” from punishment. *See, e.g.*, TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 1 (1969); Morris, *supra* note 57; HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 25–28 (1968); Wasserstrom, *supra* note 55.

2. *Rehabilitation*

Because coercive rehabilitation often entails significant deprivations of liberty,⁶⁰ it is sometimes mistakenly considered punitive in nature.⁶¹ Similarly, as will be discussed later,⁶² punitive dispositions are sometimes mistaken for rehabilitation in juvenile justice cases. In fact, however, in many ways, therapeutic or rehabilitative dispositions are premised on principles directly opposite to those defining punishment. While punishment entails the purposeful infliction of suffering upon its recipient, rehabilitation involves purposeful behavior towards its recipient intended to alter the recipient's condition in a beneficial manner.⁶³ In contrast to punishment, rehabilitation is directed at re-

60. In juvenile justice, custodial confinement in "training schools" or "industrial schools" for purposes of rehabilitation has been a dispositional alternative from the beginning of the juvenile court movement. See GARDNER, UNDERSTANDING, *supra* note 5, at 281–82.

61. Some have defined sanctions as punitive simply if the conditions entailed in the sanction are experienced as unpleasant by their recipients. Thus, if the "impact" of a sanction is to visit upon its recipient unpleasant restrictions similar to those experienced by persons who are punished—similar, for example to deprivations existing in prisons—then the sanction is considered "punishment" regardless of the state's purpose in administering it. See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1331 (1974) (footnote omitted) ("Under an 'impact' theory of punishment, if an individual is subjected to deprivations similar to those existing in prisons, those deprivations are deemed to constitute punishment."). A federal judge expressed the view this way: "It would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated, . . . and conclude that their custody was not punitive in effect if not in intent." *Feeley v. Sampson*, 570 F.2d 364, 380 (1st Cir. 1978) (Coffin, C.J., dissenting); see also *Lieggi v. U.S. Immigration & Naturalization Serv.*, 389 F. Supp. 12, 21 (N.D. Ill. 1975) ("[T]he overall effect, the reality of the situation, is that petitioner . . . and his family will suffer severe punishment in relation to the offense unless this Court grants him some form of relief."), *rev'd* 529 F.2d 530 (7th Cir. 1976). See generally Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632 (1981) (opining that intent of a challenged practice is irrelevant in defining punishment).

The impact theory provides an inadequate definition of punishment. If punishment is defined solely in terms of the impact of a sanction on its recipient, without regard to questions of motivation for imposing it, virtually all coercive sanctions would become punitive, thus making it impossible to draw necessary distinctions between, *inter alia*, punishment and coercive rehabilitation. See PACKER, *supra* note 59, at 19–31; Gardner, *Punishment and Juvenile Justice*, *supra* note 46, at 811–13. For examples of courts resorting to the impact theory, see *infra* subsection IV.A.3.

62. See *infra* subsections IV.A.1 & IV.A.2.

63. See PACKER, *supra* note 59, at 25 ("[T]he justification for [rehabilitation] rests on the view that the person subjected to it is or probably will be 'better off' as a consequence."); Wasserstrom, *supra* note 55, at 179 ("[W]e would be treating someone if . . . [w]e acted in [a] way . . . [which] would alter [the recipient's] condition in a manner beneficial to him or her.").

lieving unpleasantness in its recipient's life rather than inflicting it. Moreover, while punishment always responds to *actions* deemed undesirable, rehabilitation aims at alleviating present status *conditions* deemed unhealthy.⁶⁴ While actions may be symptomatic of one's present unhealthy condition, they are not necessary predicates for rehabilitation.⁶⁵ As punishment responds to the commission of offenses, rehabilitation responds to the needs of the person, whether or not he or she has committed offenses. Finally, unlike punitive dispositions, which are determinate in nature,⁶⁶ rehabilitative dispositions are indeterminate at the time of their imposition because it is impossible to know at that time how long it will take to rehabilitate a given offender.⁶⁷

3. *Punishment v. Rehabilitation: Mutually Exclusive Dispositions?*

In light of the above discussion, it is not surprising that many see punishment and coercive treatment or rehabilitation as mutually ex-

64. PACKER, *supra* note 59, at 25–26; Wasserstrom, *supra* note 55, at 179.

65. Offending conduct is the *sine qua non* of punishment but is not necessarily relevant to dispensations of treatment. PACKER, *supra* note 59, at 26. Packer explains:

[I]n the case of Punishment we are dealing with a person because he has engaged in offending conduct; our concern is either to prevent the recurrence of such conduct, or to inflict what is thought to be deserved pain, or to do both. In the case of Treatment there is no necessary relation between conduct and Treatment; we deal with the person as we do because we think he will be "better off" as a consequence.

Id.

66. See *supra* notes 56–57 and accompanying text.

67. "[T]reatment [or rehabilitation] [is] always subject to revision upon a showing either: a. That an alternative response would be more beneficial to him or her, or b. That his or her condition has altered so as no longer to require that, or any other, further response." Wasserstrom, *supra* note 55, at 179. "The *idea* of treatment necessarily entails individual differentiation, indeterminacy, a rejection of proportionality, and a disregard of normative valuations of the seriousness of behavior." Feld, *Abolish the Juvenile Court*, *supra* note 1, at 91. In distinguishing offense-oriented sentences (punitive) and offender-oriented ones (rehabilitative), Professor Feld observes:

When based on the characteristics of the offense, the sentence usually is determinate and proportional, with a goal of retribution or deterrence. When based on the characteristics of the offender, however, the sentence is typically indeterminate, with a goal of rehabilitation or incapacitation. The theory that correctional administrators will release an offender only when he is determined to be "rehabilitated" underlies indeterminate sentencing. When sentences are individualized, the offense is relevant only for diagnosis. Thus, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and directly related to the past offense.

Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 847 (footnotes omitted).

clusive sanctions.⁶⁸ However, some disagree, seeing punishment and rehabilitation as compatible.⁶⁹ In a sense, both camps are correct, depending on the context in which they make their claims.

68. Professor Feld sees an “innate contradiction” in attempting to combine a “penal social control” function with a rehabilitative “social welfare” function. Feld, *Abolish The Juvenile Court*, *supra* note 1, at 93. He explains:

Conceptually, punishment and treatment are mutually exclusive penal goals. Both make markedly different assumptions about the sources of criminal or delinquent behavior. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts. Punishment imposes unpleasant consequences because of an offender's *past offenses*. By contrast, most forms of rehabilitative treatment . . . assume some degree of determinism. Whether grounded in psychological or sociological processes, treatment assumes that certain antecedent factors cause the individual's undesirable conditions or behavior. Treatment and therapy, therefore, seek to alleviate undesirable conditions in order to improve the offender's *future welfare*.

Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 833 (footnotes omitted). Professor Federle observes that “the juvenile court fluctuates between punishment and rehabilitation without attempting to reconcile these opposing justifications” which are “two [irreconcilable] polar impulses.” Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Rights*, 16 J. CONTEMP. L. 23, 38 (1990). H.L.A. Hart observes that “[t]he ideals of Reform . . . (corrective training) . . . plainly run counter to . . . [punitive] principles of Justice or proportion.” Hart, *supra* note 54, at 25–26. Professor Herbert Morris argues for a basic human right to be punished for one's criminal offenses in stark contrast to being subjected to coercive rehabilitation which disrespects human dignity. *See generally* Morris, *supra* note 57. I have related Morris's views to juvenile justice. *See* Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182 (1989). C.S. Lewis has expressed views similar to Morris's. C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES. JUDICATAE 224 (1953). Herbert Packer adds that punishment and rehabilitation are “always distinguish[ed] . . . [by] the nature of the relationship between the offending conduct and what we do to the person who has engaged in it.” PACKER, *supra* note 59, at 26. He explains:

For example, by saying that we may deal with a youth who seems likely to fall into a life of crime either by locking him up or by providing him with an education, we have not described the essential difference between Punishment and Treatment. If we send him to a school pursuant to a judgment that he has engaged in offending conduct, we are subjecting him to Punishment; if we think that he will be better off in jail than on the streets and proceed to lock him up without a determination that he has engaged in offending conduct, we are subjecting him to Treatment.

Id.

69. In the context of discussing whether an order of probation was consistent with the thesis that probation is meant to rehabilitate rather than punish, New Jersey Chief Justice Weintraub said:

The argument assumes that punishment and rehabilitation are somehow incompatible. Of course they are not. . . . Punishment and rehabilitation are not antagonists.

Probation assumes the offender can be rehabilitated without serving the suspended jail sentence. But this is not to say that probation is

Those seeing compatibility make a valid point in claiming punishment sometimes makes its recipient "better off."⁷⁰ For decades, adult inmates have been sent to prisons and penitentiaries as punishment for committing criminal offenses, but with hopes that they will also be rehabilitated.⁷¹ While in practice these goals may well be fundamentally at odds,⁷² there are certainly situations where individuals do

meant to be painless. Probation has an inherent sting, and restrictions upon the freedom of the probationer are realistically punitive in quality. . . . Probation is meant to serve the overall public interest as well as the good of the immediate offender.

In re Buehrer, 236 A.2d 592, 596–97 (N.J. 1967); see *infra* notes 70–73 and accompanying text.

70. See PACKER, *supra* note 59, at 26–27; *infra* note 74 and accompanying text.

71. See *supra* note 36. For example, the punishments defined by the *Model Penal Code* are administered within a "general framework of a preventative scheme" with "rehabilitation" as a "subsidiary" goal. MODEL PENAL CODE § 1.02 explanatory note (Official Draft 1985). The Federal Comprehensive Control Act of 1984 offers the following:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; . . .

18 U.S.C. § 3553 (2006).

Some claim that the introduction of the rehabilitative ideal into adult criminal law theory meant that punishment, with its concerns for retribution and deterrence, had been totally abandoned in favor of a systematically rehabilitative and preventative model. See Jerome Hall, *Justice in the 20th Century*, 59 CAL. L. REV. 752, 753 (1971) (describing the widespread disillusionment with punishment in the twentieth century with attendant disparagement of theories of deterrence and retribution and the emergence of rehabilitation as "the single rational goal" of legal policy).

However, the emergence of the rehabilitative ideal never meant the total demise of punishment. Vestiges of retributivism remained in legislation embodying the rehabilitative model. Sentences were based on legislative proscriptions of maximum penalties based on offenses and considerations of relative blameworthiness. AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 38 (1974). The commission of a criminal act as a necessary predicate for a sentence thus belied any systematic rehabilitative model in favor of a "backward-looking," desert-oriented system of justice.

72. In a famous statement expressing skepticism regarding the effectiveness of rehabilitation within penal confinement, Judge Marvin Frankel said that "no one should be sent to prison *for rehabilitation*." *United States v. Bergman*, 416 F.

emerge from prison “rehabilitated,” at least partly as a consequence of events or rehabilitation programs occurring within the prison.⁷³

In the juvenile justice context one commentator made the following observation:

[P]unishment and rehabilitation are theoretically compatible. In recent years, researchers have begun to suggest that some degree of punishment, especially for serious offenders, is appropriate and compatible with the juvenile system’s child-centered philosophy. . . . Plainly, the two are not mutually exclusive goals: some types of “punishment” can serve to rehabilitate a young offender.⁷⁴

On the other hand, while rehabilitation may, in a sense, exist alongside punishment within a punitive regime,⁷⁵ the concepts of punishment and rehabilitation are mutually exclusive for purposes of assessing constitutionally mandated procedural protections at trial. If a punitive disposition is possible upon a finding of guilt in a given proceeding, the proceeding is “criminal” and subject to Fifth and Sixth Amendment requirements regardless of whether some rehabilitation might be intended or even forthcoming.⁷⁶ On the other hand, if the

Supp. 496, 499 (S.D.N.Y. 1976). By the 1970s disillusionment with the rehabilitative ideal had become widespread. See Martin R. Gardner, *The Renaissance of Retribution: An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 782–83 [hereinafter Gardner, *The Renaissance of Retribution*].

73. See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 132 (2005) (arguing that “properly conducted” programs of “risk management” may effectuate offenders’ ability to change their antisocial behavior). But see Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, Spring 1974 PUB. INTEREST 22, 25 (arguing only in a “few and isolated” situations do rehabilitative efforts in correctional institutions actually reduce recidivism).

74. Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 506–07 (1995).

75. Similarly, punishment may occur within rehabilitative dispositions. See, e.g., *Knecht v. Gillman*, 488 F.2d 1136, 1139–40 (8th Cir. 1973) (holding administering to hospitalized mental patient a drug, which induces vomiting as “aversive stimuli,” for allegedly violating behavior rule of the institution, constitutes cruel and unusual punishment unless the inmate consents to the use of the drug). However, the Supreme Court has arguably ruled that Eighth Amendment remedies are unavailable to involuntarily committed mental patients even if hospital officials are “deliberately indifferent” to their medical and psychological needs. See *Youngberg v. Romeo*, 457 U.S. 307, 312, 325 (1982) (holding lower court erred in instructing jury on the Eighth Amendment deliberate indifference standard in case of patient’s allegations of unsafe conditions in hospital in which he was confined). The Court noted with approval the position of the Third Circuit Court of Appeals that the “Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed.” *Id.* at 312.

76. See *supra* notes 37–41 and accompanying text. Justice White summarized this point in the context of the Sixth Amendment right to trial by jury:

[T]he consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where

possible consequences of a given proceeding are solely rehabilitative or otherwise nonpunitive, the proceeding is a “civil” matter not subject to Fifth and Sixth Amendment requirements. Professor Feld states the matter clearly:

[M]any legislatures and courts fail to consider adequately whether a juvenile justice system can explicitly punish without simultaneously providing criminal procedural safeguards such as a jury trial. Although a legislature certainly may conclude that punishment is an appropriate goal and a legitimate strategy for controlling young offenders, it must provide the procedural safeguards of the criminal law when it opts to shape behavior by punishment. Any ancillary social benefit or individual reformation resulting from punishment is irrelevant to the need for such procedural protections.⁷⁷

C. The Emergence of Punitive Juvenile Justice

As mentioned earlier, the rehabilitative ideal influenced criminal law sentencing policy for much of the twentieth century.⁷⁸ That all changed in the latter quarter of the century, however, when a “renaissance of retribution” suddenly emerged as theorists across the political spectrum began to reject rehabilitation as a penal goal and defend punishment as the means of giving offenders their just deserts and deterring crime.⁷⁹

demand, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. . . .

The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others that they must be punished to deter them and others from crime. Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system.

. . . . States are free . . . to embrace condemnation, punishment, and deterrence as . . . desirable attributes of the juvenile justice system [so long as they extend criminal court safeguards].

McKeiver v. Pennsylvania, 403 U.S. 528, 551, 553 (1971) (White, J., concurring).

77. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 847; *see also* PACKER, *supra* note 59, at 27 (opining that if the “ultimate aim” of a disposition is punishment, the disposition is punitive even if as an “intermediate mode” we hope for the betterment of the offender).

78. *See supra* notes 36, 70–73 and accompanying text.

79. *See generally* Gardner, *The Renaissance of Retribution*, *supra* note 72. Professor Feld notes that in the 1970s determinate sentencing based on present offense and prior record increasingly replaced indeterminate sentencing as “just deserts” and retribution displaced rehabilitation as the underlying rationale for criminal sentencing. Feld, *Unmitigated Punishment*, *supra* note 10, at 26 n.83. By the mid-1980s, about half the states enacted determinate sentencing laws, ten eliminated parole boards, and many utilized guidelines to determine sentencing decisions.

Not surprisingly, this new retributive orientation spilled over into juvenile justice as policy makers adopted “get tough” policies on youthful offenders in response to perceptions of rapidly increasing juvenile crime rates.⁸⁰ The policy manifested itself in several ways. In the mid-1990s, virtually all states enacted measures that facilitated waiving more and younger youths to criminal court for prosecution as adults.⁸¹ More significantly for present purposes, “just deserts” considerations emerged in juvenile justice as many jurisdictions enacted determinate and mandatory minimum sentencing based on the offense committed.⁸²

Some states, such as Washington, enacted systems aimed explicitly at providing “punishment commensurate with the age, crime, and criminal history of the juvenile offender”⁸³ in order to, among other things, “[m]ake the juvenile offender accountable for his or her criminal behavior.”⁸⁴ Today, the Washington juvenile code embodies a pre-

Id.; see also Forst & Blomquist, *supra* note 10, at 335–47 (analyzing the shift in the juvenile justice system away from rehabilitation towards punitive dispositions).

