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The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences

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JUVENILE LAW

THE EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS AND AGE AND THE CONSTITUTIONALITY OF USING JUVENILE ADJUDICATIONS TO ENHANCE ADULT SENTENCES

INTRODUCTION

The same justice systems served juveniles and adults until the late nineteenth century when society decided to protect child offenders' innocence.[1] The decision to protect juvenile delinquents was based on the premise that juvenile delinquents could be rehabilitated.[2] The fundamental objective of the juvenile justice system was not to determine the guilt or innocence of the juvenile, but rather to examine how the juvenile became whom he or she is and what can be done in the best interest of the child and the state to save him.[3] Recently, however, public perceptions of increasing crime rates and the belief that rehabilitation-based treatment was neither efficient nor deserved influenced the juvenile justice system to treat "delinquents less as misguided but redeemable individuals and more as a faceless army of pint-sized criminals."[4] For instance, "in the last four years, "there have been a total of six mass killings by juveniles."[5] Throughout the last decade alone, "the number of juveniles committing murder, rape, robbery, and assault has increased by 93 percent."[6] However, in the last decade, fear of rising juvenile crime has pro-

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1. Randi-Lynn Smallheer, Sentence Blending and The Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle, 28 HOFSTRA L. REV. 259, 264 (2000). Individuals became more concerned with protecting young offenders rather than punishing them. *Id.* This shift in thinking was based on the belief that the "child's poor living environment, rather than willful behavior, caused juvenile delinquency." *Id.*

2. *See* Danielle R. Oddo, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong With the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 107 (1998). The commission of crimes by children was not the result of a decision by a morally responsible individual; "rather it was a type of youthful illness which could be treated and the child rehabilitated." *Id.* at 107.

3. *Id.*

4. Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in the Juvenile Court*, 75 N.Y.U. L. REV. 159, 166-69, 175 (2000) (noting that "harsh conditions and lack of services characteristic if youth prisons will not provide preadolescent children, who are at a formative stage in their moral and cognitive development, with the educational and therapeutic services necessary to lead law-abiding and productive lives upon release.").

5. Jennifer A. Chin, *Baby-Face Killers: A Cry for Uniform Treatment for Youths Who Murder, From Trial to Sentencing*, 8 J.L. & POL'Y 287, 302 (1999). Because of this increase, or perception of an increase, in violent crimes committed by juveniles, some critics argue for tougher sanctions on juvenile murders. *Id.* at 302. But how should the juvenile justice system treat juveniles who commit violent crimes but not murder? This is an issue addresses by the Tenth Circuit in Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999). *See infra*, notes 72-109.

duced a wave of legislation affecting juveniles which has stated that "children who commit serious crimes should be treated virtually the same as adults."[7] Also, when a case stays in juvenile court, the records of the proceeding can be disclosed to public officials conducting criminal investigations.[8]

Through an analysis of the Tenth Circuit's treatment of juvenile law and sentencing law, this survey will discuss the sentencing of juveniles with a focus on juveniles' constitutional rights. This survey will also discuss the use of juvenile records in the sentencing of adult criminals. Part I discusses *Hawkins v. Hargett*[9] and the Eighth Amendment proportionality test and its application to juveniles sentenced as adult criminals. Part II examines *United States v. McKissick*[10] and the use of juvenile records in the sentencing of adult criminals. This survey evaluates the recent trend in treating juveniles as adults and the future of the juvenile justice system and juveniles' constitutional rights. This survey does not reflect the entire body of juvenile law.[11]

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6. Charles J. Aron and Michael S.C. Hurley, Juvenile Justice at the Crossroads, Champion, June 1998, at 1.

7. *See* Gregory Loken and David Rosettenstein. *The Juvenile Justice System Counter-Reformation: Children and Adolescents as Adult Criminals.* 18 QLR 351, 352 (1999). The "get tough" legislation falls into three main categories: transferring more juveniles to the adult criminal justice system, "increasing the severity of juvenile sentences, and reducing the protections of juvenile confidentiality." Oddo, *supra* note 2, at 113. Laws allowing for the transfer of juveniles to adult courts expose the juvenile to longer incarceration periods with an emphasis on retribution. *Id.* Measures have also been taken to increase juvenile sentences for both maximum and minimum sentences. *Id.* at 114. Moreover, many states replaced "traditional confidentiality protections with open proceedings and records." *Id.* at 115. Some of the changes caused by these new confidentiality provisions may include: open proceedings to the public, some access to juvenile records, the release of the juvenile's name and/or picture to the media or general public, and the use of the juvenile's record in adult sentencing procedures. *Id.* at 116. *See, e.g.*, Or. Laws ch. 422, sec. 48, codified at Org. Rev. Stat. Sec. 161.290 (1997) (eliminating completely the defense of "incapacity due to immaturity" for all persons age twelve or older); Kann. Stat. Ann. §§ 38-1602a(a), 1636(a)(1) (West 1998)(making children as young as ten years old subject to discretionary waiver to adult court for any criminal offense); Conn. Gen. Stat. § 46b-124(c-e) (1997)(allowing for the disclosure of the records of juvenile court proceedings to public officials, to the victim, and to "any person who has a legitimate interest in the information.") For a discussion about the transfer process *See infra* note 43.

8. Loken and Rosettenstein, *supra* note 7, at 352.

9. 200 F.3d 1279 (10th Cir. 1999).

10. 204 F.3d 1282 (10th Cir. 2000).

11. This survey addresses decisions about the Eighth Amendment and its application to the sentencing of juveniles and the use of prior juvenile adjudications to enhance adult sentences rendered by the United States Court of Appeals for the Tenth Circuit between September 1, 1999 and August 31, 2000.