80. Feld, *Unmitigated Punishment*, *supra* note 10, at 25, 31.
81. *Id.* at 31, 34, 40. Among the states, the enhanced waiver policy took three forms: liberalizing the power of judges to make waiver decisions, legislative exclusion of certain offenses from juvenile court jurisdiction, and granting prosecutors discretion to “directly file” certain cases in criminal court. *Id.* at 39. See generally Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987). See also Forst & Blomquist, *supra* note 10, at 337–42 (discussing the various waiver procedures used to waive juveniles into adult criminal court).
82. As of 1988, about one-third of the states had employed offense-based determinate sentencing in one form or another. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 851; see also Gardner, *supra* note 1, at 132 (footnotes omitted) (stating that “[p]rinciples of personal responsibility and accountability . . . are now routinely coming to the forefront as offending minors are given their ‘just deserts’ through punishment proportionate to the gravity of their offenses”).
83. WASH. REV. CODE ANN. § 13.40.010(2)(d) (West 2004 & Supp. 2010). In passing the Juvenile Justice Act of 1977, Washington became the first state to enact a systematic determinate sentencing statute for juvenile offenders. Forst & Blomquist, *supra* note 10, at 343. For a discussion of California’s enactment of a punitive approach, see *id.* at 343–45, 347–49.
84. WASH. REV. CODE ANN. § 13.40.010(2)(c) (West 2004 & Supp. 2010). In addition to the provisions for punishment, the Washington Juvenile Justice Act provides:
- (2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter:
- (a) Protect the citizenry from criminal behavior;
- (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;

sumptive sentencing system in which dispositions are determined by the youth's age, the offense committed, and the history and seriousness of previous offenses.⁸⁵ Clearly such provisions are not premised on meeting the rehabilitative needs of the offender, but rather embody an extensive sentencing system aimed at holding juveniles accountable in proportion to their culpability.⁸⁶ Moreover, Washington proceedings are open to the public,⁸⁷ contrary to the private proceedings mandated in traditional rehabilitative juvenile justice,⁸⁸ although jury trials are excluded.⁸⁹

Other states have also adopted offense-based criteria with substantial sentences for the most serious crimes and proportionally shorter sentences for less serious offenses.⁹⁰ Some dictate mandatory minimum terms of confinement based on the seriousness of the offense.⁹¹ Finally, some states retain indeterminate sentencing for convicted delinquents generally but mandate determinate dispositions for repeat offenders or those committing certain serious offenses.⁹² Such jurisdictions thus manifest pockets of punitive juvenile justice within otherwise indeterminate and arguably rehabilitative systems. Clearly, the offense-oriented, determinate sentencing movement constitutes a clear invocation of the punitive sanction,⁹³ and stands in stark con-

...
(f) Provide necessary treatment, supervision, and custody for juvenile offenders;

(g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;

(h) Provide for restitution to victims of crime;

(i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels;

(j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services; [and]

...
(l) Encourage the parents, guardian, or custodian of the juvenile to actively participate in the juvenile justice process.

WASH. REV. CODE ANN. § 13.40.010(2) (West 2004 & Supp. 2010).

85. The Washington system is described in detail elsewhere. See Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 843, 852–55; Walkover, *supra* note 1, at 528–31.

86. Walkover, *supra* note 1, at 531.

87. WASH. REV. CODE ANN. § 13.40.140(6) (West 2004 & Supp. 2010).

88. See *supra* note 28 and accompanying text.

89. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 843; see WASH. REV. CODE ANN. § 13.40.010(2) (West 2004 & Supp. 2010). For criticism of the jury trial denial, see the discussion of *State v. Chavez*, 180 P.3d 1250 (Wash. 2008), *infra* subsection IV.A.2.

90. See, e.g., Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 859–60.

91. *Id.* at 862–63.

92. *Id.* at 863–71.

93. See *supra* notes 47–58 and accompanying text.

trast to the offender-oriented, indeterminate dispositional scheme reflected in traditional rehabilitative juvenile justice.⁹⁴

III. SIXTH AMENDMENT PUBLIC TRIALS BY JURY AND JUVENILE COURTS

This Part examines the Supreme Court's consideration of the Sixth Amendment applicability of public jury trial protections in juvenile proceedings as compared to adult criminal courts. While the Court has said nothing specifically regarding the public trial right in juvenile cases, it has addressed the jury issue in *McKeiver v. Pennsylvania*. To appreciate the significance of *McKeiver* and to assess its ongoing vitality, it is necessary to understand the path taken by the Court before it reached the case. Therefore, the discussion here begins by reviewing the cases applying various procedural protections to juvenile courts and culminates with the Court's denial of jury trial rights in *McKeiver*. I then contrast this denial with an examination of the role of jury trials in criminal courts in an attempt to show that continued denial of jury trials in the new era of punitive juvenile justice is unjustified. A similar contrast is then offered in the context of the right to a public trial. Where juvenile systems have become punitive, the Sixth Amendment, consistent with sound public policy, requires jury determinations and public proceedings to the same extent as in criminal trials. In addition, I will argue that juveniles constitute a unique class entitling them, unlike their adult counterparts, to waive their rights to jury determinations and to public trials, respectively.

A. Current Constitutional Protections in Delinquency Adjudications

As mentioned earlier, in the mid-1960s⁹⁵ the Supreme Court began expressing disillusionment with the juvenile justice system's ability to deliver its promises of rehabilitation. The Court's first significant case, *Kent v. United States*,⁹⁶ dealt with procedural issues at judicial waiver proceedings. The Court found that, as prerequisites to valid waivers to criminal court, juveniles are entitled to hearings in which their counsel have access to all social reports relevant to the court's decision, as well as a statement of reasons for any decision to waive the case.⁹⁷ In imposing these protections, the Court expressed serious doubt about whether the promised quid pro quo benefits of rehabilita-

94. See *supra* notes 60–67 and accompanying text.

95. See *supra* notes 3–7 and accompanying text.

96. *Kent v. United States*, 383 U.S. 541 (1966). For a detailed discussion of *Kent*, see Paulsen, *supra* note 28.

97. *Kent*, 383 U.S. at 557.

tion justified the denial of procedural protections in traditional juvenile courts:⁹⁸

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.⁹⁹

Kent set the stage for *In re Gault*,¹⁰⁰ which constituted the Court's first major effort to relate constitutional principles¹⁰¹ to delinquency adjudications. The Court reviewed the constitutionality of fifteen-year-old Gerald Gault's commitment to the Arizona State Industrial School for a period not to exceed his twenty-first birthday.¹⁰² The commitment was the result of a delinquency adjudication conducted without procedural formality,¹⁰³ at which it was determined that Ger-

98. In addition to the waiver issues, the petitioner, Kent, raised numerous claims about violations of rights he would possess if he were an adult. In declining to consider these claims, the Court nevertheless stated:

These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae*, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act.

Id. at 551-52.

99. *Id.* at 555-56.

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

101. *See supra* note 98.

102. *Gault*, 387 U.S. at 7.

103. After a complaint by a neighbor that Gerald had made an obscene phone call, Gault was taken into custody by police. *Id.* at 4. The arresting officer initiated the adjudication proceeding by filing a petition in juvenile court alleging only that Gerald Gault was "under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor." *Id.* at 5 (alteration in original) (internal quotation marks omitted). The petition alleged no factual basis for the judicial action proposed and was never served on Gerald or his parents. *Id.* Gerald appeared without counsel at a hearing that was held on the petition. *Id.* at 34. The complaining neighbor did not attend and no record of the proceedings was prepared. *Id.* at 5. The juvenile judge questioned Gerald about the neighbor's complaint, as related to the judge by the arresting officer, to whom Gault apparently had admitted making the obscene call. *Id.* at 6. Six days later, during a hearing at which Gault was again unrepresented by counsel, the judge sentenced Gault to the State Industrial School "for the period of his minority [that is, until twenty-one], unless sooner discharged by due process of law." *Id.* at 7-8 (alteration in original) (internal quotation marks omitted).

ald made an obscene phone call. The Court held that juveniles who risk incarceration in state correction facilities, if found to be delinquent, are constitutionally entitled to the following rights in their adjudication proceedings: notice of the charges; assistance of counsel; rights of confrontation and cross-examination; and the protections of the privilege against self-incrimination.¹⁰⁴

As in *Kent*, the *Gault* Court found little evidence that the juvenile justice system benignly dispensed rehabilitation to youthful offenders, however lofty the motives of the original enactors.¹⁰⁵ “Neither sentiment nor folklore” shut the Court’s eyes to the fact that the traditional juvenile system, functioning free of constitutional limitations, does not meet its rehabilitative promise.¹⁰⁶ In fact, the Court saw the system as little more than a mechanism for stigmatizing youths as “delinquents”—a label it deemed the virtual equivalent to that of “criminal”¹⁰⁷—and restricting their liberty.¹⁰⁸

104. *Gault*, 387 U.S. 1. The Court chose not to rule on whether juvenile courts are required to provide transcripts of their proceedings to appealing litigants or whether juvenile proceedings are subject to appellate review. *Id.* at 57–58.

105. The Court noted that:

[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case, the results have not been entirely satisfactory.

Id. at 17–18.

106. *Id.* at 18, 21–22.

107. The Court noted that:

[Supposedly,] one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a “criminal.” The juvenile offender is now classed as a “delinquent.” . . . [T]his term has come to involve only slightly less stigma than the term “criminal” applied to adults.

Id. at 23–24 (footnote omitted).

108. *Id.* at 27. The Court noted:

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes “a building with whitewashed walls, regimented routine and institutional hours . . .” Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and “delinquents” confined with him for anything from waywardness to rape and homicide.

Id. (alteration in original) (footnotes omitted) (quoting *In re Holmes*, 109 A.2d 523, 530 (Pa. 1954)).

The Court did not expressly see this loss of liberty as “punitive,” although it did suggest that the effects of juvenile dispositions are often indistinguishable from those experienced by convicted criminals.¹⁰⁹ The Court put the matter this way: “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.”¹¹⁰

Although the rights to notice, confrontation, and counsel recognized in *Gault* are all spelled out in the Sixth Amendment,¹¹¹ the Court instead appealed to principles of due process and fair treatment under the Fourteenth Amendment as the basis for requiring those rights in juvenile proceedings.¹¹² In avoiding an express finding that juvenile dispositions are punitive, thus rendering delinquency adjudications “criminal prosecutions” under the Sixth Amendment,¹¹³ the more flexible due process approach allowed the Court to impose the procedural protections¹¹⁴ without saddling the juvenile system with the full array of constitutional requirements applicable to criminal cases.¹¹⁵ Specifically, the flexibility of the due process approach in

109. *See supra* note 108.

110. *Gault*, 387 U.S. at 36.

111. *See supra* note 39.

112. *Gault*, 387 U.S. at 26–27. However, when addressing the applicability of the privilege against self-incrimination, the *Gault* Court found juvenile proceedings to be “criminal cases” under the Fifth Amendment, thus requiring application of the privilege in delinquency adjudications. *Id.* at 47–49. This finding of “criminal cases” did not mean, however, that the Court had necessarily found the disposition in *Gault* itself to have been punitive. The Court observed that the availability of the privilege turns not on the type of proceeding in which its protection is invoked but upon “the nature of the statement . . . and the exposure which it invites.” *Id.* at 49. Because statements by juveniles invite exposure to commitment to state institutions similar to prisons as well as exposure to actual criminal court through various waiver mechanisms, see *supra* notes 34–35 and accompanying text, the Court found the privilege applicable to the juvenile justice system. *Id.* at 49–52.

In a separate *Gault* opinion, Justice Black appealed directly to the Sixth Amendment as the basis for the notice, confrontation, and counsel rights, as well as to the Fifth Amendment as the basis for the privilege against self-incrimination. *Id.* at 59–61 (Black, J., concurring).

113. *See supra* notes 37–40 and accompanying text.

114. In discussing the demands of due process, the Court noted: “[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *Gault*, 387 U.S. at 27–28.

115. *Id.* at 30. The Court expressed some reluctance to completely criminalize the juvenile system. Indeed, it opined that the protections it imposed would not detract from the rehabilitative mission—to the extent that it meaningfully existed—of juvenile courts. *See id.* at 21. In fact, the Court suggested that the protections might even promote rehabilitation:

Gault would later allow the denial of jury trial rights in *McKeiver*,¹¹⁶ a result which would have been difficult, if not impossible, had the *Gault* Court found that delinquency adjudications were punitive and thus governed by the Sixth Amendment.

Three years after *Gault*, in *In re Winship*,¹¹⁷ the Court considered whether the proof beyond a reasonable doubt standard, theretofore limited to criminal proceedings, is constitutionally required in delinquency adjudications. The Court held that juveniles charged in delinquency proceedings with acts that would be crimes if committed by adults are entitled as a matter of due process to the reasonable doubt standard of proof.¹¹⁸ The Court noted that the reasonable doubt standard is constitutionally required in adult criminal cases to minimize the risks of subjecting innocent persons to the stigma and loss of liberty inherent in criminal conviction and punishment.¹¹⁹ Similar risks required that the same standard apply in delinquency proceedings because “[judicial] intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.”¹²⁰ As in *Gault*, the *Winship* Court avoided any explicit finding that the juvenile process was punitive and, therefore, governed by all the procedural protections unique to the criminal system. Instead, the Court focused on two aspects of juvenile dispositions—the potential for stigma and the potential for severely restrict-

Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help “to save him from a downward career.” Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.

Id. at 25–26 (footnote omitted) (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909)).

In a partial dissent, Justice Harlan disagreed, believing the application of confrontation rights and the privilege against self-incrimination would frustrate rehabilitative goals. *Id.* at 74–78 (Harlan, J., dissenting).

116. *See infra* subsection III.A.1.

117. *In re Winship*, 397 U.S. 358 (1970).

118. *See id.* at 368.

119. *Id.* at 363.

120. *Id.* at 367 (footnote omitted).

ing liberty—as the reasons for requiring the reasonable doubt standard.¹²¹

Kent, *Gault*, and *Winship* thus paint a picture of a failed or failing juvenile justice system that subjects young people to confinement in secure institutions in the name of rehabilitation but with little prospect of it actually occurring. It is against this backdrop that *McKeiver* made its entrance.

1. *McKeiver*

In *McKeiver v. Pennsylvania*,¹²² the Court held that juveniles are not entitled to jury trials in delinquency proceedings even though adjudication could result in the same impositions of stigma and loss of liberty at issue in *Gault* and *Winship*.¹²³ Noting that neither *Gault* nor *Winship* compelled the conclusion that delinquency proceedings are “criminal prosecutions” for purposes of the Sixth Amendment right to jury trial,¹²⁴ a plurality of the Court¹²⁵ concluded that due process considerations of fundamental fairness were not offended by denying jury trials at delinquency adjudications.¹²⁶ Unlike the protections recognized in *Gault* and *Winship*, which enhance accurate

121. Outside the juvenile court context, the Court has held that some proceedings potentially resulting in stigmatic labeling and significant losses of liberty need not be governed by the reasonable doubt standard. Thus, in *Addington v. Texas*, 441 U.S. 418 (1979), the Court rejected the argument, based on *Winship*, that the loss of liberty and the stigma that occurred through involuntary hospitalization of the mentally ill constituted sufficient grounds for requiring the reasonable doubt standard in civil commitment proceedings. Acknowledging that significant stigma and loss of liberty are inherent in mental health commitments, *id.* at 425–26, the *Addington* Court nevertheless distinguished the civil commitment process from the procedures in *Winship*. Unlike the juvenile system, which imposes its stigma and restriction of liberty upon offenders because of their past offenses, the civil commitment process focuses on the present status of the defendant and attempts to determine his present dangerousness and need for confinement and therapy. *Id.* at 428–29. Therefore, the central issue in *Winship* was “a straight forward factual question—did the accused commit the act alleged”—but in *Addington* the Court grappled with an evaluation of the patient’s mental health, a difficult subjective judgment of an inherently doubtful nature. *Id.* at 429–30. The Court concluded that the reasonable doubt standard would frustrate the purposes of commitment proceedings and, therefore, was not required. *Id.* at 429–30, 432.

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

123. *See id.* at 545. *McKeiver* dealt with several consolidated cases concerning a variety of criminal conduct ranging from robbery and assault to willfully impeding traffic and making riotous noise. *Id.* at 534–36.

124. “[T]he juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment.” *Id.* at 541.

125. Justices Blackmun, Stewart, White, and Chief Justice Burger comprised the plurality. *Id.* at 530. Justice Harlan concurred in the judgment and filed a separate opinion. *Id.* at 557. Justice Brennan concurred in part and dissented in part. *Id.* at 553. Justices Douglas, Black, and Marshall dissented. *Id.* at 557.

126. *See id.* at 543.

fact-finding, the plurality found that juries are not necessary to achieve that accuracy.¹²⁷ Furthermore, the Court felt imposing juries in juvenile cases might actually be counterproductive: “If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.”¹²⁸ Were such consequences to befall the juvenile courts, “there [would be] little need for [their] separate existence.”¹²⁹

In sharp contrast to the skeptical and gloomy picture of the juvenile system painted by the Court in its earlier cases, the *McKeiver* plurality was “reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise.”¹³⁰ Indeed, with more commitment and resources, the various states may yet make their systems work if left to their own devices.¹³¹

In a dissenting opinion, Justice Douglas, joined by Justices Black and Marshall,¹³² argued that:

[W]here 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 or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult.¹³³

127. *Id.* Specifically, the plurality observed that “one cannot say that in our legal system the jury is a necessary component of accurate factfinding.” *Id.*

128. *Id.* at 550.

129. *Id.* at 551.

130. *Id.* at 547.

131. The plurality observed:

So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. 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. That, however, is the State’s privilege and not its obligation.

Id.

132. *Id.* at 557 (Douglas, J., dissenting).

133. *Id.* at 559. Justice Douglas elaborated:

In the present cases imprisonment or confinement up to 10 years was possible for one child and each faced at least a possible five-year incarceration. No adult could be denied a jury trial in those circumstances. . . . The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to “any person,” not denial of rights to “any adult person”; and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to be tried under a standard of proof beyond a reasonable doubt.

Id. at 560.

These same procedural protections include a trial by jury.¹³⁴ Speaking to the plurality's fears that jury trials would introduce undesirable delay, formality, and openness to the juvenile system, the dissent referenced a lower court opinion addressing such concerns.¹³⁵ Regarding delay, the lower court found "that there is no meaningful evidence that granting the right to jury trials will impair the function of the court"¹³⁶ given that "few juries have been demanded" in states that permit jury trials in juvenile court.¹³⁷ Moreover, delay may be a good thing: "By granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time."¹³⁸

A supposed virtue of excluding juries from juvenile proceedings is that the proceedings can thereby be private and informal, thus reducing the trauma experienced by the accused juvenile.¹³⁹ However, the "fact is that the procedures which are now followed in juvenile cases are far more traumatic than the potential experience of a jury trial."¹⁴⁰ Moreover, a jury trial removes the possible prejudice raised when the same juvenile court judge makes waiver decisions on the basis of evidence inadmissible at adjudication and then acts as the fact-finder at adjudication having had access to such evidence.¹⁴¹

134. *Id.* at 561.

135. *Id.* at 561–62.

136. *Id.* app. at 564.

137. *Id.* But see Andrew Treaster, *Juveniles in Kansas Have a Constitutional Right to a Jury Trial. Now What?*, 57 U. KAN. L. REV. 1275, 1293 (2009) (showing many juveniles requested jury trials shortly after jury trial rights were recognized).

138. *McKeiver*, 403 U.S. app. at 565 (Douglas, J., dissenting).

139. See *supra* note 28 and accompanying text.

140. *McKeiver*, 403 U.S. app. at 563 (Douglas, J., dissenting). Justice Douglas explained:

The fact that a juvenile realizes that his case will be decided by twelve objective citizens would allow the court to retain its meaningfulness without causing any more trauma than a trial before a judge who perhaps has heard other cases involving the same juvenile in the past and may be influenced by those prior contacts. To agree that a jury trial would expose a juvenile to a traumatic experience is to lose sight of the real traumatic experience of incarceration without due process. The real traumatic experience is the feeling of being deprived of basic rights.

Id. app. at 563–64.

141. Justice Douglas noted:

A judge who receives facts of a case from the police and approves the filing of a petition based upon those facts may be placed in the untenable position of hearing a charge which he has approved. His duty is to adjudicate on the evidence introduced at the hearing and not be involved in any pre-adjudicatory investigation.

Id. app. at 564. Similarly, a jury trial "will provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him because of some past occurrence which was heard by the same judge." *Id.* app. at 565.

Finally, for Justice Douglas, the concern that jury trials would introduce undesirable openness to juvenile proceedings was minimized if not eliminated by interests that support public trials. He cited such benefits of public trials as alerting witnesses unknown to the parties; educating the public about the legal system; and restraining the possible abuse of judicial power through contemporaneous review in the forum of public opinion.¹⁴²

2. *The Supreme Court and Punitive Juvenile Justice*

It is important to note that all of the Court's delinquency adjudication cases¹⁴³ were decided prior to the explicit movement towards punitive juvenile justice, which began in earnest in the late 1970s.¹⁴⁴ Thus, the Court heard its cases at a time when the rehabilitative ideal

142. *Id.* app. at 567. In fact, juvenile proceedings are never totally secret. Witnesses are present, parents and relatives routinely attend, and an array of social workers, court reporters, students, police trainees, probation counselors, and law enforcement officers are also often in attendance. *Id.*

143. In addition to the *Gault*, *Winship*, and *McKeiver* cases discussed above, the Court decided another significant case assessing constitutional aspects of delinquency adjudications. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court unanimously held that the Double Jeopardy Clause of the Fifth Amendment prohibits the trial of juveniles as adults if they have previously been subjected to a delinquency hearing on the same charge. Jeopardy describes "the risk that is traditionally associated with a criminal prosecution." *Id.* at 528. Indeed, "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment.'" *Id.* at 529 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548–49 (1943)).

In assessing delinquency adjudications in terms of such risks, the Court stated:

[I]t 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.

Id.

Therefore, "in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." *Id.* at 530. Both proceedings are designed "to vindicate [the] very vital interest in enforcement of criminal laws." *Id.* at 531 (alteration in original) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971)) (internal quotation marks omitted). The *Breed* Court concluded, therefore, that the juvenile respondent was placed in jeopardy at the delinquency adjudication. *Id.* at 531.

Unlike the *McKeiver* Court's views on the negative effects of jury trials on the ability of the juvenile system to rehabilitate youthful offenders, the *Breed* Court found that imposing double jeopardy protections would not frustrate whatever rehabilitative potential the system possessed. *See id.* at 535–37.

144. *See supra* subsection II.C. One commentator has noted that the *McKeiver* Court's "perspective of a benevolent, non-adversary juvenile court was not far off the mark in 1971" but "[t]he same cannot be said 25 years after *Gault*" in light of the "widely recognized" fact that juvenile courts have become increasingly punitive. Sanborn, *supra* note 12, at 231.

was still the universal underpinning of juvenile justice. That the Court found the system wanting in *Kent*, *Gault*, and *Winship* meant only that it questioned whether the system delivered on its quid pro quo rehabilitative promises and not that it had explicitly found the system to be punitive. In fact, the Court has never directly confronted the question of whether the juvenile system punishes, and if so, what constitutional consequences flow therefrom.¹⁴⁵ That the lower courts have insufficiently addressed such questions,¹⁴⁶ however, argues for Supreme Court clarification of the matter.

With the imposition of punitive dispositions, juvenile proceedings become "criminal prosecutions" entitling the accused to a public trial by an impartial jury.¹⁴⁷ Although closely related and sharing underlying interests to some degree, the public trial and jury trial rights are distinct. A proceeding imposing the risk of *any* punishment is seemingly a criminal prosecution for purposes of the public trial provision,¹⁴⁸ while only actions charging "serious crimes" trigger the jury trial right.¹⁴⁹ Because of its priority in the Sixth Amendment text¹⁵⁰ and its broader scope, the public trial right will be discussed herein prior to its companion jury trial right.

B. Public Trials in Criminal Court

Because the Sixth Amendment rights to a public trial and a jury determination are closely associated,¹⁵¹ recognizing a right to trial by jury in juvenile proceedings would likely entail a corresponding recognition of the public trial right.¹⁵² The public trial right reflects "the

145. The Court came close to a direct finding of punishment within the juvenile system in *Breed*, see *supra* note 143, and in *Gault's* conclusion that delinquency proceedings are "criminal cases" for purposes of the Fifth Amendment privilege against self-incrimination. *In re Gault*, 387 U.S. 1, 49 (1967). However, such a conclusion did not necessarily commit the Court to the view that juvenile dispositions are punitive. See *supra* note 112.

146. See *infra* subsection IV.A.

147. See *supra* notes 37-44, 76-77 and accompanying text.

148. See *infra* note 152.

149. See *infra* notes 179-81 and accompanying text.

150. See *supra* note 39.

151. The public trial guaranty is "an accompaniment of the ancient institution of jury trial." *In re Oliver*, 333 U.S. 257, 266 (1948) (holding that requiring defendant to testify in secret before a one-man grand jury who subsequently sentenced defendant to jail for contempt violated defendant's right to a public trial).

152. One commentator has noted:

[The public trial] seems almost a necessary incident of jury trials since the presence of a jury . . . already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the "country" and that it was in that capacity and not as judges, that it was summoned.

Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 388 (1932). For a critical view of the public trial right arguing that there is "no more reason for the

traditional Anglo-American distrust for secret trials”¹⁵³ by safeguarding against “attempt[s] to employ our courts as instruments of persecution” through the “knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion.”¹⁵⁴ These interests clearly overlap with some of those underlying the right to jury trial.¹⁵⁵

The Supreme Court has held that the right to a public trial is not absolute.¹⁵⁶ While closure is constitutionally permissible under some circumstances,¹⁵⁷ the Court has not recognized a right to a private trial¹⁵⁸ even though the right to a public trial has been held to apply

public trial as it is currently conceived than there is for a public execution,” see *id.* at 397.

The Supreme Court has observed that “historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (holding that absent overriding interests criminal trials must be open to the public). The *McKeiver* Court noted the “possibility” of the public trial being brought into the juvenile court system if jury trials were injected into the system. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971). If juvenile proceedings were deemed “criminal prosecutions” for Sixth Amendment purposes, the public trial right would be more extensive than the jury trial protection, which is triggered only when the charged offense is punishable by imprisonment for six months or longer. See *infra* notes 179–81 and accompanying text. In *Oliver*, the public trial provision was mandated in a situation where the defendant was sentenced to jail for sixty days or until such time as he complied with the court’s order to answer questions. *Oliver*, 333 U.S. at 260. It would thus appear that the threat of *any* punishment triggers the public trial right. Moreover, the public trial right applies not simply to the trial phase of the process, including the empanelling of the jury, but also to pretrial proceedings that bear a resemblance to a trial such as suppression hearings. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 1133 (5th ed. 2009).

153. *Oliver*, 333 U.S. at 268.

154. *Id.* at 270; see *supra* note 142 and accompanying text.

155. See *infra* section III.C. Compare *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that the public trial right “ensur[es] that judge and prosecutor carry out their duties responsibly”), with *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting the jury trial interest in checking “overzealous prosecutor[s] and compliant, biased, or eccentric judge[s]”).

156. “[T]he Court has made clear that the right to an open trial may give way to other . . . interests.” *Waller*, 467 U.S. at 45.

157. See *Oliver*, 333 U.S. at 272 (suggesting in dicta that a trial with only the accused’s relatives, friends, and counsel present would constitute a public trial).

158. Citing the Court’s observation that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right,” *Singer v. United States*, 380 U.S. 24, 34–35 (1965), the Court observed in dicta that “while the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial.” *Gannett v. DePasquale*, 443 U.S. 368, 382 (1979) (holding no right of the press to attend pretrial suppression hearings).

to the defendant and not to the public.¹⁵⁹ Trials may be closed if the party seeking closure advances “an overriding interest that is likely to be prejudiced” if the trial is open.¹⁶⁰

Moreover, a separate First Amendment right protects the interests of the public and the press in attending trials.¹⁶¹ Similar to its treatment of public trials under the Sixth Amendment, the Court has recognized that public and press rights may be overridden if “necessitated by a compelling . . . interest and is narrowly tailored to serve that interest.”¹⁶²

While some interests protected by the First Amendment right of access overlap some of those protected by the Sixth Amendment,¹⁶³ the First Amendment cases recognize the additional interest of educating the public to the workings of the criminal justice system, thereby enhancing responsible participation in a republican form of government.¹⁶⁴ The Court summarized these interests this way: “[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that [the public communication on governmental matters] is an informed one.”¹⁶⁵

C. Jury Trials in Criminal Court

The right to a trial by jury has longstanding roots in Anglo-American jurisprudence. At the time of the drafting of the Constitution, jury trials in criminal cases had been the accepted practice in England for several centuries¹⁶⁶ and were deemed essential aspects of fair pro-

159. The Court has noted that its “cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.” *Gannett*, 443 U.S. at 380.

160. *Waller*, 467 U.S. at 48 (holding that closure of a suppression hearing violated defendant’s public trial guarantee). In addition, “the closure must be no broader than necessary to protect that [overriding] interest, [and] the court must consider reasonable alternatives to closing the proceeding and . . . make findings adequate to support the closure.” *Id.*

161. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that absent overriding interests criminal trials must be open to the press and public).

162. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (holding that a state statute mandating closure of courtroom during testimony of child victim of sexual abuse violated the public’s right to attend criminal trials).

163. *Compare id.* at 606 (noting that public access to criminal trials “serve[s] as a check upon the judicial process”), *with* *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that juries act as a check on “overzealous prosecutors” and “biased judges”).

164. *Globe Newspaper*, 457 U.S. at 604–05.

165. *Id.*

166. Some see the origin of the jury trial as early as the year 997 A.D. THEODORE F. T. PLUCKETT, *A CONCISE HISTORY OF THE COMMON LAW* 108 (1956). Others see Article 39 of the *Magna Carta* as an embodiment of the right to jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 151 n.16 (1968); *see* *MAGNA CARTA*, art. XXXIX (1215) (“[N]o free man shall be seized or imprisoned or stripped of his rights or posses-

ceedings by the American colonists.¹⁶⁷ The constitutions of all the original states and every new state thereafter guaranteed trial by jury.¹⁶⁸ Furthermore, in addition to the Sixth Amendment,¹⁶⁹ the United States Constitution from the outset commanded jury trials for “all Crimes” except “Cases of Impeachment.”¹⁷⁰ Indeed, denials of trial by jury were among the grievances expressed in the Declaration of Independence.¹⁷¹ Referring to jury trials as a “great privilege,” the Supreme Court in an early case observed that “[t]hose who emigrated to this country from England brought with them [jury trials] ‘as their birthright and inheritance, as part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’”¹⁷²

In holding that trial by jury is a “fundamental right” and thus applicable to the states, the Supreme Court in *Duncan v. Louisiana*¹⁷³ further explained the role of the jury as a check on arbitrary power:

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.¹⁷⁴

The *Duncan* Court addressed the common criticism that jurors as untrained laymen are incapable of understanding evidence or determining issues of fact by citing an authoritative study¹⁷⁵ which con-

sions, or outlawed or exiled, or deprived of his standing in any other way . . . except by the lawful judgment of his equals or by the law of the land.”)

167. See LAFAYE ET AL., *supra* note 152, at 1068–69.

168. *Id.* at 1069.

169. See *supra* note 39.

170. U.S. CONST. art. III, § 2, cl. 3.

171. LAFAYE ET AL., *supra* note 152, at 1069.

172. *Thompson v. Utah*, 170 U.S. 343, 349–50 (1898) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779 (Boston, Little, Brown & Co. 1891)).

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

174. *Id.* at 156. Later, the Court observed:

[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.

Baldwin v. New York, 399 U.S. 66, 72 (1970).

175. HARRY KALVIN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

cluded that juries understand the evidence and come to sound conclusions in most cases.¹⁷⁶ The study further found that when juries differ from judges in reaching results, the difference is usually because the jurors are serving some of the very purposes for which they are meant to serve.¹⁷⁷

Even though the text of the Sixth Amendment refers to “all criminal prosecutions,”¹⁷⁸ the Supreme Court held in *Baldwin v. New York*¹⁷⁹ that the jury trial right applies only for accusations of “serious crimes,” specifically only those “where imprisonment for more than six months is authorized.”¹⁸⁰ Although it recognized that the prospects of imprisonment for less than six months will usually be traumatizing, the Court nevertheless thought that “[w]here the accused cannot possibly face more than six months’ imprisonment . . . [such trauma], onerous though [it] may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications.”¹⁸¹

In addition to specifying when Sixth Amendment jury trials are required, the Court has also addressed whether there exists a corresponding right to insist on a bench trial. In *Singer v. United States*,¹⁸² the Court held that while the right to trial by jury may be waived,¹⁸³ a possessor of the right has no additional right to waive a jury and obtain a bench trial.¹⁸⁴ In concluding that there exists “no constitutional impediment to conditioning a waiver of [the] right on the consent of the prosecuting attorney and the trial judge,”¹⁸⁵ the Court found that if either of those parties does not consent to a waiver, “the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.”¹⁸⁶

176. *Id.* at 4 n.2; *Duncan*, 391 U.S. at 157.

177. *Duncan*, 391 U.S. at 157 (citing *KALVIN & ZEISEL*, *supra* note 175, at 4 n.2).

178. *See supra* note 39.

179. *Baldwin v. New York*, 399 U.S. 66 (1970).

180. *Id.* at 68–69.

181. *Id.* at 73.

182. *Singer v. United States*, 380 U.S. 24 (1965).

183. “[A] jury trial [is] a right which the accused might forego at his election.” *Id.* at 33 (quoting *Patton v. United States*, 281 U.S. 276, 298 (1930)).

184. *Id.* at 36. The Court observed that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.” *Id.* at 34–35.

185. *Id.* at 36.

186. *Id.* The Court explained:

The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

Id.