I. SENTENCING OF JUVENILES AND THE EIGHTH AMENDMENT PROPORTIONALITY TEST

A. *History of the Juvenile Court System*

Until recently, society treated juvenile offenders with rehabilitation rather than severe punishment.[12] Underlying that trend is the theory that because children are of a tender age, less culpable, and able to change for the better.[13] The juvenile justice system began as part of "the efforts of [p]rogressive reformers at the turn of the century."[14] The reformers anticipated a system that recognized the belief that children were different from adults and needed protection and nurturing rather than absolute accountability.[15] Thus, the juvenile justice system operated under the idea that the state would act as parens patriae of the child and use its judgment to do what is in the best interest of the child.[16]

1. Emergence of Juvenile's Rights

The juvenile justice system originally focused on rehabilitating children because of the belief that children were responsive to treatment and that treatment was essential.[17] Based on these principles, juvenile court proceedings were informal with the fatherly like judge, the friendly probation officer, and the juvenile and his parents having a conference to

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12. Chin *supra* note 5, at 297. It was thought that a separate juvenile justice system emphasizing rehabilitation would be more beneficial to the child and society. *Id.* The proceedings in this system were less adversarial. *Id.* Juveniles were not offenders, but respondents, and attorney's did not file charges, but instead filed petitions. *Id.* These systems were based on the assumption that children were not criminally responsible for their behavior, and thus, could not be punished like adult criminals. *Id.* at 298.

13. *Id.* at 295-296.

14. Martin L. Forst and Martha-Elin Blomquist. *Cracking Down on Juveniles: Changing the Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB POL'Y 323, 324 (1991). Some commentators suggest that this system developed in response to the shift from a rural society to a urban society which led to accompanying problems of modernization and immigration. *See also* Deborah L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 906 (1996). In an attempt to address these problems, the Progressive reformers offered solutions to incorporating the changes in basic family structure, family functions, and conceptions in childhood and social control. *Id.* at 907.

15. Forst & Blomquist, *supra* note 10, at 324. Essential to the reformers beliefs was the assumption that children were not completely developed physically nor mentally and thus required time to complete their "cognitive, social, and moral development before being expected to shoulder the burden of adulthood." *Id.* "Juveniles were adjudicated 'delinquent' rather than found 'guilty,' and a conviction did not send them to jail. Overall, the goal was to provide juveniles with services to encourage rehabilitation and supervision to help them stay on the right path." Oddo, *supra* note 2, at 107.

16. Sarah M. Coupet, *What to do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System.* 148 U. P.A. L. REV. 1303, 1308 (2000). The concept of parens patriae refers to the role of the state as the custodian of persons who suffer from some form of legal disability; it is this concept that "provides the basis for state laws that protect rather than punish citizens." *Id.*

17. Oddo, *supra* note 2, at 107.

discuss what would be in the child's best interest.[18] But as the number of juvenile offenders increased, providing individualized treatment was not feasible or realistic.[19] Eventually, lawyers, social workers, and child advocates raised concerns that the juvenile justice system was falling short of its goals and that the lack of procedural protections resulted in children being unjustly and arbitrarily punished.[20] "Without right to notice, counsel, or any of the basic protections provided to an adult criminal defendant, a delinquent child often was powerless to contest whatever judgment the court saw fit to pronounce."[21]

The Supreme Court responded to the emerging shortcomings of the juvenile justice system in two significant cases.[22] In *Kent v. United States,*[23] the Supreme Court held that juveniles are entitled to a hearing before transfer to adult criminal court and to the right to confer with counsel throughout the hearing process.[24] The Court emphasized that, in its view, the original purpose of rehabilitation and treatment of juvenile offenders was not being achieved.[25]

Then, in *In re Gault,*[26] the court expanded the definition of juvenile rights by granting juveniles the right to notice of charges, to counsel, to confrontation, to cross-examination of witnesses, and to the privilege against self-incrimination.[27] In *Gault,* the Court reviewed the inadequa-

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18. Smallheer, *supra* note 1, at 265.

19. *Id.* at 266. As a result of the increase in juvenile offenders, the system began either giving juveniles a "slap on the wrist, or . . . sent to large congregate institutions, which could not possible treat each juvenile on an individualized basis" and as a result many dispositions of juvenile cases resembled dispositions of adult criminal cases. *Id.*

20. *Id.* at 267. *See also* Bazelon, *supra* note 4, at 173.

21. Bazelon, *supra* note 4, at 173. "Juvenile court-mandated 'placements' sometimes resulted in terms of imprisonment that far outlasted the harshest sentence the child could have received upon conviction in criminal court." *Id.*

22. Kent. v. United States, 383 U.S. 541, and In re Gault, 387 U.S. 1, discussed *infra* notes 23-30.

23. 383 U.S. 541 (1966). Kent, age 14, was convicted of housebreaking and robbery, and placed on probation. Kent, 383 U.S. at 543. Two years later, Kent was taken into custody by the police for robbing and raping a women. *Id.* The police interrogated him without the benefit of counsel or his parents. *Id.* at 534-544. Kent was then sent to a Receiving Home for a week with no hearing or arraignment. *Id.* at 544-45. The juvenile court waived jurisdiction without hearing and without ruling on any of the motions filed by Kent's attorney. *Id.* at 546.

24. *Id.* at 561.

25. *Id.* at 556. According to the Court, juveniles adjudicated in the juvenile courts "receive the worst of both worlds . . . he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children." *Id. See also* Smallheer, *supra* note 1, at 268. (discussing the shift of the juvenile justice system towards retributions and the constitutional protections afforded to juveniles as a result of this shift).

26. 387 U.S. 1 (1967). Gault was fifteen years old when he was convicted of making obscene phone calls. *In re Gault,* 387 U.S. at 4-10. Gault was sent to the State Industrial School for a maximum of six years by the juvenile court for being a "delinquent." *Id.* at 7-8.

27. *Id.* at 31-57.

cies of the traditional juvenile court proceedings and in its critique the majority said:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, and is frequently a poor substitute for principle and procedure...the absence of substantive standard has not necessarily meant that children receive careful, compassionate, individualized treatment.[28]

Both decisions emphasized the fact that the "juvenile courts had failed to deliver on their promise of treatment, and instead were merely providing punishment in the form of training schools or other types of incarceration." [29] But, as constitutional rights were extended to juveniles, the juvenile court system became more adversarial and more like the adult criminal justice system.[30] In fact, after the *Gault* era, fundamental changes in sentencing of juveniles emerged as the focus shifted to considerations of crime committed and retribution.[31]

Three years after *Gault*, in *In re Winship,*[32] the court imposed a requirement of proof beyond a reasonable doubt for the juvenile court convictions of delinquent acts.[33] The court reasoned that when a juvenile's liberty is at stake, due process requires that the standard of evidence necessary for conviction be as exacting as that applied in adult proceedings.[34] The dissenters in *Winshop* expressed concern that by mandating to juveniles similar procedural due process protections afforded to adult criminals, the Court would destroy the philosophy that warranted maintaining a separate justice system for juveniles.[35] Then, in *Breed v. Jones,*[36] the Court decided that juvenile courts must adhere to the double jeopardy clause.[37] Yet, the Court refused to apply the rationale of *Gault* and *Winship* in *McKeiver v. Pennsylvania,*[38] and held that juvenile delinquents do not have a constitutional right to a trial by jury.[39]

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28. *Id.* at 18-19.

29. Florence B. Burnstein, *Tenth Circuit Survey Juvenile Law*, 76 DENV. U. L. REV. 877, 880 (1999). Thus, Kent and Gault transformed the juvenile justice system from a social welfare agency, to a "wholly-owned subsidiary of the criminal justice system." Smallheer, *supra* note 1, at 269.

30. Smallheer, *supra* note 1, at 269.

31. *Id.*

32. 397 U.S. 358, 368 (1970). In this case, a juvenile was found guilty of stealing money from a women's purse based on a preponderance of evidence standard. *Id.* at 360.

33. 397 U.S. 358, 368 (1970) ("[T]he constitutional safeguards of proof beyond a reasonable doubt is as much required during the adjudicator stage of a delinquency proceeding as are those constitutional safeguards applied in Gault").

34. *Id.*

35. *Id.* at 376. (Burger, J., dissenting).

36. 421 U.S. 519 (1975).

37. *Breed*, 421 U.S. at 541.

38. 403 U.S. 528 (1971).

39. *McKeiver*, 403 U.S. at 547.

2. The Juvenile Justice Today: A Response to Juvenile Crime Rates

The social trend today is to treat juveniles as criminals because of the atrocious crimes they commit.[40] With the increase in violent crimes committed by juveniles,[41] legislators have shown a willingness to treat juvenile offenders as adults.[42] For example, new legislation allows for the removal of juvenile offenders from the juvenile system and into the adult criminal system through the process of transfer or direct filing. [43] Furthermore, many states have expanded the purpose clauses of their juvenile codes to include the promotion of public safety, punishment, and accountability.[44] "Few jurisdictions provide for an intermediary court where juvenile sentencing may be more appropriate".[45] Juveniles in "adult criminal court will be subject to the full range of adult punishment, including life imprisonment and the death penalty."[46]

"High profile cases and regular news reports of gang violence and school shootings have solidified the public view that juvenile crime is out of control."[47] "The period between 1985 to 1994 saw a 100% increase in adolescent homicides, paralleled by a 100% increase in the number of homicides by adolescents using guns."[48] Furthermore, juvenile violence has declined since the peak in 1994, although total arrests

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40. Matthew Thomas Wagman,. *Innocence Lost: In the Wake of Green: The Trend is Clear--- If You Are Old Enough To Do The Crime*, Then You Are Old Enough To Do The Time. 49 CATH. U. L. REV. 643, 644 (2000).

41. According to the Uniform Crime Reports for 1995, over a five year period starting in 1991 juvenile arrests increased twenty percent, more than ten times that of adults. Federal Bureau of Investigation, United States Department of Justice, 1995 Crime in the United States: Uniform Crime Reports 207 (1996). These statistics also illustrated that the police arrested children between the ages of thirteen and fourteen for forcible rape with greater frequency than most other age groups considered juveniles. *Id.* at 218.

42. Loken and Rosettenstein *supra* note 7, at 355.

43. *Id.* "Transfer" of jurisdiction is the process of removal of juvenile offenders to the adult judicial system. *See* Burnstein *supra* note 29, at 880. Transfer can occur if the juvenile court waives jurisdiction or if a statute mandates immediate transfer depending on the type of crime. *Id.* The final way a juvenile can be transferred is through direct filing by the prosecution. *Id.* Legislation may give the prosecutor the discretion to file charges directly either in juvenile court or adult criminal court. *Id.* "Today, most judicial transfer statutes include a list of criteria that a juvenile court judge is allowed to consider or should consider in making a transfer determination." Lisa A. Cintron, "Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court", 90 NW. U. L. R.ev. 1254, 1265 (1996).

44. Mabel Artega, *Juvenile Justice with a Future .for Juveniles*, 2 CARDOZA WOMEN'S L.J. 215, 219 (1995). As the states changes the purpose of their juvenile codes the rehabilitative goals of the juvenile justice system is becoming overshadowed. *Id.*

45. Burnstein, *supra* note 29, at 880.

46. *Id.* at 881.