The *Singer* Court based its conclusions on the fact that, historically, jury determinations were deemed essential to fair trials¹⁸⁷ and that there was “no evidence” that the common law recognized the defendant’s right to choose between bench and jury trial.¹⁸⁸ Nevertheless, while denying a right to a bench trial in *Singer*, the Court left open the possibility that such a right might be recognized in the future:

We need not determine in this case whether there might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where “passion, prejudice . . . public feeling” or some other factor may render impossible or unlikely an impartial trial by jury. . . . [T]his is not such a case¹⁸⁹

D. A Sixth Amendment Right to a Public Trial by Jury Trial in Punitive Juvenile Justice

Prior to the advent of juvenile courts, juveniles were routinely subjected to open proceedings with jury determinations when they faced the threat of punishment in criminal proceedings.¹⁹⁰ In today’s juvenile system, if a given jurisdiction brings a delinquency action and subjects the accused juvenile to the possibility of punishment, the proceeding is a “criminal prosecution” triggering the right to a public trial.¹⁹¹ If the accused risks the possibility of punitive incarceration in excess of six months, it follows from *Duncan* and *Baldwin* that he or she is also entitled to a jury trial.¹⁹² Such conclusions are not inconsistent with *McKeiver*, which premised its denial of the right to trial by jury on assumptions of a rehabilitative model of juvenile justice without addressing whether juvenile court dispositions were in fact punitive.¹⁹³

187. “Soon after the thirteenth Century trial by jury had become the principal institution for criminal cases.” *Id.* at 27. Trials could not occur unless defendants consented to such. *Id.* Sometimes they “were tortured until death or until they ‘consented’ to a jury trial.” *Id.* “[D]efendants who refused to submit to a jury were not entitled to an alternative method of trial.” *Id.* Eventually, Parliament enacted provisions that abolished torturing defendants to consent to jury trial and instead dictated that “defendant[s] who stood mute when charged with a felony [were] deemed to have pleaded guilty.” *Id.* Finally, statutes were enacted permitting trials for those standing mute but requiring jury trials without the necessity of the defendant’s formal consent. *Id.*

188. *Id.* at 26.

189. *Id.* at 37–38 (footnote omitted).

190. See 4 WILLIAM BLACKSTONE, COMMENTARIES ch. 2(1); *supra* notes 15–18 and accompanying text.

191. See *supra* note 39 and accompanying text; see also *supra* note 152 (discussing *In re Oliver*, 333 U.S. 257 (1948)).

192. See *supra* notes 173–81 and accompanying text.

193. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1976).

In addition to being constitutionally required when serious punitive dispositions are at stake, public jury trials in juvenile courts make sense on policy grounds, as will be shown. Should public jury trials be considered undesirable in particular cases, however, I will argue that any such objections can be rectified by entitling accused juveniles to choose bench trials in which their identity is kept confidential. The following discussion will proceed first by considering the jury trial issue and then the right to a public proceeding.

1. *Jury Trials in Juvenile Court*

a. *Policy Considerations*

Justice Douglas's dissent in *McKeiver* addressed some policy concerns implicated in utilizing jury determinations in delinquency adjudications.¹⁹⁴ Adding to that discussion, several other points should be noted. *Duncan* recognized that juries protect against weak or biased judges, inject the community's values into the law, and increase the visibility and accountability of the legal process.¹⁹⁵ These protective functions are arguably of even greater importance in delinquency adjudications, which are typically conducted outside public view.¹⁹⁶

Moreover, despite the *McKeiver* plurality's claims that juries are not necessary for accurate fact-finding,¹⁹⁷ it does appear that juries are often advantageous to an accused. Judges are far more likely to convict than juries.¹⁹⁸ In fact, the "case law suggests that judges often convict on evidence so scant that only the most closed-minded or mis-

194. *McKeiver*, 403 U.S. app. at 563-67 (Douglas, J., dissenting); see *supra* notes 135-42 and accompanying text.

195. "In *Duncan*, the Supreme Court emphasized that the purposes of the jury trial were to check against arbitrary actions by the government, to safeguard against the overzealous prosecutor and the biased judge, and to assure fair trials. Jury trials are necessary in juvenile court for the same reasons." Sanborn, *supra* note 12, at 236 (footnote omitted); see *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

196. Feld, *supra* note 1, at 88. Increasing the visibility of juvenile proceedings is especially important in light of the fact that problems occurring therein are not easily corrected on appeal due to the fact that juvenile courts generally possess jurisdiction only during the defendant's minority, often making cases moot before appeal can be effectuated. As one court put it:

Delinquency proceedings as much as adult criminal prosecutions can be used as instruments of persecution, and may be subject to judicial abuse. The appellate process is not a sufficient check on juvenile courts, for problems of mootness and the cost of prosecuting an appeal screen most of what goes on from appellate court scrutiny. We cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases, and wonder whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings.

R.L.R. v. State, 487 P.2d 27, 38 (Alaska 1971) (footnote omitted).

197. *McKeiver*, 403 U.S. at 543; see *supra* note 127.

198. Ainsworth, *Youth Justice*, *supra* note 12, at 942.

guided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt.”¹⁹⁹ A variety of explanations have been offered for this phenomenon, including judicial access to prejudicial information unknown to juries,²⁰⁰ individual “tough on crime” judicial biases,²⁰¹ and judicial use of conviction as a means to provide convicted youths rehabilitative services as conditions of probation or as incidents of institutional confinement.²⁰²

Jury trials are additionally advantageous to juvenile defendants because they enhance meaningful appellate review and the corresponding correction of legal error occurring at adjudication. In jury trials, judges must articulate the law governing the case in instructing the jury.²⁰³ Such instructions are subject to later appellate review and correction if necessary.²⁰⁴ In bench trials without such instructions, “prejudicial errors of law can easily go undetected because they are not articulated.”²⁰⁵ Therefore, “juveniles denied a jury trial lose out . . . [because they] are unlikely to be able to prove an error of law which would allow them to prevail on appeal.”²⁰⁶

Finally, the group dynamics inherent in jury decision-making increase the likelihood that witness credibility will be assessed and facts correctly found.²⁰⁷ Among other advantages, the group decision-making entailed in jury deliberations provides “the give-and-take of a discussion format [which] promotes accuracy and good judgment by ensuring that competing viewpoints are aired and vetted.”²⁰⁸ Such considerations lead to the conclusion that the *McKeiver* Court erroneously assumed defendants in delinquency adjudications do not suffer

199. Guggenheim & Hertz, *supra* note 12, at 564.

200. As one commentator observed:

Juries would not have access to the youths’ records, would not know defendants from previous offenses or stages in the court process, and would not realize which juveniles had been held in detention. Juries would not be exposed to prejudicial, inadmissible evidence that frequently surfaces at preliminary, detention, or certification hearings. Juries also would not know which prosecutors were from special units that deal only with offenders who have prior records.

Sanborn, *supra* note 12, at 236; see also Guggenheim & Hertz, *supra* note 12, at 571–75 (discussing case-related factors that lead to distorting influences in bench trials).

201. Guggenheim & Hertz, *supra* note 12, at 569–70.

202. *Id.* at 570. As Professor Ainsworth notes: “[T]rial by jury was eliminated in most juvenile courts as irrelevant to the proper determination before the court, because the court was less concerned with factually determining whether the child had broken the law than with sensitively diagnosing and treating the child’s social pathology.” Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12, at 1101.

203. Ainsworth, *Youth Justice*, *supra* note 12, at 942.

204. *Id.*

205. *Id.*

206. Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12, at 1126.

207. Guggenheim & Hertz, *supra* note 12, at 576–82.

208. *Id.* at 578–79.

any diminution in the quality of their adjudications as a result of being denied the right to a jury.²⁰⁹

The dissent in *McKeiver* addressed concerns about whether jury trials would impose significant costs, thereby inhibiting the effectiveness of juvenile courts.²¹⁰ However convincing that argument, it is important to keep in mind that the jury trial costs of delay and formality cited by the *McKeiver* plurality²¹¹ are of concern only within a rehabilitative model of juvenile justice.²¹² If the system has become punitive, thus necessitating jury trials, the benefits of jury determinations²¹³ replace whatever costs such trials might have imposed on a rehabilitative model.²¹⁴

b. Waiver of Jury Trial Right: A Juvenile Right to a Bench Trial?

As made clear by the discussion above, jury trials have long been deemed vital to fair trials.²¹⁵ Nevertheless, the Supreme Court has recognized that jury trial waivers are permissible.²¹⁶ Thus, a constitutional requirement of jury trials in juvenile cases would mean that, as is the case of waivers of counsel or indeed of all trial rights themselves,²¹⁷ defendants in delinquency adjudications would be allowed to express their wishes and forego a jury in favor of a bench trial. Notwithstanding the considerable benefits entailed in jury determinations, a variety of factors unique to young people support allowing

209. *Id.* at 579; see also Feld, *Constitutional Tension*, *supra* note 12, at 1161–69 (discussing advantages of jury trials over bench trials).

210. See *McKeiver v. Pennsylvania*, 403 U.S. 528, app. 564–65 (1971) (Douglas, J., dissenting).

211. *Id.* at 550 (plurality opinion); see *supra* note 128 and accompanying text.

212. See *supra* notes 28–32 and accompanying text; see also Feld, *Constitutional Tension*, *supra* note 12, at 1143–52 (providing a critical analysis of *McKeiver*).

213. See *supra* notes 194–209 and accompanying text.

214. “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.” Rixey, *supra* note 12, at 886. *But see* Feld, *Constitutional Tension*, *supra* note 12, at 1159–61 (discussing possible dangers in advocating jury trials for delinquents including increased severity in sentences and perverse incentives to plea bargain).

215. See *supra* notes 166–74 and accompanying text.

216. See *Patton v. United States*, 281 U.S. 276 (1930) (holding waiver of jury trial permissible in federal criminal trials).

217. See *McKeiver v. Pennsylvania*, 403 U.S. 528, app. 569–70 (1971) (Douglas, J., dissenting) (discussing ability of juveniles to waive counsel and rights to trial by pleading guilty); Feld, *A Century of Juvenile Justice*, *supra* note 27, at 217 (“[S]tates use the adult waiver standard—‘knowing, intelligent, and voluntary’ under the totality of the circumstances—to gauge juveniles’ waivers of rights including the right to counsel.”).

them a right to choose a bench trial in lieu of a jury despite the Court's denial of such a right in *Singer*.²¹⁸

It must be noted that most jurisdictions employing punitive dispositions also continue to advocate rehabilitation as a goal of their juvenile justice systems.²¹⁹ Several considerations conducive to a delinquent's rehabilitation are promoted if he or she is granted a choice of a jury or bench trial. First, research indicates that allowing young people to make choices as to their treatment enhances favorable evaluations of the law, leading to greater compliance with the law in the future.²²⁰ Specifically, the data suggests that children's perceptions of fair procedures are based on: "[T]he degree to which [they are] given the opportunity to express [their] feelings or concerns, the neutrality and fact-based quality of the decision-making process, whether the child was treated with respect and politeness, and whether the

218. See *supra* notes 182–86 and accompanying text. At least one court has held under state law that a juvenile in a delinquency proceeding has the right to choose either a bench or jury trial. *R.L.R. v. State*, 487 P.2d 27, 35 (Alaska 1971) (mandating bench trial in a juvenile proceeding unless the juvenile, after consulting with counsel, asserts state constitutional right to jury trial). Other courts in criminal cases have recognized, under state constitutional provisions, that the prosecution has no right to veto a defendant's decision to waive his jury trial rights and instead opt for a bench trial. See, e.g., *State ex rel. Nelson v. Mont.* Ninth Judicial Dist. Court, 863 P.2d 1027 (Mont. 1993); *State v. Baker*, 976 P.2d 1132 (Or. 1999). Such state law decisions are not inconsistent with *Singer*:

The Supreme Court in *Singer* did not hold that, as a matter of constitutional law, approval by the state or the trial court was necessary before the right to jury trial could be waived by a defendant. It simply held that there was no constitutional right to a trial before the court without a jury and that the method for waiver chosen by the Federal Rules of Civil Procedure which required approval of the prosecution and trial court was not unconstitutional.

State ex rel. Nelson, 863 P.2d at 1029.

219. See, e.g., *supra* notes 83–84 and accompanying text (noting the Washington system's embrace of both "punishment" and "treatment" of juvenile offenders). Likewise, Kansas has adopted a determinate sentencing scheme similar to Washington's and also includes as a statutory goal "improving the ability of juveniles to live productively . . . in the community." KAN. STAT. ANN. § 38-1601 (2000 & Cum. Supp. 2010). For evidence of the punitive nature of the Kansas system, see the discussion of *In re L.M.*, 186 P.3d 164 (Kan. 2008), *infra* note 322. In the view of some commentators, these diverse goals lead to the conclusion that a sound model of juvenile justice should incorporate both retributive and rehabilitative dimensions. See Scott & Grisso, *supra* note 19, at 140.

While empirical studies have generally offered little hope for the efficacy of rehabilitation programs for either adult or juvenile offenders, some studies suggest that some programs are successful in treating serious juvenile offenders. See Feld, *Constitutional Tension*, *supra* note 12, at 1118 n.18. See generally Sheffer, *supra* note 74.

220. Birkhead, *supra* note 12, at 1478; Fondacaro et al., *supra* note 12, at 976 ("[E]ven those who fail to prevail on their [legal dispute] nonetheless exhibit greater outcome satisfaction and express greater willingness to accept the decision when the procedures used to reach the decision are perceived as fair.").

authorities appeared to be acting out of benevolent and caring motives.”²²¹ Thus, allowing juveniles the right to choose either a jury or bench trial may enhance their perception of fairness within the process.²²²

Furthermore, the right to choose a bench trial allows for the possibility of a closed, or relatively closed, hearing which may limit the stigma and lasting impact of being adjudicated a delinquent.²²³ In fact, most teenage males engage in some criminal conduct, leading some researchers to conclude that delinquency is a “normal part of teen life.”²²⁴ At the same time, most adolescent delinquents desist from antisocial behavior after reaching majority.²²⁵ Thus, while holding adolescents accountable for their criminal actions through punitive dispositions is perfectly defensible, the response should be “tailored to protect rather than damage the prospects for a productive future of adolescents whose desistance is probable.”²²⁶ Allowing the defendant the choice to close the proceedings is one way to protect—rather than damage—that future.²²⁷

If acts of delinquency are in a sense “normal” for most adolescents, it is largely because adolescents are categorically unique in ways that make them less culpable than adults for their actions and, at the same

221. Birkhead, *supra* note 12, at 1478.

222. *Id.* at 1486 (suggesting the need for future research into juveniles’ perceptions of fairness related to jury trials).

223. Scott & Grisso, *supra* note 19, at 187; *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 526–30, 539–42 (2004) (discussing various ways the stigma accompanying publicity of delinquency proceeding negatively impacts juveniles).

224. Scott & Grisso, *supra* note 19, at 154 (quoting Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993)).

225. *Id.* at 154.

226. *Id.* at 187.

227. *Id.*; *see* R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (finding right to jury trial under state constitution but only when demanded by juvenile); *see also* INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, STANDARDS RELATING TO ADJUDICATION, Standard 4.1 (1980) [hereinafter IJA/ABA STANDARDS] (advocating that jury trials be provided only upon the demand of the juvenile accused); *infra* notes 243–51 and accompanying text (discussing a right to choose between either an open or closed proceeding as an aspect of the right to a public trial). While closing juvenile proceedings may be objected to as compromising the public interest in knowing the identity of dangerous offenders so as to protect against future harm, *see* Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1558 (1983), under current practice in many jurisdictions such offenders, assuming they could be identified, may well have been waived into the adult criminal system.

time, more able than adults to make desirable changes in their lives.²²⁸ As the Supreme Court has recently pointed out:

As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure and their characters are not as well formed.

. . . .
 . . . Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.²²⁹

Such factors argue in favor of allowing juvenile defendants a right to choose between jury or bench trials even though such choice may not be available to their adult counterparts. These considerations provide justification for a constitutional right to choose a bench trial contrary to *Singer*. *Singer* left open the possibility of a right to a bench trial if "some circumstances" and "factors" are so compelling that they outweigh the "impartial trial" interest promoted by jury trials.²³⁰ The Court itself has accepted the constitutional validity of bench trials.²³¹ Furthermore, it has also acknowledged that adolescents constitute a

228. First, the scientific evidence indicates that teens are simply less competent decisionmakers than adults, largely because typical features of adolescent psycho-social development contribute to immature judgment. Adolescent capacities for autonomous choice, self-management, risk perception and calculation of future consequences are deficient as compared to those of adults, and these traits influence decisionmaking in ways that can lead to risky conduct. Second, adolescence is a developmental period in which personal identity and character are in flux, and begin to take shape through a process of exploration and experimentation. Youthful involvement in crime is often a part of this process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity. Most young law violators do not become adult criminals, because their youthful choices are shaped by factors and processes that are peculiar to (and characteristic of) adolescence.

Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.

Elizabeth S. Scott & Lawrence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801 (2003).

229. *Graham v. Florida*, 130 S. Ct. 2011, 2026–27 (2010) (internal quotation marks and citations omitted) (holding imposition of life without parole sentence on juvenile offender who did not commit homicide unconstitutional under Cruel and Unusual Punishments Clause of the Eighth Amendment). For a summary of the social science assessing culpability of adolescents, see Feld, *Unmitigated Punishment*, *supra* note 10, at 45–61.

230. *Singer v. United States*, 380 U.S. 24, 37–38 (1965); see *supra* note 189 and accompanying text.