47. *See* Elizabeth Cauffman, Jennifer Woolard, and N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents Competence and Culpability*, 18 QLR 403, 404 (1999) (noting that regardless of the accuracy of this perception, the sentiment that the juvenile court was too soft led to an introduction in many states of tougher policies for juvenile delinquents).

48. Cauffman *supra* note 18, at 403, citing Al Blumstein, *Violence by Young People: Why the Deadly Nexus?*, NAT'L INST. JUST. J., Aug. 1995, at 3.

remain significantly higher than the rates in the 1980's and these trends and media coverage of these trends have scared the public.[49]

Ironically, the public demand for adult treatment of adolescents did not go beyond the area of retributive justice.[50] For instance, the Virginia legislature "that lowered the age of transfer to fourteen years of age" also prohibits children "under the age of eighteen from getting a tattoo without permission from their parents because they are too immature to make this type of decision on their own."[51] These recent changes in the treatment of juvenile delinquents raises concerns about the psychological and developmental differences between adolescents and adults, specifically in regards to adjudicative competence and culpability.[52]

3. The Eighth Amendment Gross Proportionality Test

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[53] In *Weems v. U.S.*,[54] the Court held that the Constitution requires proportionality in sentencing.[55] Thus, the Eighth Amendment became a constitutional basis for "challenges to excessively harsh prison sentences."[56]

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49. *Id.* at 403.

50. *Id.* at 404.

51. *Id. See generally* Va. Code Ann. § 18.2-371.3 (1999).

52. Cauffman *supra* note 48, at 405. Adjudicative competence refers to "the ability of a person to consult with his or her lawyer and to have a rational and factual understanding of the court proceeding." *Id.* "Culpability refers to the extent to which an individual can be held accountable for his or her actions, and by extension, the degree to which retributive punishment is appropriate." *Id.* For the purposes of this discussion on the Eighth Amendment proportionality, only culpability of adolescents will be further explored.

53. U.S. CONST. AMEND. VIII.

54. 217 U.S. 349 (1910). The issue in this case was a disbursing officer's 15 year sentence to "cadena temporal" for falsifying a cashbook for the port of Manilla in the Philippines. *See id.* at 357-358. "Cadena" is defined as "an afflictive penalty consisting of imprisonment at 'hard and laborious work,' originally with a chain hanging from the waist to the ankle and carrying with it the accessory penalties of civil interdiction, perpetual absolute disqualification from office, and in the case of 'cadena temporal,' surveillance by the authorities during life." Black Law's Dictionary.

55. *Weems*, 217 U.S. at 368. Proportionality is the proposition that a punishment should not exceed the guilt incurred by the commission of a particular crime, gauged by the heinousness of the crime and the culpability of the offender. Chris Baniszewski, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. S.T. L.J. 929, 942 (1993).

56. Benjamin L. Felcher, *Kids Get the Darndest Sentences: State v. Mitchell and Why Age Should Be A Factor in Sentencing for First Degree Murder*, 18 LAW & INEQ. 323, 332 (2000). Eighth Amendment issues arise in three main circumstances: challenges to the death penalty, challenges to the treatment of prisoners, and challenges to the length of prison sentences. *Id.* at FN 69. *See* Mirah Horowitz, *Kids Who Kill: A Critigue of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 SUM. LAW CONTEMP. PROB. 133 (2000) (discussing the history of the death penalty and the juvenile death penalty). The application of the Eighth amendment differs depending upon the issue involved, thus this paper will focus solely upon the Court's decisions

Three cases in which the Supreme Court attempted to clarify the meaning of the Eighth amendment are *Gregg v. Georgia*,[57] *Solem v. Helm*,[58] and *Harmelin v. Michigan*.[59] In *Gregg*, the court created a two-prong test to determine whether a punishment is excessive within the bounds of the Eighth Amendment.[60] The first prong stated that, whatever the punishment, it cannot involve unnecessary and unwarranted infliction of pain.[61] The second prong of the test outlined that the punishment inflicted must be in proportion to the crime committed.[62]

The *Solem* court expanded and clarified the second prong established by the *Gregg* court.[63] Relying on *Gregg*, the *Solem* court held that, regardless of the crime, the sentence imposed must be in proportion to the crime committed.[64] The court stated that, if courts find it necessary to conduct an Eighth Amendment analysis, they should be guided by an objective analysis of the following factors: (1) the seriousness of the crime as well as subsequent punishment, (2) how the state treats other criminals, in order to determine whether or not criminals who commit more serious crimes are subject to a less severe penalty, and (3) how other jurisdictions adjudicate the crime.[65] These factors should be viewed "in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[66]

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involving the duration of prison sentences and its application to juveniles specifically in the Tenth Circuit's decision in Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999).

57. 428 U.S. 153, 187 (1976) (holding that a death sentence for the crime of murder does not constitute cruel and unusual punishment).

58. 463 U.S. 277 (1983). In *Solem*, the court overturned a life sentence imposed upon a defendant who was found guilty of his seventh felony, the last of which was forging a check. *Id.* at 281-82. In so holding, the court stated that although the judiciary must show substantial deference to legislatures enacting sentencing schemes, the sentence must be proportionate to the crime committed. *Id.* at 290.

59. 501 U.S. 957 (1991). The *Harmelin* court modified the Eighth Amendment proportionality principle and agreed that courts should use the *Solem* objective criteria analysis only in cases where the defendant's sentence was "grossly disproportionate" to the offense. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

60. *Gregg*, 428 U.S. at 173.

61. *Id.*

62. *Id.*

63. *See generally Solem*, 463 U.S. 277. In *Solem*, the court reversed the imposition of a life sentence without the possibility of parole for the cashing of a $100 check for which the defendant did not have an account. *Id.* at 284. *See also* Felcher, *supra* note 56, at 331-338 (discussing the history of the Supreme Court Eighth Amendment Jurisprudence).

64. *Solem*, 463 at 290.

65. *Id.* at 291-92. Based on those factors, the Court found the defendant's sentence "significantly disproportionate his crime, and . . . therefore prohibited by the Eighth Amendment." *Id.* at 303.

66. *Id.* at 292. The majority supported the position that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted" with an inquiry into the history of the adoption of the Eighth Amendment. *Id.* at 284-286. The Court stated that the list of established principles was not exhaustive, but simply illustrative of *generally* accepted criteria for comparing the severity of different crimes on a broad scale. *Id.* at 294.

In *Harmelin*, the court rejected the *Solem* three-prong test for proportionality. [67] The court modified the proportionality test and found that it does exist in narrow circumstances.[68] In sum, the law today states that no defined proportionality between the crime and sentence mandated by the Eighth Amendment exists, but rather the Eighth Amendment prohibits outrageous sentences, that are "grossly disproportionate."[69]

4. The Eighth Amendment Proportionality Test and Its Application in the Sentencing of Juveniles in the Tenth Circuit: *Hawkins v. Hargett*[70]

a. Facts

Trent Hawkins, thirteen years and 11 months old, broke into a neighbor's home, tied the neighbor up with ropes, blindfolded her, and then, raped and sodomized her repeatedly.[71] "Throughout the two and half-hour episode, Mr. Hawkins threatened the victim with a knife and threatened to kill her children if she told the police."[72] "After the sexual assault, Mr. Hawkins took seven dollars from the victim's purse and fled."[73] The court certified Mr. Hawkins to stand trial as an adult and the Court of Appeals upheld that decision.[74] "A jury found Mr. Hawkins guilty of first degree burglary, robbery with a dangerous weapon, forcible sodomy, and second degree rape."[75]

b. Sentencing

"The jury sentenced Mr. Hawkins to maximum sentences of twenty years for the burglary, twenty years for forcible sodomy, fifteen years for rape, and up to forty-five years out of a possible life sentence for robbery with a dangerous weapon."[76] "The trial judge ordered that Mr. Hawkins serve the sentences consecutively, resulting in a total term of one hun-

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67. Harmelin v. Michigan, 501 U.S. 957, 986-91 (1991). Harmelin was convicted of possession of cocaine. *Id.* at 961. Harmelin argued that the mandatory life sentence could only be the harshest of a series of penalties available to a sentencing court, imposed only after a determination that such a sentence would not be grossly disproportionate to the particular crime and defendant. *Id.* at 994-95.

68. *Id.* at 996-1009 (Kennedy, J., concurring in part and concurring in the judgment).

69. *Id.* at 1001. (Kennedy, J., concurring in part and concurring in the judgment). (emphasis added).

70. 200 F.3d 1279 (10th Cir. 1999).

71. *Hawkins*, 200 F.3d at 1280.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Hawkins*, 200 F.3d at 1280.

dred years."[77] "The Oklahoma Court of Criminal Appeals affirmed Mr. Hawkins' convictions and sentences."[78]

Mr. Hawkins filed an application for post-conviction relief in state court and argued that his sentence violated the Eighth Amendment.[79] The court denied relief, and the state court of criminal appeals affirmed.[80] Mr. Hawkins then filed a habeas corpus petition in federal district court.[81] The federal court referred the petition to a magistrate judge for a proportionality review.[82] "The Magistrate's report and recommendations included a detailed proportionality review and recommended denying Mr. Hawkins' petition."[83] The district court adopted the recommendation and affirmed the lower court decision, and then Mr. Hawkins appealed.[84] Mr. Hawkins asked that the Tenth Circuit "examine whether the consecutive sentences were constitutionally disproportionate in light of the fact that, at the time he committed the crimes, he was only thirteen years old."[85]

c. The Eighth Amendment Proportionality Test

First, the court held that the Eighth Amendment proportionality test set forth in *Harmelin* was applicable.[86] After discussing *Solem* and *Harmelin,* the court concluded that the *Harmelin* test was applicable because "Justice Kennedy's opinion was the controlling position of the court since his opinion both retains proportionality and narrows *Solem.*"[87] Thus, the court proceeded to review Mr. Hawkins' sentence in relation to his crimes for "gross disproportionality."[88]

Mr. Hawkins urged the court "to consider his youth at the time of the crimes as a mitigating factor."[89] The court held that "[t]he chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate in as much as it relates to culpability."[90] Culpability is "weighed by examining factors such as the defendant's motive and level of scienter, among other

77. *Id.*; Hawkins v. State, 742 P.2d 33 (Okla. Crim. App. 1987)
78. *Hawkins*, 200 F.3d at 1280.
79. *Id.* at 1281.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Hawkins*, 200 F.3d at 1280.
85. *Id.*
86. *Id.*
87. *Id.* at 1282.; McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992); United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992); McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir. 1992).
88. *Hawkins*, 200 F.3d at 1283.
89. *Id.*
90. *Id.*

things."[91] The court recognized the Supreme Court's indication "that the age of a young defendant is relevant, in the Eighth Amendment sense, to his culpability."[92] In *Thompson v. Oklahoma*,[93] the Supreme Court concluded that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[94]

In *State v. Green*,[95] the Supreme Court of North Carolina found that, "while the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime, the court's review is not limited to that factor."[96] In that case, the court upheld a mandatory life sentence for a thirteen-year-old convicted rapist.[97] Similarly, the court held that "age is a relevant factor to consider in a proportionality analysis."[98] However, the conclusion by the court to consider Mr. Hawkins' age did not lead the court to find Mr. Hawkins' sentence "grossly disproportionate" to his crimes.[99] The court emphasized the seriousness of Mr. Hawkins' crimes.[100] The crimes involved "a deadly weapon, a home invasion, threats of violence, and repeated sexual attacks."[101] "Although his culpability may be diminished somewhat, due to his age at the time of his crimes," the court stated that the sentence is more than "counterbalanced by the harm Mr. Hawkins caused to his victim."[102]

Furthermore, the court underscored the fact that the length of sentence can change considerably by the availability of parole and "good time" credits.[103] The court had previously held that "the availability of

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91. *Id.*; Solem v. Helm, 463 U.S. 277, 293-294, 103 S.Ct. 3001 (1983).