231. See *Patton v. United States*, 281 U.S. 276 (1930) (holding waiver of jury trial permissible in federal criminal trials); see also *McKeiver v. Pennsylvania*, 403

categorically distinct constitutional class with unique rehabilitative amenabilities and diminished culpability.²³² It may well be that a bench trial, with its absence of publicity, affords an accused adolescent a more “impartial trial” than does a jury proceeding that risks publicly stigmatizing a juvenile as a guilty offender. Therefore, the Sixth Amendment right to trial by jury should be understood as also granting a right to a bench trial to adolescent offenders due to their unique status.²³³ However, whether or not a federal constitutional right to waive jury trial exists, it is clearly constitutionally permissible to allow such a right either under state constitutional provisions²³⁴ or legislative enactment.²³⁵

2. *Public Trials in Juvenile Courts*

a. *Policy Considerations*

As mentioned above, public trials have long been thought to provide such benefits as alerting witnesses unknown to the parties, educating the public about the legal system, and checking possible judicial abuses through contemporaneous review in the forum of public opinion.²³⁶ These benefits are not limited to criminal courts. As one court put it, “[t]he reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings.”²³⁷

First, the possibility of alerting unknown witnesses can be especially important in situations where their input prevents the unjust infliction of punishment that would otherwise be imposed. Unjustly punishing a juvenile is surely no more defensible than doing so to an adult. Second, as for the concern with educating the public about the legal system, the public has a deep interest in the juvenile system.²³⁸ Access to its proceedings enhances informed public opinion about both

U.S. 528, 543 (1971) (“[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding.”).

232. See *supra* note 229 and accompanying text.

233. Although “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right,” *Singer*, 380 U.S. at 34–35, the right to insist on the opposite articulated right will exist if the constitutional provision granting the right also itself supports its opposite. See, e.g., *Faretta v. California*, 422 U.S. 806 (1975) (holding that defendants who competently and intelligently waive counsel rights have a corresponding right to proceed *pro se* under the language and history of the Sixth Amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment right to counsel to the states).

234. See, e.g., *State ex rel. Nelson v. Mont. Ninth Judicial Dist. Court*, 863 P.2d 1027 (Mont. 1993); *State v. Baker*, 976 P.2d 1132 (Or. 1999).

235. See, e.g., IJA/ABA STANDARDS, *supra* note 227.

236. See *supra* notes 76–77, 142, 152–55 and accompanying text.

237. *R.L.R. v. State*, 487 P.2d 27, 38 (Alaska 1971).

238. Note, *supra* note 227, at 1549.

reform and administration of the system.²³⁹ Finally, the interest in checking abuses of power by judges and other court functionaries is especially important in juvenile courts because abuses are not easily checked through the appellate process.²⁴⁰ Juvenile judges exercise more discretion than their criminal law counterparts in making dispositions, even in systems permitting punishment specifically linked to offenses.²⁴¹ In addition, juvenile court judges, at least historically, have also been viewed as less qualified and competent than other judges.²⁴²

b. Waiver of Public Trial Rights: A Juvenile Right to a Closed Hearing?

As discussed above, recognition of the Sixth Amendment jury trial right would not require juries in all punitive juvenile justice cases.²⁴³ Bench trial proceedings could be available as a matter of right either constitutionally or by state law.²⁴⁴ The considerations justifying a right to choose a jury or a bench trial would also be significant when determining the corresponding right of juveniles to choose a closed or open proceeding.

Thus far the Court has held that First Amendment interests can be overridden only if compelling interests, determined on a case-by-case basis, outweigh the public's interest in access to criminal proceedings.²⁴⁵ However, because the Court has recently recognized adoles-

239. *Id.* at 1550–51.

240. *See supra* note 196.

241. Note, *supra* note 227, at 1550. Juvenile courts in Kansas have discretion to impose a variety of dispositions, ranging from probation to determinate sentences in correction facilities. *In re L.M.*, 186 P.3d 164, 169 (Kan. 2008). For a discussion of *In re L.M.*, see *infra* note 322. For similar examples of courts with broad discretion in determinate sentencing schemes, see Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 859, 867, 869, 871 (discussing New Jersey, Kentucky, Ohio, and Minnesota, respectively). The Washington State provisions also allow broad discretion in imposing punitive dispositions. *See* WASH. REV. CODE ANN. §§ 13.40.150, 13.40.160 (West 2004 & Supp. 2010).

242. Note, *supra* note 227, at 1550.

243. *See supra* notes 173–89, 215–35 and accompanying text.

244. *See supra* notes 233–35 and accompanying text.

245. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (holding that compelling interest of protecting child victim witness from trauma of testifying did not justify mandatory closure of trial proceeding—a “court can determine on a case-by-case basis” whether closure is necessary to protect a particular minor).

As an aspect of the traditional rehabilitative juvenile court model, closure of proceedings was often deemed necessary. While some courts require closure, including press denial, in all cases, see, for example, *In re J.S.*, 438 A.2d 1125 (Vt. 1981), most courts “tend to hold that closure of juvenile hearings is appropriate as long as the public or the press is provided an opportunity to present evidence and argument that in a given case the state’s or juvenile’s right to privacy is outweighed by concern for public safety or a similar public interest.” SAMUEL M.

cents as a distinct class, categorically less culpable than adults and especially amenable to rehabilitation,²⁴⁶ it is possible the Court might see a “compelling interest”²⁴⁷ in allowing juveniles to choose closed proceedings. Thus, granting juveniles a categorical right to opt for closure,²⁴⁸ thereby ameliorating the negative effects open proceedings

DAVIS ET AL., *CASES AND MATERIALS: CHILDREN IN THE LEGAL SYSTEM* 1156 (4th ed. 2009).

While the Supreme Court has not directly ruled on the constitutionality of excluding the public in traditional juvenile court proceedings, it has expressed dicta suggesting that closure would be permitted. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court held unconstitutional a statute subjecting newspapers to a criminal penalty for publishing the name of a juvenile offender without written authorization of the juvenile court. The name of the juvenile had been obtained by interviewing witnesses at the crime scene. *Id.* at 99. The Court held that the state’s interest in protecting an offender’s anonymity as an aid to his rehabilitation did not outweigh the First Amendment rights involved. *Id.* at 106. The Court noted in dicta, however:

Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings, . . . there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent’s name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute’s imposition of criminal sanctions on this type of publication.

Id. at 105–06 (footnote and citation omitted).

246. See *supra* note 229 and accompanying text.

247. *Globe*, 457 U.S. at 607 (“[I]t must be shown that . . . denial is necessitated by a compelling governmental interest.”). The *Globe* Court found “safeguarding the physical and psychological well-being of a minor” sexual abuse victim to be a “compelling interest,” albeit not one justifying mandatory closure of all proceedings in which child victim witnesses testify. *Id.* at 607–08.

248. In the opinion of Chief Justice Burger, the *Globe* case does not foreclose a state from mandating closure in all situations where a child victim witness will testify, except where the child agrees to testify in open court. *Id.* at 612 (Burger, C.J., dissenting). If this view is correct, child victims would essentially be given the categorical right to choose either closed or open trials.

At least one court has recognized a right for juveniles in delinquency proceedings to choose either statutorily mandated closed proceedings or open proceedings under state constitutional provisions specifying a right to a public trial. *R.L.R. v. State*, 487 P.2d 27, 38–39 (Alaska 1971).

The *IJA/ABA Standards* recommend that defendants in delinquency adjudications be given a similar categorical right to choose private over public trials. Section 6.2 provides:

A. Each jurisdiction should provide by law that the respondent, after consulting with counsel, may waive the right to a public trial.

.....

C. The judge of the juvenile court should honor any request by the respondent, respondent’s attorney, or family that specified members of the public be permitted to observe the respondent’s adjudication proceeding when the respondent has waived the right to a public trial.

IJA/ABA STANDARDS, *supra* note 227, Standard 6.2.

Commentators have argued that “policies of maintaining the anonymity of juvenile defendants in the press and of giving accused juveniles the right to choose

can have on juvenile defendants.²⁴⁹ It is at least arguable that juveniles' interests in rehabilitation are strong enough to outweigh the public educational interest of the First Amendment. Whether or not a total denial of access to punitive juvenile justice trials would be constitutionally permissible, it seems clear that it would be constitutional to employ the less drastic alternative of allowing conditional access to the press and other interested individuals, pursuant to an agreement with the court not to disseminate sensitive aspects of the proceedings, particularly the offender's identity.²⁵⁰

3. Summary

Recognition that juvenile trials are "criminal prosecutions" entails not only rights to either a jury or a bench trial but also rights to either a public or a closed proceeding, or at least one protecting the anonymity of the defendant. It might also be possible to opt for a jury trial in the context of an otherwise closed proceeding. In such situations, members of the jury could be precluded from disclosing the identity of the defendant.²⁵¹ Thus, bringing Sixth Amendment protections to punitive juvenile courts would afford an array of new benefits—even some not enjoyed by defendants in criminal court—to those charged with acts of delinquency.

Whether visiting Sixth Amendment protections upon delinquency adjudications would constitute a significant change in the actual workings of those proceedings depends on how readily defendants request juries and opt for public trials.²⁵² Policy makers favoring the traditional rehabilitative model requiring closed bench trial proceed-

a closed hearing may limit the stigma of delinquency status and its lasting impact." Scott & Grisso, *supra* note 19, at 187.

249. See *supra* notes 223–27 and accompanying text. *But see* Note, *supra* note 227, at 1557–58 (arguing that open proceedings visit little harm to juvenile defendants).

250. See Note, *supra* note 227, at 1562–64. Such conditional access is recommended by *IJA/ABA Standard 6.3(A)* which provides: "Each jurisdiction should provide by law that members of the public permitted by the judge of the juvenile court to observe adjudication proceedings may not disclose to others the identity of the respondent when the respondent has waived the right to a public trial." *IJA/ABA STANDARDS*, *supra* note 227, Standard 6.3(A).

For a helpful discussion of the *IJA/ABA Standards* as compared to other proposed legislation, see Edward J. McLaughlin & Lucia Beadel Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force and NAC Standards*, 46 *BROOK. L. REV.* 1 (1979).

251. See *supra* note 250.

252. A number of states already provide for juries in adjudication proceedings either by statute or by judicial decision applying state constitutional provisions. See DAVIS, *supra* note 31, at 354–57. A majority of states have declared by statute that hearings should be conducted without a jury. *Id.* Most states also continue the tradition of closed proceedings in hopes of keeping the identity of juvenile offenders confidential. Henning, *supra* note 223, at 532.

ings may see these Sixth Amendment innovations as too costly financially, or undesirable on other grounds. If so, the innovations can be avoided simply by refraining from imposing punitive dispositions.

IV. IDENTIFYING PUNITIVE DISPOSITIONS

Identifying whether a juvenile court disposition is punitive is essential to determining whether Sixth Amendment public jury trial rights are required.²⁵³ Unfortunately, a review of the lower court case law considering the issue reveals an almost universal absence of effective judicial analysis. Some courts simply reach conclusions without even attempting to identify the presence or absence of the punitive sanction.²⁵⁴ Others fail to distinguish punishment from rehabilita-

253. See *supra* notes 37–44 and accompanying text.

254. See, e.g., *In re D.J.*, 817 So. 2d 26 (La. 2002), discussed in detail *infra* note 274. In *A.C., IV v. People*, 16 P.3d 240 (Colo. 2001), the court denied a jury trial to a juvenile found guilty of criminal negligent homicide, thereby subjecting him to a potential commitment to a state institution for more than six months. The court made no attempt to assess whether the confinement might be punitive, but instead assumed it to be rehabilitative, citing *McKeiver* for authority. See *id.* at 244. Similarly, the Court in *State ex rel Upham v. McElligott*, 956 P.2d 179 (Or. 1998), denied a jury trial to a juvenile charged with various acts of sexual assault. The court made no mention of possible disposition (although an earlier case involving similar offenses subjected a juvenile to a presumptive sentence of sixteen to eighteen-months imprisonment) and assumed a rehabilitative disposition, citing *McKeiver*. See *id.* at 182. In *In re J.F.*, 714 A.2d 467 (Pa. Super. Ct. 1998), the court denied a right to a jury trial, concluding that “concern for the juvenile remains a cornerstone of our system of juvenile justice” even though statutory revisions invited “imposition of accountability for offenses” as a dispositional foundation. *Id.* at 471 (citing 42 PA. CONS. STAT. ANN. § 6352 (amended 1995)). The court made no mention of the possible disposition in the specific case or whether it might have been punitive. Citing *McKeiver*, the court concluded that “dispositional alternatives available to the court remain rehabilitative and are not punitive in nature.” *Id.* at 473. In *State ex rel. Juvenile Dept of Klamath Cnty. v. Reynolds*, 857 P.2d 842 (Or. 1993), the court relied heavily on *McKeiver* in denying jury trial rights under a system the court deemed rehabilitative, even though the dispositional system specified maximum periods of confinement based on the offense committed. The court did not consider whether the offense-based dispositions might be punitive. See *id.* A similar approach was taken by the court in *Valdez v. State*, 801 S.W.2d 659 (Ark. Ct. App. 1991). The court in *In re J.S.*, 438 A.2d 1125, 1128 (Vt. 1981), upheld a statute mandating closure of juvenile proceedings by concluding without analysis that “the juvenile proceeding . . . involves . . . no punishment.” Without any analysis, nor even a cite to *McKeiver*, the court in *Elkins v. State*, 646 S.W.2d 15 (Ark. Ct. App. 1983), found juvenile dispositions rehabilitative, thus justifying denial of jury trial rights. In *State v. Gleason*, 404 A.2d 573 (Me. 1979), a fourteen-year-old was denied a jury trial and given an indefinite commitment to the Maine Youth Center for theft of beer from a store. The court supported the denial of a jury trial by referring to the rehabilitative purposes spelled out in the juvenile court statutes and made no assessment of the actual nature of the juvenile’s commitment (possibly for four years) or whether it might have been punitive, even though it might have lasted much longer than that permitted for an adult committing the same offense. See

tion by applying overly broad definitions of rehabilitation, conflating the concept of punishment into that of rehabilitation, causing the courts to state such things as “treatment is often disguised punishment”²⁵⁵ and “punishment . . . does as much to rehabilitate . . . an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile.”²⁵⁶ Still others apply an overly broad definition of punishment, unduly emphasizing the significance of the conditions of a given sanction as they impact its recipient, resulting in conflating the concept of rehabilitation into that of punishment.²⁵⁷ Very few courts engage in the necessary process of carefully identifying punitive dispositions, which trigger Sixth Amendment applicability, and distinguishing them from rehabilitative ones, which do not.

This Part illustrates these points by considering several examples from a host of badly reasoned cases. The cases will be critiqued and

id. at 580–81. Similarly, in *In re Johnson*, 257 N.W.2d 47, 48–50 (Iowa 1977), the court sustained the denial of a jury trial by simply concluding that the proceedings were not a “prosecution[] for crime” under the state constitution, citing *McKeiver* as authority. The court made no assessment of the actual nature of juvenile court dispositions. Another court essentially begged the Sixth Amendment question by merely citing *McKeiver*: “It is argued that the imposition of a minimum . . . ‘sentence,’ in excess of . . . six month[s] . . . mandates trial by jury. This argument does violence to the actual holding of *McKeiver*.” William M. v. Harold B., 393 N.Y.S.2d 535, 537 (N.Y. Fam. Ct. 1977). In *Raines v. Alabama*, 317 So. 2d 559 (Ala. 1975), the court upheld a denial of jury trial to a youth facing a possible commitment to the custody of the department of corrections for up to three years. Without assessing the actual nature of juvenile court dispositions the court simply concluded the proceedings were “not criminal in nature,” citing *McKeiver*. *Id.* at 562. For still another case where a court denied that juvenile proceedings are “criminal prosecutions” under the Sixth Amendment by referring to *McKeiver* with little additional analysis, see *In re J.I., Jr.*, 290 A.2d 821 (D.C. 1972).

255. *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401, 415 (W. Va. 1980). Such talk caused a fellow judge to accuse its speaker of adopting “a punishment model of treatment for juvenile offenders.” *Id.* at 416 (McGraw, J., concurring).

256. *State v. Lawley*, 591 P.2d 772, 773 (Wash. 1979); see, e.g., *In re Myresheia v. Superior Court*, 72 Cal. Rptr. 2d 65, 69 (Cal. Ct. App. 1998) (denial of jury trial, “while part of the juvenile system does include punishment . . . it does not change the primary purpose of juvenile proceedings from that of preserving and promoting the welfare of the child”); *In re Charles C.*, 284 Cal. Rptr. 4, 9 (Cal. Ct. App. 1991) (denial of jury trial, “[t]he state’s punishment of minors is a ‘rehabilitative tool’”); *In re L.C.*, 548 S.E.2d 335, 337 (Ga. 2001) (denial of jury trial, “although [the juvenile statutes] ha[ve] some punitive aspects, one of the primary functions is the treatment and rehabilitation of the child”); *In re Seven Minors*, 664 P.2d 947, 950–51 (Nev. 1983) (waiver proceeding from juvenile to criminal court, “punishment has in many cases a rehabilitative effect on the child”); *In re David J.*, 421 N.Y.S.2d 411, 412 (N.Y. App. Div. 1979) (denial of jury trial, “a period of mandatory placement in a secure facility where . . . rehabilitation [is] available” promotes “the best interests of youths” committing acts which would be serious crimes if committed by adults).