92. *Hawkins*, 200 F.3d at 1283.

93. 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed.2d 702 (1988).

94. Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed.2d 702 (1988). A 15-year-old participated in the brutal murder of his brother in law who had been beating his sister. *Id.* at 816. The court convicted the boy of first degree murder and sentenced him to death. *Id.* On certiorari, the United States Supreme Court vacated the sentence stating that the imposition of the death penalty against the defendant would violate the cruel and unusual punishment clause in the Eighth amendment because of the boys age at the time of the offense. *Id.*

95. 348 N.C. 588, 502 S.E.2d 819 (1998).

96. *Green*, 348 N.C. at 609-610. "North Carolina is among the minority states that allow for juvenile offenders to be transferred to adult criminal court for adjudication." *See* Wagman, *supra* note 40, at 654. In State v. Green, Andre Green was arrested and convicted for raping a twenty-three-year-old woman. *See Green*, 348 N.C. at 593-96. The North Carolina Supreme Court held that the sentence was not contrary to societal standards of decency, the sentence was not disproportionate to the crime committed, and that a mandatory life sentence was not cruel and/or unusual punishment. *Id.* at 602-03. The court held that crime transcended the realm of crimes usually committed by children and that because the court considered Green unamendable to treatment that an adult sentence was the only appropriate remedy for the victim and the state. *Id.* at 610.

97. *Green*, 348 N.C. at 609-612.

98. *Hawkins*, 200 F.3d at 1284.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

parole is relevant to determining whether the length of a sentence violates the Eighth Amendment"[104] Mr. Hawkins had already finished his sentences for the rape and sodomy convictions.[105] The court pointed out that Mr. Hawkins would "serve a total of thirty-five years for all four convictions combined, and would be eligible for parole in approximately fifteen years."[106] Furthermore, the court noted that the sentences met the "permissible statutory range for the offenses he committed."[107]

The court concluded that, "in the light of Mr. Hawkins' crimes, the Supreme Court's benchmarks, and the legislature's proper role in setting sentencing ranges," that Mr. Hawkins' one hundred year sentence with the possibility of parole was not grossly disproportionate to the four violent acts that he committed, nor did it violate "evolving standards of decency" simply because the defendant was thirteen years old at the time of the offense.[108]

B. *Other Circuits*

Other circuits also deal with the proportionality issue in the context of youthful defendants given statutorily mandated sentences.[109] In *Harris v. Wright,*[110] the defendant was fifteen years old when he committed aggravated first-degree murder and received that state's mandatory sentence of life without parole.[111] The defendant argued that his sentence was "grossly disproportionate" to a fifteen-year-old's limited culpability for any crime.[112] The Ninth Circuit disagreed, holding that it had no power to reverse the state legislature's decision on the matter. [113]

In *Rice v. Cooper,*[114] the Seventh Circuit decided that life without parole was not a disproportionate punishment for a sixteen-year-old mentally retarded boy who killed four people.[115] Although the court stated

104. *Id.*
105. *Hawkins*, 200 F.3d at 1284.
106. *Id.*
107. *Id.*
108. *Id.* at 1285.
109. *See infra*, notes 110-119.
110. 93 F.3d 581 (9th Cir. 1996).
111. *Harris*, 93 F.3d at 581. The court stated that the sentence was consistent with the evolving standards of decency and that at least twenty-one other states allowed life without parole sentences to be mandatory imposed on fifteen year olds. *Id.* at 583-586.
112. *Harris*, 93 F.3d at 584.
113. *Id.*
114. 148 F.3d 747 (7th Cir. 1998).
115. *Rice*, 148 F.3d at 747. The boy, who was encouraged by two friends, tossed a bottle of gasoline into an apartment building. *Id.* at 749. "The bottle exploded setting a fire that killed four residents of the building." *Id.* The boy was convicted of first degree murder and sentenced to a natural life in prison. *Id.* In upholding the sentence, the court examined the fact that the United States Supreme Court had rejected the argument that mandatory life sentences, including mandatory life without the possibility of parole, are unconstitutionally just because they prevent the consideration of mitigating factors such as age. *Id.* at 752.

that the defendant's youth argued for a lighter sentence, it found that the statutorily mandated sentence of life without parole was not disproportionate to the crime. [116]

Some circuits determined that the availability of parole should foreclose proportionality review altogether, reasoning that any sentence less than life without parole can never be "grossly disproportionate.[117] However, the Tenth Circuit refused to go that far.[118] It recognized the availability of parole as a relevant consideration but refused to make it a dispositive factor.[119]

C. *Analysis*

The Tenth Circuit's decision in Hawkins is consistent with the recent trend to treat juvenile criminals as adults.[120] Juvenile justice, as it is currently practiced, "imposes two significant costs on American youth."[121] First, the juvenile court itself no longer fulfills its promise of rehabilitation.[122] Second, courts, corrections, and other youth serving agencies are allowed to ignore the inherent youthfulness of many defenders now defined as adults.[123] Thousands of fourteen and fifteen-year-olds are "removed to criminal courts every year to be treated just like any other adult."[124] Furthermore, "[t]he use of structured sentencing fundamentally contradicts the basic premise of juvenile justice by making sentence length proportional to the severity of the offense rather than basing court outcomes on the characteristics and life problems of the offenders."[125]