257. This faulty definition is characterized as the “impact theory.” See *supra* note 61.

analyzed in terms of the conceptual distinction between punishment and rehabilitation offered above²⁵⁸ in an attempt to illustrate how those and similar future cases should be resolved. A rare example of a well reasoned opinion will then be considered in contrast. Finally, *McKeiver* itself will be rethought in terms of the punishment/rehabilitation framework in an endeavor to determine whether *McKeiver* has become dead letter.

A. Failing to Effectively Analyze the Issue

1. *Begging the Question*

As mentioned above, some courts—when presented with questions of whether juvenile proceedings are criminal prosecutions for Sixth Amendment purposes—simply beg the constitutional question by failing to even raise the possibility that a given disposition might be punitive.²⁵⁹ A Delaware case, *State v. J.K.*,²⁶⁰ is a vivid example. The *J.K.* court upheld the constitutionality²⁶¹ of a statute which required institutional confinement for one year²⁶² of any juvenile adjudicated a delinquent based on the commission of two or more statutorily designated felonies within a one-year period. The case raised the issue whether the mandatory commitment provision denied juveniles Sixth Amendment jury trial rights. While declining to rule on the jury trial issue because it was not adequately briefed, the court did find that mandatory commitments under the statute were rehabilitative in nature, leading it to suggest strongly that no jury trial right existed by “invit[ing] the attention of the Trial Courts”²⁶³ to a series of cases, including *McKeiver*, that denied the right.

The Court never addressed the possibility that mandatory determinate confinement for the commission of multiple felonies might constitute punishment. Instead, it simply assumed it to be rehabilitative by referring to the statute’s purpose clause, which placed delinquency matters within the “civil jurisdiction” of the court in order to achieve “control, care, and treatment” of the juvenile.²⁶⁴ The court observed that the “object of the legislation, rehabilitation . . . is a compelling

258. See *supra* note 58 and accompanying text.

259. See *supra* note 254.

260. *State v. J.K.*, 383 A.2d 283 (Del. 1977).

261. Under equal protection attack, the court upheld the statute which permitted juveniles waived to criminal court to possibly receive probation, while those committing the same offenses who remained in juvenile court were ineligible for probation and received mandatory six-month sentences. *Id.* at 289.

262. At the time of *J.K.*, the statute allowed judicial discretion to suspend confinement in excess of six months, see *id.* at 285, but was later amended to remove judicial discretion to suspend mandatory commitments. See DEL. CODE ANN. tit. 10, § 1009(c) (West 1999).

263. *J.K.*, 383 A.2d at 292.

264. *Id.* at 286–87.

State interest”²⁶⁵ reflected in the mandatory sentencing law which constituted “an attempt to salvage something in a juvenile who has committed . . . two separate felonies in one year [which] begin[s] with a mandatory commitment for a six-month minimum.”²⁶⁶

Such analysis obviously begs the constitutional question of whether the six-month confinements constitute punishment. Had the *J.K.* court addressed the punishment issue under the framework developed in this Article,²⁶⁷ the court would have concluded that the confinements were punitive, thereby mandating jury trials. Because the proceedings are labeled “civil,” the burden would be on the juvenile to show by “the clearest proof” that he or she faced a possible punitive disposition.²⁶⁸ Under the punishment definition, the institutional confinement would surely constitute “unpleasant restraint,” obviously imposed “because of an offense.”²⁶⁹ The purposes of the confinement clearly appear to be aimed at achieving retributive and deterrent goals.²⁷⁰ The six-month period is fixed and mandatory, consequently meeting the determinacy aspect of punishment.²⁷¹ The juvenile would continue to serve the six-month sentence even if he or she were rehabilitated.²⁷² The juvenile would be immediately released, however, if the disposition were truly rehabilitative because his or her “condition has altered so as no longer to require . . . [any] further response.”²⁷³ Thus, the dispositional scheme at issue in *J.K.* makes sense only as punishment for offenses and not as a beneficent response that meets the rehabilitative needs of offenders.²⁷⁴

265. *Id.* at 289.

266. *Id.* The mandatory minimum was six months because the court could suspend confinement in excess of six months. *See supra* note 262.

267. *See supra* notes 46–58 and accompanying text.

268. *See supra* note 48.

269. *See supra* notes 50–58 and accompanying text.

270. *See supra* notes 50–58 and accompanying text.

271. *See supra* notes 50–58 and accompanying text.

272. The statute did permit discretionary release, perhaps because the juvenile had become rehabilitated, during the *second* six months of the mandatory one-year sentence. *State v. J.K.*, 383 A.2d 283, 285 (Del. 1977); *see supra* note 262 and accompanying text.

273. Wasserstrom, *supra* note 55, at 179; *see supra* note 67.

274. The *J.K.* case is only one of many cases where courts simply assume a given disposition is rehabilitative without analysis. *See supra* note 254. One other case is especially worthy of note. In *In re D.J.*, 817 So. 2d 26 (La. 2002), the court rejected a juvenile’s argument that Louisiana juvenile courts had “become more criminal than civil in nature,” thus triggering the right to trial by jury. *Id.* at 28. The court made no mention of the possibility that dispositions might be punitive and found them rehabilitative by citing the purpose clause of the Children’s Code, referring to *McKeiver*, and to the many other cases denying jury trials to juveniles. *Id.* at 29–30, 34. The court seemed to assume that if juvenile dispositions were not exactly the same as those for adults committing the same offense, the juvenile dispositions were necessarily nonpunitive. The court observed:

2. *Confusing the Concepts of Punishment and Rehabilitation:
Conflating Punishment into Rehabilitation*

While some courts decide the public jury trial issues by simply assuming the absence of a punitive disposition, others address the punishment question but mistakenly equate the concepts of punishment and rehabilitation,²⁷⁵ thus precluding sound analysis. *State v. Chavez*²⁷⁶ is a vivid example of judicial failure to carefully distinguish punitive and rehabilitative dispositions in order to decide the jury trial issue. After being denied his request for a jury trial, fourteen-year-old Azel Chavez was convicted in juvenile court for attempted murder, unlawful possession of a firearm, armed robbery, armed assault, and theft of a motor vehicle.²⁷⁷ Chavez had no criminal history and was given the “standard range” disposition for three counts of attempted murder under statutory sentencing guidelines,²⁷⁸ amounting to a sentence of 309–387 weeks confinement in a juvenile detention facility.²⁷⁹ In sustaining the jury trial denial, the Washington Supreme Court recognized that Chavez’s disposition was punitive,²⁸⁰ but adhered to a line of earlier cases that characterized the Washington system as par-

[T]here remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime. . . . An adult defendant convicted of the identical charge would face a maximum sentence of 55 years imprisonment at hard labor, 50 years without benefit of parole, probation or suspension of sentence.

Id. at 33. In perhaps inadvertently admitting the punitive nature of Louisiana dispositions, the court said this in comparing those dispositions to those of other states:

Notably, the Louisiana legislature, unlike some of its counterparts, has not elected to enact legislation that would enable the state to punish juveniles under the age of 14 at the time of the offense beyond their 21st birthdays. In highly publicized cases from other states, juveniles younger than D.J. have faced, and sometimes received sentences of life imprisonment. . . . In contrast, in Louisiana, juveniles adjudicated delinquent who were under the age of 14 when they committed the offense may be incarcerated only until their 21st birthdays.

Id. Such comparisons of juvenile dispositions to those of adults and between Louisiana dispositions and those of other states are obviously beside the point. Whatever the comparisons, if Louisiana dispositions are punitive, public jury trial rights are triggered.

275. *See, e.g., supra* notes 255–56 and accompanying text.

276. *State v. Chavez*, 180 P.3d 1250 (Wash. 2008).

277. *Id.* at 1251.

278. *Id.* The Washington scheme involves a presumptive sentencing system based on present offense, age of the offender, and the offender’s prior record. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 854. The sentencing judge classifies a youth as a minor, middle, or serious offender and then refers to sentencing guidelines detailing a dispositional schedule that prescribes the standard range of sentences for a youth with that offense record. *Id.* The judge must follow the guidelines and cannot set indeterminate sentences. *Id.*

279. *Chavez*, 180 P.3d at 1251.

280. *See id.* at 1254; *infra* note 286 and accompanying text.

tially punitive but primarily rehabilitative at the same time.²⁸¹ The *Chavez* court observed that while punishment is the primary purpose of the adult criminal system, the juvenile system embraces the two-fold purposes of “responding to the needs of youthful offenders, and [holding] juveniles accountable for their offenses.”²⁸² While acknowledging that “juvenile proceedings are similar to adult criminal prosecutions, enough distinctions still exist to justify denying juvenile offenders the right to a trial by jury.”²⁸³ The court elaborated on the distinctions by noting that, unlike adults, juveniles may be eligible for diversion programs in lieu of prosecution, and those found guilty if prosecuted will normally be sent to juvenile detention facilities.²⁸⁴ Moreover, incarcerated juveniles receive more effective psychotherapy than that afforded adult prisoners, as well as an array of educational services, treatment options, and spiritual and cultural programs not necessarily available to adult inmates.²⁸⁵ Finally, the court noted the relative leniency of juvenile punishment as a basis for denying jury trials:

[T]he juvenile code provides for much more lenient penalties [than the criminal law], a difference that weighs heavily in the balance between the two systems for purposes of a juvenile’s right to a jury trial. . . .

. . . [B]y remaining in the juvenile system, Chavez received a substantially lesser penalty upon finding of guilt. Whereas in the juvenile system, one count of attempted first degree murder is punishable by 103 to 129 weeks (about 2 to 2 1/2 years), the same count in the adult criminal system is punishable by 180 to 240 months (15 to 20 years). This illustration reinforces the difference between the predominantly rehabilitative philosophy of the juvenile justice system and the punitive philosophy of the adult criminal system.²⁸⁶

It is, of course, hardly obvious that punishing juveniles less severely than similarly situated adults “reinforces . . . the predominantly rehabilitative philosophy of the juvenile justice system.”²⁸⁷ Rather, what is “reinforced” is that the Washington system is at best a mixed system of punishment and rehabilitation, much like the adult criminal system.²⁸⁸ In such situations, the punitive aspects take prominence over the rehabilitative ones in assessing Sixth Amendment rights.²⁸⁹ Because Chavez faced a punitive disposition in excess

281. *Chavez*, 180 P.3d at 1253–54; see *supra* notes 84–89, 256 and accompanying text.

282. *Chavez*, 180 P.3d at 1252.

283. *Id.* at 1253 (quoting *State v. J.H.*, 978 P.2d 1121, 1130 (Wash. Ct. App. 1999)) (internal quotation marks omitted).

284. *Id.* at 1254.

285. *Id.*

286. *Id.* (footnote omitted).

287. *Id.*

288. See *supra* notes 36, 70–73 and accompanying text.

289. See *supra* notes 75–77 and accompanying text.

of six months, he was entitled to a jury trial²⁹⁰ regardless of the rehabilitative services available to him during his punitive confinement.

Under the conceptual framework developed in this Article, there can be little doubt that Chavez was unjustifiably denied a right to trial by jury. By listing punishment as a statutory purpose,²⁹¹ Chavez's sentence may be presumed to be punitive under Supreme Court case law.²⁹² However, even if the statutory purpose is deemed nonpunitive in light of the fact that rehabilitation is also articulated as a statutory goal, Chavez could easily provide the "clearest proof" that he was subjected to punishment.²⁹³ His sentence meets all the characteristics of punishment. Confinement in a closed institution for over seven years surely constitutes an "unpleasant restraint" on liberty, whatever the conditions of the facility.²⁹⁴ Furthermore, the disposition is obviously based on the offenses committed according to the sentencing guidelines proportioning sentences to the seriousness of offenses.²⁹⁵ Washington sentences are determinate and must be served for their duration.²⁹⁶ Clearly, retributive and deterrent purposes provide the foundation for such dispositions. If the disposition were rehabilitative, Chavez would be released upon rehabilitation, "his . . . condition [being] altered so as no longer to require . . . [any] further response,"²⁹⁷ rather than being required to serve the term of his determinate sentence. While Chavez hopefully received some rehabilitation while serving his sentence, he was obviously subjected to punitive confinement in excess of six months and thus denied his Sixth Amendment right to a jury trial.

3. *Defining Punishment Under the "Impact Theory": Conflating Rehabilitation into Punishment*

Unlike courts that beg the constitutional question, or mistakenly conflate punishment into rehabilitation by applying overly broad definitions of rehabilitation, some courts make the opposite mistake of conflating rehabilitation and other coercive sanctions into the notion of punishment by applying an overly broad definition of punishment. Instead of adhering to the conceptual scheme developed above, which requires a motivational assessment for imposing a given sanction in

290. See *supra* notes 179–80 and accompanying text.

291. See *Chavez*, 180 P.3d at 1252; *supra* notes 83–85 and accompanying text.

292. See *supra* note 48 and accompanying text.

293. See *supra* notes 48, 57–58 and accompanying text.

294. See *supra* notes 50–58 and accompanying text.

295. See *supra* note 278.

296. The Washington scheme requires that an incarcerated youth serve sixty percent of the minimum sentence imposed with a release date set by the court thereafter. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 854. This manifests a determinate system imposing mandatory minimum sentences.

297. Wasserstrom, *supra* note 55, at 179; see *supra* note 67.

determining whether or not it is punitive,²⁹⁸ some courts—when determining whether a given sanction is punitive—resort to defining punishment solely in terms of the extent to which the impact of the sanction on its recipient is experienced as unpleasant, without engaging in the necessary determination of the purposes for the sanction’s imposition. This erroneous definition is characterized as the “impact theory of punishment”—application of which makes it impossible to properly distinguish punishment from other coercive sanctions that manifest an unpleasant impact upon those sanctioned, sometimes even more severe than the impact experienced by recipients of punishment.²⁹⁹

For example, in *In re Hezzie R.*,³⁰⁰ the court considered whether Wisconsin juvenile dispositions were punitive in deciding the jury trial issue raised in the case. Even though the court noted that recent legislative revisions had listed holding juveniles personally “accountable” as a statutory objective within a “balanced approach” alongside the traditional goal of rehabilitation,³⁰¹ the court found that the possibility of several years confinement in a secured juvenile correctional facility was not punitive, thus permitting denial of Sixth Amendment jury trial rights.³⁰² On the other hand, the court deemed punitive a statutory provision permitting the possible transfer of juveniles from secured juvenile facilities to adult prisons in situations where a juvenile “presents a serious problem to the juvenile or others.”³⁰³ Disposi-

298. See *supra* notes 50–59 and accompanying text.

299. The “impact theory” is described *supra*, note 61. In addition to the text immediately forthcoming, the following represents a clear example of the impact theory:

Delinquency proceedings have all the hallmarks of a criminal prosecution. The basis of the charge of delinquency is the commission of a criminal offense, and, if found delinquent, a juvenile can be incarcerated in the Department of Corrections until he is 21 years old. This is a classic case of crime and punishment.

. . . . However one chooses to characterize the purpose of the juvenile justice system, the fact remains that “the incarcerated juveniles’ liberty . . . is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons.”

In re G.O., 727 N.E.2d 1003, 1015–16 (Ill. 2000) (Heiple, J., dissenting) (alteration in original) (footnote omitted) (quoting *In re Urbasek*, 232 N.E.2d 716, 719 (Ill. 1967)). “When commitment to an adult facility is permitted . . . the juvenile is constitutionally entitled to a trial by jury.” *In re Jeffrey C.*, 781 A.2d 4, 6 (N.H. 2001). See a similar example of the impact theory *infra* notes 300–20 and the accompanying text.

300. *In re Hezzie R.*, 580 N.W.2d 660 (Wis. 1998).

301. *Id.* at 675.

302. *Id.* at 673.

303. *Id.* at 673–74. The court found the adult prison transfer provision unconstitutional because it subjected juveniles to “criminal prosecutions” under the Sixth Amendment, without allowing for the right to trial by jury. *Id.* at 674. The court then severed the provision from the remainder of the juvenile code. *Id.* at 674–75.

tions in either the juvenile or adult facilities were indeterminate and subject to an individualized "permanency plan" aimed at "ensur[ing] that [the] juvenile [be] reunified with his family whenever possible," with the underlying goal that he receive "treatment . . . meeting [his] physical, emotional, social, educational and vocation needs."³⁰⁴

The court based its distinction between juvenile and adult facilities solely upon its perception of the different conditions of the respective facilities, without taking into account the purpose(s) of confinement.³⁰⁵ The adult facilities manifested a harsher impact and were therefore deemed punitive. Referring with approval to other cases concluding that "although the focus of the Children's code was rehabilitation . . . subjecting juveniles to placement in adult prisons result[s] in 'punitive incarceration,'"³⁰⁶ the *Hezzie R.* court observed: "Juveniles transferred under these provisions are subject to placement in the exact environment to which adults with criminal convictions are subject. In addition, those juveniles are subject to being housed with the general population of criminally convicted adults."³⁰⁷ Merely being housed in such an environment was enough to convince the court that the confinement was punitive.³⁰⁸

However, if being placed in an adult prison by itself constitutes punishment, it would follow that pretrial detention in a jail with convicted misdemeanants would also constitute punishment, and would thus be unconstitutional.³⁰⁹ Yet, the Supreme Court has held that jailing a juvenile awaiting adjudication is not punishment because the purposes of the jailing are nonpunitive.³¹⁰ Thus, the harsh impact of a given confinement itself cannot establish its punitive nature. Only a harsh impact imposed for punitive purposes constitutes punishment.³¹¹

For the *Hezzie R.* court to simply conclude that confinement in juvenile facilities is nonpunitive because life there is less harsh than that in adult prisons overlooks the possibility that life in both facilities

304. *Id.* at 669-70.

305. The juvenile facilities solely housed juveniles "allowing the focus of juvenile treatment and rehabilitation to remain intact." *Id.* at 673. Apart from being housed with adult criminals, the court did not describe how the adult prisons differed from the juvenile facilities.

306. *Id.* at 674 (quoting *In re C.B.*, 708 So. 2d 391, 396 (La. 1998)).

307. *Id.*

308. *See id.*

309. See the discussion of *Bell v. Wolfish*, *supra* note 37.

310. See *Schall v. Martin*, 467 U.S. 253 (1984) (detaining juveniles thought to pose a serious risk of committing crimes if released did not constitute preadjudication punishment because the confinement was motivated by the nonpunitive purpose of preventing future crime); *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979) (holding pretrial detention in a jail facility to be nonpunitive because it was motivated by the nonpunitive purpose of assuring the detainee's presence at trial).

311. See *supra* notes 50-58 and accompanying text.

could either be punitive or rehabilitative. Assessments of punishment are impossible without determining the purposes of confinement in the respective facilities.³¹²

In fact, the *Hezzie R.* court afforded no basis for concluding that the purposes of confinement in the adult facilities were more punitive than those applicable to the juvenile facilities. Juveniles were transferred to adult prisons not for retribution or deterrence³¹³ but because they posed a “serious problem” to themselves or others while housed in the juvenile facility.³¹⁴ The purpose of the commitment to adult prisons thus appears more a matter of preventive detention³¹⁵ than punishment, especially in light of the fact that the commitments were indeterminate, permitting release “whenever possible.”³¹⁶

Had the *Hezzie R.* court applied the framework presented in this Article, it would have concluded that confinement in neither the adult nor the juvenile facilities constituted punishment for purposes of assessing Sixth Amendment jury trial rights. Because the legislature effectively labeled juvenile dispositions “civil,”³¹⁷ the burden would be on juveniles asserting jury trial rights to show by the “clearest proof” that they were subjected to punishment.³¹⁸ While confinements in either the juvenile or adult facilities would constitute “unpleasant restraints” imposed “because of an offense,”³¹⁹ the indeterminate nature of the disposition in either type of facility would call into question whether the purposes of the disposition were punitive rather than rehabilitative. Because juveniles would apparently be released from confinement upon rehabilitation,³²⁰ their commitment appears rehabilitative, thereby making it impossible to satisfy the “clearest proof” of punishment requirement. The *Hezzie R.* court should have concluded that jury trials were not mandated for any juveniles in Wiscon-

312. See *supra* notes 50–58, 61 and accompanying text.

313. Retribution and deterrence are the purposes defining punishment. See *supra* note 53 and accompanying text. The Supreme Court has observed that “[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.” *Bell*, 441 U.S. at 539 n.20.

314. *In re Hezzie R.*, 580 N.W.2d 660, 673 (Wis. 1998); see *supra* note 303 and accompanying text.

315. For a discussion of the distinction between preventive detention and punishment, see Gardner, *Punishment and Juvenile Justice*, *supra* note 46, at 809–15.

316. *Hezzie R.*, 580 N.W.2d at 669–70. For a case holding it permissible to commit a juvenile to adult correctional facilities without affording a jury trial, see *In re Janet R.*, 353 N.Y.S.2d 783 (N.Y. App. Div. 1974).

317. Wisconsin statutes had previously provided for jury trials in juvenile cases. *Hezzie R.*, 580 N.W.2d at 662–63. The elimination of the jury trial right indicates that the Wisconsin Legislature considered juvenile proceedings to be civil matters and not criminal prosecutions requiring jury trials.

318. See *supra* note 49 and accompanying text.

319. See *supra* note 54 and accompanying text.

320. See *supra* note 304 and accompanying text.

sin because none risked punitive dispositions.³²¹ This is not to say, however, that Wisconsin juveniles necessarily received meaningful rehabilitation, but only to say that they did not receive punishment.

B. Effective Analysis: The Rare Exception

Although the vast majority of courts fall prey to the kinds of faulty analysis described in subsection IV.A, courts do—on very rare occasions—effectively analyze the question of whether a given juvenile disposition constitutes punishment when considering the applicability of Sixth Amendment rights. While the 2008 decision of the Kansas Supreme Court in *In re L.M.* constitutes a well reasoned opinion,³²² an earlier New York decision, *In re Felder*,³²³ provides an even better example of succinct, effective analysis that utilizes a conceptual framework essentially the same as that proposed in this Article. Attention will therefore be focused on *Felder*.

The *Felder* court found that Sixth Amendment jury trial rights applied in delinquency actions brought against juveniles charged with “designated felon[ies]” under the Juvenile Justice Reform Act of 1976.³²⁴ The Reform Act was a response to a perceived increase in serious crime committed by juveniles and was aimed at protecting the

321. The conclusion that the presence of rehabilitation within adult prisons renders them nonpunitive institutions for purposes of assessing juveniles’ jury trial rights under the Sixth Amendment does not make the prisons nonpunitive for the adults incarcerated therein for violations of the criminal law. The Wisconsin Legislature almost certainly would have labeled adult dispositions punitive, thus conclusively establishing their punitive nature. See *supra* notes 48, 57–58 and accompanying text. Moreover, the adult sentences would certainly be determinate, unlike those imposed on juveniles, rendering the adults’ confinements punitive, notwithstanding the rehabilitation inmates might also receive within the prison. See *supra* notes 57–59, 71 and accompanying text.

322. While the New York case *In re Felder*, 402 N.Y.S.2d 528 (N.Y. Fam. Ct. 1978), will be discussed in detail following immediately in the text, the Kansas Supreme Court decision in *In re L.M.*, 186 P.3d 164 (Kan. 2008), is also worthy of emulation. The *L.M.* court considered the appeal of a juvenile whose request for a jury trial was denied prior to his being convicted of sexual battery and placed on probation after the trial court stayed his sentence of eighteen months in a juvenile correctional facility. *Id.* at 165. The sentence was imposed according to sentencing guidelines, which embodied a determinate sentencing system based on the level of the offense and in some cases the past adjudication history of the juvenile. *Id.* at 169. The *L.M.* court found that adoption of the determinate sentencing scheme—along with other factors such as a legislative abandonment of the traditional euphemisms of juvenile justice in favor of the terminology of the criminal system in juvenile cases—evidenced a rejection of the rehabilitative model and a move towards a system of punitive juvenile justice. *Id.* at 168–70. The court therefore held that juvenile proceedings had become essentially criminal prosecutions, thus requiring Sixth Amendment jury trial rights. *Id.* at 170.

323. *In re Felder*, 402 N.Y.S.2d 528 (N.Y. Fam. Ct. 1978).

324. *Id.* at 536.

community while also attending to the needs of juvenile offenders.³²⁵ The statute imposed fixed periods of confinement either for six-month or twelve-month intervals, depending on the seriousness of the felony, for juveniles committing certain enumerated offenses if restrictive placement was thought necessary.³²⁶ While the decision to confine was discretionary with the court, the period of confinement was fixed by the statute once the court elected to confine the juvenile.³²⁷

The *Felder* court recognized that the jury trial right hinged upon whether the mandatory dispositions constituted punishment.³²⁸ In assessing that question, the court carefully attended to the punishment/rehabilitation distinction³²⁹ and found the mandatory dispositions to be punitive.³³⁰ The court emphasized that the statutes premised the length of confinement on “the act committed rather than [upon] the needs of the child.”³³¹ The court saw the mandatory nature of the confinements to be inconsistent with the “philosophy of treatment,” which requires that juveniles be released at the moment rehabilitation occurs.³³² The court elaborated:

The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment.

. . . By mandating restrictive placement in a secure facility for a minimum of six months, the Legislature has created a disposition that more nearly resembles a punishment than a treatment . . .³³³

The *Felder* court applied virtually the same conceptual framework as suggested in this Article and reached the correct conclusion. Because the New York legislature designated juvenile proceedings “civil” in nature,³³⁴ juveniles asserting jury trial rights would be required to show “by the clearest proof” that the dispositions were punitive,³³⁵ a

325. *Id.* at 531–32.

326. Conviction for committing “Class A” designated felonies required a twelve-month restrictive placement while conviction of any other designated felony resulted in a six-month restrictive placement. *Id.* at 532.

327. *Id.*

328. The court observed: “When . . . the protections provided to the juvenile criminal offender have been so eroded away that what is actually a punishment is characterized as a treatment, an abuse of constitutional dimension has occurred, and, a jury trial is required before punishment, although appropriate, may be inflicted.” *Id.* at 531.

329. *Id.*

330. *Id.* at 533.

331. *Id.*

332. *Id.* (“In effect the Legislature has determined that a child who at the time of his dispositional hearing requires restrictive placement will continue to require restrictive placement for the entire period of the minimum sentence.”).

333. *Id.*

334. The legislature labeled the designated felony provisions as “juvenile” proceedings, thus distinguishing them from criminal proceedings. *Id.* at 529.

335. *See supra* notes 49, 57–58 and accompanying text.

burden they could easily meet. As the *Felder* court pointed out, the unpleasant restraints were imposed because of offenses and were proportionate to their seriousness. The determinate nature of the dispositions evidenced purposes of retribution and deterrence and belied offender-oriented, rehabilitative concerns.³³⁶ The mandatory dispositions at issue in *Felder* thus met all the characteristics of punishment and none of rehabilitation.³³⁷

C. The Ongoing Viability of *McKeiver*

The fact that *Felder* and the recent Kansas *L.M.* decision³³⁸ convincingly recognize the applicability of Sixth Amendment jury trial rights to delinquency adjudications does not necessarily call *McKeiver* into question. *McKeiver*'s denial of jury trial rights was decided on due process grounds³³⁹ without considering whether juvenile dispositions are punitive, thus triggering Sixth Amendment rights.³⁴⁰ In fact, had the *McKeiver* Court addressed the Sixth Amendment issue under the conceptual rubric developed in this Article, the Court would have concluded that the dispositions at issue were nonpunitive under the "clearest proof" requirement³⁴¹ due to their indeterminate na-

336. *See Felder*, 402 N.Y.S.2d at 533.

337. *See supra* notes 57–58. Notwithstanding the convincing analysis of the *Felder* court, other New York courts have reached the opposite conclusion, finding the designated felony dispositions nonpunitive and rehabilitative in nature. *See People v. Young*, 416 N.Y.S.2d 171 (N.Y. Fam. Ct. 1979); *In re William M.*, 393 N.Y.S.2d 535 (N.Y. Fam. Ct. 1977).

338. *See supra* note 322.

339. *McKeiver* found that juvenile adjudications are essentially "fair" under due process considerations even though they deny jury trial rights. As Justice Brennan explained: "[T]he States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests . . . jury trials are intended to serve." *McKeiver v. Pennsylvania*, 403 U.S. 528, 554 (1971) (Brennan, J., concurring and dissenting). Justice Brennan quoted *Duncan v. Louisiana* for the proposition that "[a] criminal process which was fair and equitable but used no juries is easy to imagine." *Id.* at 554 n.1 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)).

340. "*McKeiver* did not analyze the purported distinctions between treatment in juvenile courts and punishment in criminal courts." Feld, *Constitutional Tension*, *supra* note 12, at 1148–49.

341. Even though the *McKeiver* Court saw it "wooden" and "simplistic[]" to call juvenile court proceedings either "civil" or "criminal," 403 U.S. at 541 (plurality opinion), such a characterization is necessary under the Court's framework for assessing punishment that it fully developed after *McKeiver* was decided. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (requiring the "clearest proof" threshold for showing punishment when the legislature designates a disposition as a nonpunitive civil sanction); *supra* notes 48–49 and accompanying text. At the time of *McKeiver*, juvenile dispositions were legislatively deemed nonpunitive, thus triggering the "clearest proof" requirement.

ture.³⁴² Thus, whatever the merits of the Court's denial of jury trial rights as a matter of due process,³⁴³ juries would not have been required under the Sixth Amendment. On the other hand—given the markedly different juvenile justice landscape from the one encountered by the *McKeiver* Court—it is hoped that the Supreme Court will soon address the jury trial issue raised in cases like *J.K.*,³⁴⁴ *Chavez*,³⁴⁵ and *Felder*³⁴⁶ where punitive dispositions are clearly evident, and find such situations to be criminal prosecutions requiring open trials with jury determinations.

V. ABOLISH JUVENILE COURTS?

When the juvenile system becomes punitive, the Sixth Amendment rights to public trials and trial by jury are required, making juvenile courts virtually indistinguishable from criminal courts. As Professor Feld has observed, this “substantive and procedural convergence between juvenile and criminal courts eliminates virtually all the conceptual and operational differences in strategies of criminal social control for youths and adults.”³⁴⁷ For Feld, this means that no compelling reasons exist to maintain separate juvenile and adult courts. Feld and others thus favor abolishing punitive juvenile courts and subjecting all juveniles to criminal court jurisdiction with scaled-down penalties to accommodate their diminished culpability.³⁴⁸ Others disagree and argue that good reasons exist for retaining a separate system of juvenile courts, even if they administer punishment.³⁴⁹

In this section, I will briefly discuss the arguments on both sides of the abolition debate. I will then relate some matters explored in this Article to the debate and argue, contrary to the abolitionists, that the

342. The dispositions at issue in *McKeiver* constituted possible confinement until the juvenile reached the age of majority. *McKeiver*, 403 U.S. at 542. Such a disposition is nonpunitive under the conceptual framework developed in this Article. See the discussion of *In re Hezzie R.*, 580 N.W.2d 660 (Wis. 1998), *supra* notes 300–21 and accompanying text.

343. See *supra* notes 12, 132–42 and accompanying text for criticism of *McKeiver*.

344. See *supra* notes 260–74 and accompanying text.

345. See *supra* notes 276–97 and accompanying text.

346. See *supra* notes 323–37 and accompanying text.

347. Feld, *Abolish the Juvenile Court*, *supra* note 1, at 68–69.

348. *Id.*; see NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT 106–07 (1971); Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12; Ainsworth, *Youth Justice*, *supra* note 12; Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Sanford J. Fox, *Abolishing the Juvenile Court*, 28 HARV. L. SCH. BULL. 22 (1977); Francis Barry McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

349. See *infra* notes 359–63 and accompanying text.

movement to punitive juvenile justice actually *supports*, rather than *contravenes*, the existence of a separate juvenile court system.

A. The Argument for Abolition

Abolitionists argue that even if Sixth Amendment rights are applied in juvenile courts, the quality of procedural justice afforded in those courts would still be vastly inferior to the quality available in criminal court.³⁵⁰ For example, the right to counsel promised in *In re Gault* has largely been unrealized as juveniles are routinely unrepresented in delinquency proceedings.³⁵¹ Even when attorneys do represent defendants in delinquency adjudications, the attorneys often experience role tensions between acting as rigorous advocates, on the one hand, and as guardians for their youthful clients on the other.³⁵² Additionally, evidence suggests that juvenile property offenders waived into adult criminal court, which constitute the majority of waiver cases, receive shorter sentences for the same property offenses committed by other juveniles sentenced in punitive juvenile courts.³⁵³ Such disparities raise obvious issues of sentencing policy fairness and justice.³⁵⁴ These considerations lead abolitionists to conclude that no coherent rationale remains for retaining a separate system for juvenile offenders once juvenile justice becomes punitive.³⁵⁵ Without a meaningful rehabilitative underpinning, juvenile justice supposedly loses its reason for existence.³⁵⁶

350. See, e.g., Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 1, at 913.

351. See Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12, at 1126–30; Feld, *Abolish the Juvenile Court*, *supra* note 1, at 87–90.

352. Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12, at 1120, 1129–30.

353. Feld, *Abolish the Juvenile Court*, *supra* note 1, at 80–81.

354. In addition to sentencing disparities, a bifurcated system arguably “undermines the ability of the adult system to respond adequately to either persistent or violent young offenders. Without an integrated record system that merges juvenile with adult criminal histories, some chronic offenders may ‘slip through the cracks’ and receive inappropriately lenient sentences as adults.” *Id.* at 81.

355. Janet Ainsworth has argued that the movement towards punitive juvenile justice manifests a recognition that the sharp child-adult dichotomy assumed by the originators of the juvenile court movement has broken down. Adolescents are viewed more as a subclass of adults than as a subclass of child. Ainsworth, *Youth Justice*, *supra* note 12, at 931–41. If adolescents are not “essentially” different from adults, “[t]he continued existence of a separate juvenile court system [is] difficult . . . to sustain.” *Id.* at 936. “With its philosophical underpinnings no longer consonant with the current social construction of childhood, the juvenile court now lacks a rationale for its continued existence other than sheer institutional inertia.” Ainsworth, *Abolishing Juvenile Courts*, *supra* note 12, at 1118.