"The public's widespread and angry sentiment toward young offenders has fueled the most recent demands for reforming the juvenile

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116. *Id.*

117. *See, e.g.*, United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995) (holding that the court will not "engage in a proportionality analysis except in cases where the penalty imposed is death or life imprisonment without the possibility of parole"); United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995) (holding that "It is well settled that proportionality review is not appropriate for any sentence less than life imprisonment without the possibility of parole) ; United States v. Meirovitz, 918 F. 2d 1376, 1381-82 (8th Cir. 1990) (The defendant was convicted of conspiracy to distribute cocaine and possession of cocaine with the intent to distribute and sentenced to life without parole. After conducting the three factor Solem analysis, the court concluded that the defendant's life sentence without parole, although harsh, did not violate the proportionality requirement of the Eighth amendment.).

118. *Hawkins*, 200 F.3d at 1284.

119. *Id.*

120. *See infra* notes 109-119.

121. Jeffrey A. Butts, Can We Do without a Juvenile Justice? 15-SPG CRIM. JUST. 50, 52 (2000).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 55. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988). The dissent in this case noted that merely because a state permits juveniles to be prosecuted as adults it does not necessarily follow that the legislature deliberately concluded that it would be appropriate to impose capital punishment on juveniles.

justice system."[126] However, contrary to popular belief, juvenile crime is not rising out of control.[127] The Bureau of Justice Statistics' National Crime Victimization Survey indicates that, between 1993 and 1997, serious violence by juveniles dropped by thirty-three percent.[128] Although incidences of violent juvenile crime continue to capture headlines, the majority of juvenile court cases involve nonviolent property offenses.[129] The Coordinating Council on Juvenile Justice and Delinquency Prevention reported in 1996 that only a fraction of youth are arrested for violent crimes each year.[130]

Juvenile justice policies are cyclical in nature with polices "shaped directly by changing social responses to juvenile crimes and rhetoric about juvenile delinquency, rather than by actual increases in criminality."[131] This vicious cycle of constantly changing juvenile justice policy begins when officials and the general public believe that juvenile crime is high, and the result is a shift towards harsher punishment.[132] A more balanced approach to fighting juvenile crime than just treating juvenile offenders like adults is needed. A more sensible approach is to incorporate both offender and offense-focused factors in accountability, public safety, and competency development, while delivering appropriate consequences for delinquent conduct and maintaining a focus on long-term objectives for offenders.[133] This balanced approach improves the current system by including restorative principles and, at the same time, preserving the original intent of those who created a separate system for children.[134] A restorative system allows for recognition "that violations

126. Coupet, *supra* note 16, at 1330.

127. *Id.*

128. Statistical Briefing Book. Online. Available. http://www.ojjdp.ncjrs.org/ojstatbb/qal35.html.30 September 1999. Furthermore, "[t]he rate at which juveniles committed aggravated assaults declined 33% between 1994 and 1995 and remained relatively stable thereafter." *Id.* "The number of robberies by juveniles rose in 1981 and 1993, but by 1997, had dropped below the rates seen in the 1970's." *Id.*

129. Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations, Future of Children*, Winter 1996, at 7 ("Although violent juvenile crime grab headlines, the bulk of the court's delinquency work is in the handling of a large volume of crimes against property such as larceny, vandalism, and motor vehicle theft.").

130. Coordinating Council on Juvenile Justice and Delinquency Prevention, Combating Violence and Delinquency: The National Juvenile Justice Action Plan 1 (1996). "Juveniles are responsible for a far greater share of all property crime arrests (33 percent) than either violent crime arrests (18 percent) or drug arrests (8 percent)." *Id.* "In 1993, the highest percentage of juvenile arrest, compared to adults, was for arson (49 percent), vandalism (45 percent), and motor vehicle theft (44 percent). *Id.*

131. Coupet, *supra* note 16, at 1328.

132. *Id.*

133. *Id.* at 1341.

134. *Id.*at 1342.

create obligations and these obligations are bilateral—the offender must acknowledge and take responsibility to both victims and offenders."[135]

In fact, statistics have shown the failure of harsher punishments to deter juvenile crime.[136] For instance, a 1986 New York study found that, for juveniles transferred to adult court at the onset, the likelihood of continued involvement in criminal activity once they were back on the streets increased.[137] Furthermore, a study in Idaho concerning the deterrent effect of their transfer statute reached the conclusion that waivers to adult court neither deter juvenile crime nor lower the rate of violent juvenile crime.[138] Other research indicates that juveniles incarcerated with adults may actually become more violent as a reaction to the violence they regularly experience in prison.[139] The transfer of juveniles to the adult system is incapacitating a system already overwhelmed with too many adult offenders.[140] Also, juveniles in adult prisons are more likely to be victims of sexual assault, beatings by staff, and attacks with weapons than those in juvenile centers.[141]

Transferring juveniles to adult court appears to lack consistent deterrent effects, and incarcerating them seems equally ineffective.[142] Even though the United States permits the execution of individuals for murders committed as juveniles,[143] "the United States continues to have one of the

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135. *Id.* at 1341. Restorative justice focuses on relationships as well as individuals with the aim of justice on promoting the healing of and the relationships of the victims, community, and offenders. *Id.*

136. *See infra* notes 135-139.

137. Candace Zierdt, *The Little Engine That Arrived At The Wrong Station: How To Get Juvenile Justice Back On The Right Track,* 33 U.S.F. L. REV. 401, 422 (1999).

138. *Id.* at 423.

139. *Id.* at 426.