356. As Professor Feld puts it, “once a state separates social welfare from criminal social control, no role remains for a separate juvenile court for delinquency matters.” Feld, *Abolish the Juvenile Court*, *supra* note 1, at 69. Furthermore, any attempts to “rehabilitate rehabilitation” through the juvenile court system, whether explicitly punitive or not, are criticized as misguided. As Feld argues, if

Thus, for abolitionists, juvenile offenders should be handled exclusively through the criminal justice system, where they will be afforded the full array of procedural protections and affirmative defenses—including the infancy defense.³⁵⁷ By scaling down its sentences from those imposed on similarly situated adult offenders,³⁵⁸ abolitionists argue the criminal system could easily accommodate the diminished culpability of juveniles, thereby resulting in a single system dispensing procedural and substantive justice without the defects of the present juvenile system nor the inefficiencies of two separate systems.

B. The “Rehabilitate Rehabilitation” Argument Against Abolition

Granting that juvenile courts dispense punishment, not everyone agrees that the system should be abolished. Some complain that abolitionists overstate the ability of criminal courts to effectively enforce constitutionally mandated procedural protections.³⁵⁹ Furthermore,

we were to formulate child welfare policy *ab initio* we would not do so through a court system making criminality a condition precedent to the receipt of services:

If we would not create a court to deliver social services, then does the fact of a youth's criminality confer upon a court any special competency as a welfare agency? Many young people who do not commit crimes desperately need social services and many youths who commit crimes do not require or will not respond to social services. In short, criminality represents an inaccurate and haphazard criterion upon which to allocate social services. Because our society denies adequate help and assistance to meet the social welfare needs of all young people, the juvenile court's treatment ideology serves primarily to legitimate the exercise of judicial coercion of some *because of their criminality*.

Id. at 91. Feld concludes “[c]ombining social welfare and penal social control functions in one agency assures that the court does both badly.” *Id.* at 93.

Another commentator argues that adopting a single, unified criminal system might actually result in a more effective and finely tuned system of individualized sentencing. See Ainsworth, *Youth Justice*, *supra* note 12, at 945–50.

357. Despite the shift to punitive dispositions, juvenile courts “have been slow to recognize that the infancy defense is essential in justifying juvenile justice jurisdiction over accused offenders.” Walkover, *supra* note 1, at 506. Walkover discusses cases that deny application of the infancy defense on faulty appeals to the rehabilitative nature of juvenile justice. *Id.* at 547–51. The defense has been recognized, however, by the courts of some jurisdictions adopting the punitive model. *Id.* at 551–54.

358. See Feld, *Abolish the Juvenile Court*, *supra* note 1, at 119–28 (arguing for a “youth discount” in scaled down criminal court sentencing).

359. One commentator put the matter this way:

[T]he reality of adult criminal proceedings is crowded courtrooms in which justice is dispensed through waivers and pleas negotiated by defense attorneys who are often less than zealous and well-prepared advocates, and in which racism is at least as much a fact of life as in juvenile court. For the most part, the typical criminal court in urban areas is a harsh, tough, mean institution cranking out pleas, with few pauses for individualized attention. It is no place for an adult defendant to be, much less a child.

criminal courts will arguably be less able than juvenile courts to accommodate youthful immaturity in meting out sentences, even ones scaled down from adult penalties.³⁶⁰

Other proponents of rehabilitation argue that meaningful rehabilitation is not inconsistent with a punitive juvenile justice system. Some claim effective rehabilitation results through the utilization of “serious and habitual juvenile offender” statutes (“SHJO”) in which offenders are incarcerated for an initial sentence, after which they undergo intensive supervision for significant periods of time in order to receive rehabilitative services.³⁶¹ Also, anti-abolitionists often contend that more resources should be devoted to rehabilitative systems. As Professor Rosenberg argues: “Abandoning the juvenile court is an admission that its humane purposes were misguided or unattainable. . . . We should stay and fight—fight for a reordering of societal resources, one that will protect and nourish children.”³⁶² She adds:

Despite all their failings, of which there are many, the juvenile courts do afford benefits that are unlikely to be replicated in the criminal courts, such as the institutionalized intake diversionary system, anonymity, diminished stigma, shorter sentences, and recognition of rehabilitation as a viable goal. We should build on these strengths rather than abandon ship.³⁶³

C. Punitive Juvenile Justice as a Reason for *Retaining Separate Juvenile and Criminal Courts*

As noted above, abolitionists argue that juvenile courts lose their underlying rationale once they become punitive. So apparent is this conclusion that Professor Feld has observed: “[F]ew juvenile court proponents even attempt any longer to defend the institution on its own merits.”³⁶⁴ I will join the few and argue that rather than diminishing the role of a separate juvenile court system, the movement to punitive juvenile justice actually provides, perhaps paradoxically, unique grounds for retaining a separate system.

In the first place, as shown by this Article, punitive juvenile courts should be subject to the public jury trial protections of the Sixth Amendment. These protections—even more extensive than those afforded defendants in criminal court—will go a long way towards alleviating the problems that have traditionally rendered juvenile

Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 173–74 (1993) (footnotes omitted).

360. *Id.* at 174–75.

361. Sheffer, *supra* note 74, at 495–506.

362. Rosenberg, *supra* note 359, at 184 (footnote omitted). For similar arguments favoring separate juvenile and criminal systems, see Forst & Blomquist, *supra* note 10, at 335–36, 359–69.

363. Rosenberg, *supra* note 359, at 184–85 (footnotes omitted).

364. Feld, *Abolish the Juvenile Court*, *supra* note 1, at 96.

proceedings inferior to criminal courts.³⁶⁵ Once juvenile proceedings are understood as Sixth Amendment criminal prosecutions, the problem of attorney role ambivalence, which has plagued traditional juvenile justice,³⁶⁶ would be resolved because defense counsel will realize they have only one role, that of defending their youthful clients in the same manner attorneys advocate for criminal defendants.³⁶⁷

Even if all the procedural failings of the juvenile system are rectified, however, some would argue that the system should still be eliminated through an application of Occam's Razor in the name of efficiency.³⁶⁸ Arguably, all the benefits of the juvenile system could be accommodated in a single criminal system.³⁶⁹ Of the benefits noted by Professor Rosenberg,³⁷⁰ the criminal system could adopt diversionary intake procedures,³⁷¹ mandate shorter sentences for youthful offenders,³⁷² and adopt rehabilitative programs such as SHJO provisions if deemed desirable.³⁷³ These claims notwithstanding, it is doubtful whether revising the criminal system to achieve these benefits would be worth the costs involved, rather than simply retaining the present juvenile system, where the benefits are arguably already available and administered by court personnel experienced in working with young people.³⁷⁴

365. See *supra* notes 132–42, 151–55, 166–77, 194–209, 215–50 and accompanying text. If the rights to waive public trial and jury trial rights, argued for in this Article, are realized, juveniles will actually enjoy more procedural protections in delinquency adjudications than offenders in criminal court.

366. See *supra* note 352 and accompanying text.

367. As this Article has shown, when juvenile courts dispense punishment, they become “criminal prosecutions,” triggering Sixth Amendment rights, including those assuring the “assistance of counsel.” See *supra* note 39.

368. See McCarthy, *supra* note 348, at 1118 (arguing that since less severe juvenile sanctions in punitive models are routinely “determined by reference to the adult penalty, it would be more efficient to preserve the distinction between adult and youth sentencing by incorporating it into a criminal statute than by maintaining a separate juvenile system”).

369. For example, it would be possible to allow the special waiver rights for juveniles argued for in this Article, see *supra* note 365, to be applicable in criminal courts if the juvenile system were eliminated.

370. See *supra* note 363 and accompanying text.

371. See Wizner & Keller, *supra* note 348, at 1133.

372. See McCarthy, *supra* note 348, at 1118; Wizner & Keller, *supra* note 348, at 1133; *supra* note 358 and accompanying text.

373. See *supra* note 361 and accompanying text.

374. Some proponents of punitive juvenile justice with a rehabilitative component argue:

The most effective means to implement the lessons from developmental psychology is to maintain a system of adjudication and disposition that is separate from the adult criminal justice system. First, a juvenile court can better recognize and accommodate the reduced culpability and more limited trial competence of younger offenders. Moreover, a separate juvenile correctional system is more likely to utilize dispositional strategies, goals, and approaches that are grounded in developmental

However, even if these desirable aspects of the present juvenile courts could be achieved with a merger into criminal court, some benefits of the present two-system situation appear particularly difficult to replicate if the juvenile system is abolished. The benefit of retaining the current connotation of the delinquency label is of particular importance. If, as the Supreme Court has clearly recognized, adolescent offenders are less culpable than their adult counterparts,³⁷⁵ juveniles should no more be saddled with the same stigma imposed upon adult offenders than with the same punishment.

Although perhaps not provable by empirical research, it appears obvious to many that the stigma attached to delinquents adjudicated in juvenile court is less severe than that attending conviction in criminal courts.³⁷⁶ While being labeled "delinquent" is surely stigmatic,³⁷⁷ it seems clear that the stigma carries fewer negative connotations—

knowledge. . . . The ability or inclination of the criminal justice system to tailor its response to juvenile crime so as to utilize the lessons of developmental psychology is questionable. The evidence suggests that political pressure functions as a one-way ratchet, in the direction of ever-stiffer penalties. Programs designed for adolescents and sentencing distinctions between adults and juveniles will be much harder to maintain in a unified system in which juveniles are otherwise treated as adults; it seems predictable that the lines between age groups will become blurred.

Scott & Grisso, *supra* note 19, at 188–89.

375. See *supra* note 229 and accompanying text.

376. In discussing why a separate juvenile court should be retained even if it dispenses punishment, one commentator observed:

If shorter sentences were all that were involved, there would be no need for a separate juvenile court; criminal court judges could simply take a juvenile's age into account in setting the sentence. But more *is* involved. Juveniles' capacity for change means that less stigma should be attached to conviction and punishment of a juvenile than of an adult; a teenager's criminality should not hang over him like a cloud for the rest of his life. Although it would be naïve to suggest that the juvenile court has eliminated stigmatization, as its early advocates had hoped, the stigma nonetheless is milder and less enduring than that provided by the criminal courts.

CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 356 (1978). "[T]he end result of a declaration of delinquency *is* significantly different from and less onerous than a finding of criminal guilt." *McKeiver v. Pennsylvania*, 403 U.S. 528, 540 (1971) (quoting *In re Terry*, 265 A.2d 350, 355 (Pa. 1970)). Another commentator concluded that "the stigma of being classified a delinquent has been overestimated." Note, *supra* note 227, at 1157.

But see Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1231 (1970) (stating a "juvenile delinquent is viewed as a junior criminal hardly less threatening . . . than his more mature counterpart"); McCarthy, *supra* note 26, at 213 ("[A] stigma attaches to a delinquent in a manner similar to an adult criminal."). See also *supra* note 107 and accompanying text (showing *In re Gault* Court equating the delinquent and criminal labels).

377. See *supra* note 223 and accompanying text.

both in the minds of offenders³⁷⁸ and to the community at large—than those that flow from being convicted a “criminal” in the adult court.³⁷⁹ The fact that the vast majority of young people who commit criminal acts during the period of their minority grow out of their deviance upon reaching adulthood,³⁸⁰ means the “delinquent” label connotes understandable, even *normal*, behavior.³⁸¹ But for good luck, the label would be attached to virtually everyone. Furthermore, given the accelerating practice of waiving serious juvenile offenders to criminal court,³⁸² the delinquency label connotes not simply that the individual offender is like everyone else, but also that he or she may well have committed a relatively minor offense.³⁸³ None of this follows when one is stigmatized “criminal,” a label connoting neither immature folly

378. See Jack Donald Foster et al., *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 SOC. PROBS. 202 (1972) (finding that only a few boys adjudicated delinquent felt seriously handicapped by their encounter with the juvenile court relative to their interpersonal relationships with family, friends, or teachers).

379. See Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (discussing ways in which convicted criminals suffer stigma manifested through the reluctance of others to interact with them economically and socially).

380. See *supra* notes 224–25 and accompanying text.

381. See *supra* notes 224–25 and accompanying text. This does not mean, however, that such young people found guilty of acts of delinquency should not be punished for their wrongdoing. Developmental psychologists recognize the importance of lessons in accountability amounting to more than mere slaps on the wrist. Scott & Grisso, *supra* note 19, at 187. “The fact that many youthful offenders will desist in their criminal activity as they mature does not justify a license to offend during adolescence.” *Id.* Franklin Zimring expresses similar views:

[N]o learning role is complete without, in some measure, learning responsibility for conduct. Thus, part of the initiation into the adult role is building toward adult responsibilities. Just as the learning theory of adolescence implies a transition toward adulthood, so too it also implies a progression toward adult levels of responsibility. The adolescent must be protected from the full burden of adult responsibilities, but pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood.

FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 95–96 (1982).

382. See *supra* note 81 and accompanying text.

383. Theorists point out that there exists a tendency for the term “criminal” to “over label” through its failure to describe precise types of deviant behavior(s) triggering the label, the seriousness of those behaviors, or their social context. Ronald A. Feldman, *Legal Lexicon, Social Labeling, and Juvenile Rehabilitation*, 2 OFFENDER REHABILITATION 19, 24–25 (1977). The term “delinquent,” on the other hand, connotes an offense committed by a minor which, while perhaps serious, is at least not serious enough to merit disposition in criminal court. As one commentator observed: “When a juvenile is transferred and tried in adult court, the consequences of criminal conviction are readily apparent and warrant a vigorous defense, but for a child facing a delinquency adjudication, the criminal consequences of his or her adjudication may not be clear.” Fain, *supra* note 12, at 523.

nor minor offense.³⁸⁴ Therefore, punishing youthful dalliances with wrongful conduct makes more sense within a system expressly devoted to such.³⁸⁵

Abolitionists argue that the emergence of punitive juvenile justice spells the demise of a separate juvenile court system. To the contrary, the considerations raised above provide a rationale supporting the separate existence of punitive juvenile courts.

VI. CONCLUSION

The Sixth Amendment assures a right to a public trial for those accused of committing punishable offenses and a right to a jury trial when possible punishment exceeds six-months imprisonment. Historically, these rights were unavailable in delinquency adjudications because the dispositional consequences of such were deemed nonpunitive. The juvenile justice system was from its inception understood to constitute a rehabilitative alternative to the punitive criminal justice system. However, as is now well documented, juvenile justice, whatever its original nature, has in many jurisdictions become punitive, thus raising obvious Sixth Amendment public jury trial implications.

This Article has explored those implications by tracing the evolution of juvenile justice from its original roots in the rehabilitative ideal to its present punitive orientation. The Article has shown that while the Supreme Court has yet to speak to the Sixth Amendment consequences of the movement to punitive juvenile justice, a host of lower courts have addressed the matter. As illustrated by a consideration of a sample of cases, an overwhelming majority of lower courts inadequately address the fundamental issue of whether a given disposition is punitive, a necessary aspect of determining the applicability of Sixth Amendment public jury trial rights in juvenile court proceedings. By neglecting to even address the issue, or by applying inade-

384. See *supra* notes 379, 383.

385. It might be argued that even the advantages of retaining the delinquent/criminal distinction could be retained by creating a "delinquent division" within the criminal system. However, it seems likely that within such a system significant blurring of the distinction between "delinquents" and "criminals" would still occur. Convictions within the "delinquency division" would still be convictions by "criminal" courts. Rather than risking an experiment with criminal court delinquency divisions, the following seems wiser:

For a broad range of juvenile offenders however, utilitarian and retributive arguments converge to support adjudication and disposition in a separate juvenile justice system. Such a system, grounded in developmental principles, not only can function more coherently and effectively to achieve the complex societal objectives at stake, but also stands as a powerful symbol that most young offenders are different from their adult counterparts.

Scott & Grisso, *supra* note 19, at 189.

quate definitions of punishment, the courts routinely fail to recognize the public jury trial protections to which juveniles facing punitive dispositions are entitled.

I have offered a remedy to this judicial maladroitness by presenting a conceptual framework which, if utilized, would enable future courts to draw the necessary distinction between punitive and rehabilitative dispositions in determining the applicability of Sixth Amendment public trial and jury trial rights in juvenile court. Recognition of Sixth Amendment rights in delinquency adjudications, with the waiver rights argued for in this Article, affords juveniles even greater protections than those available in adult criminal courts, thus erasing the common characterization of juvenile courts as second class tribunals imposing sanctions similar to those of criminal courts without affording their full array of procedural protections. I have shown that bringing Sixth Amendment protections to delinquency adjudications where punitive dispositions are at stake is not only constitutionally necessary, but sound on policy grounds.

Some have maintained that juvenile courts become redundant once they become punitive, and thus should be merged into criminal courts. I have argued to the contrary; the emergence of punitive juvenile courts in fact manifests its own *raison d'être*, separate from criminal courts. With the availability of Sixth Amendment protections, juvenile courts could operate as procedurally fair vehicles for holding juveniles accountable for their wrongful actions within a system attending to their unique status as young people, while at the same time protecting them from the harshness and stigmatization inherent in the criminal justice system.