140. *Id.*at 423. This results in the need to build more prisons which is a cost absorbed by society. *See id.* at 425. "In 1994, taxpayers spent an average of $23,000 per year to keep a person in prison and approximately $70,000 per year to keep a prisoner in maximum security." *Id.* Because of this "get tough" policy, "the United States has the highest rate of incarceration in the world with a prison population growth rate that is ten times more likely that that of the general population." *Id.* at 424.

141. Zierdt *supra* note 137, at 423.

142. *Id.* at 421. *See also* Smallheer, *supra* note 1, at Fn106 (noting that according to Juvenile Justice Reform Initiatives in the States, from 1994-1996, studies confirm that juveniles transferred to adult criminal court have higher recidivism rates than juvenile offenders retained in juvenile court and that juveniles prosecuted as adults are more likely to re-enter society as criminals rather than as rehabilitated than their courter-parts retained in juvenile court). *See also,* Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court,* 19 B.C. THIRD WORLD L.J. 621, 656 (1999) (discussing additional studies that support the assertion that punitive legislative responses to juvenile offender does not meet its deterrence goals). *See also* Forst and Bloomquist, *supra* note 14, at 362 (stating that "[e]ven long periods of confinement in juvenile facilities are of questionable utility. Although on a lesser scale than prisons, violence and intimidation also occur in training schools. Moreover, all too often juvenile institutions simply warehouse youths.).

143. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on any person who murders at 16 or 17 years of age does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.).

highest rates of adolescent homicides," which serves as "further proof that even the most severe deterrence based reforms have failed to significantly reduce juvenile criminal activity."[144] Although "transferring juveniles to the adult court system is the mostly widely used method of increasing severity of sanctions for youth offenders," a more balanced approach is the use of blended sentencing.[145] "Instead of choosing between sentencing a juvenile in adult or juvenile court, a judge may draw upon both systems."[146]

Typical sentence blending allows "a juvenile court judge to impose both a juvenile disposition and a stayed adult criminal sentence upon a conviction of a juvenile offender."[147] "If the juvenile offender fails to conform to the requirements of the juvenile disposition, the stay of the adult criminal sentence may be revoked and the juvenile may be transferred to an adult correctional facility."[148] Sentence blending extends juvenile court jurisdiction into criminal court and is designed to give the juvenile a wake-up call and one last chance to change his criminal behavior.[149] Currently, in the juvenile justice system, the judge can either retain the juvenile and in his discretion impose a mandatory minimum sentence or even a more severe sentence, or he can transfer the juvenile to adult court where the juvenile will be susceptible to adult sentencing procedures.[150] While the present choice offers judges an all-or-nothing approach (juvenile court or adult court), sentence blending is an effort at integrating rehabilitation with accountability.[151]

Eighth Amendment proportionality challenges brought by juveniles against sentences, such as life without parole, have met "limited success in state courts and no success in the federal system."[152] Juveniles, who

144. *Id.*

145. Butts, *supra* note 121, at 54.

146. *Id.*

147. Smallheer, *supra* note 1 at 275.

148. *Id.*

149. David Holmstrom, *Punishment Alone Fails to Contain Juvenile Crime*, CHRISTIAN SCI. MONITOR, Apr. 9, 1998, at 13.

150. *See generally*, Hunt, *supra* note 143.

151. Smallheer *supra* note 1, at 276.

152. Wayne A. Logan, *Article: Proportionality and Punishment: Proposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 684 (1998). *See* Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) (holding a life without parole sentence of a 15-year-old convicted of aggravated first degree murder); *See also* State v. Foley, 456 So. 2d 979 (La. 1984) (upholding a sentence of life without parole at hard labor for a 15-year-old convicted of aggravated rape); State v. Moore, 906 P.2d 150, 153-54 (Idaho Ct. App. 1996) (noting that consideration must be given to the youth and immaturity of the offender, but concluding that a term of 25 years to life imposed on a 14-year-old for first degree murder of a police officer was not disproportionate); State v. Pilcher, 655 So. 2d 636, 642-43 (denying the challenge brought by a 15-year-old against a mandatory life without parole sentence for two counts of murder, noting the age of the victim); Rodriguez v. Peters, 63 F.3d 546, 568 (7th Cir. 1995) (refusing to consider the age of the 15-year-old defendant in challenge to life without parole sentence); State v. Spence, 367 A.2d 983, 989 (Del. 1976) (affirming sentence of life without parole and stating that the defendant's youth is irrelevant); State v. Douglas, 216 Wis. 2d

are at least sixteen years of age at the time of their crimes, can be sentenced to the death penalty, and just short of that, juvenile offenders may receive society's "penultimate punishment of life without parole."[153]

Traditionally, the justice system accorded special treatment to juveniles.[154] Thus, the judiciary should be sensitive to their youth, background and culpability when sentencing them as adults.[155] A sentence that is not "grossly disproportionate" for an adult may be so for a juvenile.[156] It is a basic reality that juveniles differ from adults in fundamental ways.[157] Many young offenders have intellectual deficits, learning problems or psychopathology.[158] Juveniles are simply not as able to make sound judgments concerning many decisions.[159] The National Mental Health Association states that up to seventy percent of children in the juvenile justice system suffer from mental or emotional disorders.[160] Arguably, youth may commit crimes due to deficiencies in psychosocial factors that adversely affect judgment which weakens the presumption of autonomy, free will, and rational choice—all attributes which criminal adult responsibility is based.[161] Psychological and scientific data support the idea that young children process information markedly differently from adults.[162] Furthermore, research indicates that children from underprivileged backgrounds "have underdeveloped cognitive skills and are more likely to adopt the inappropriate norms that they experience everyday."[163] Often mental health experts testify "that preadolescent children

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114, 1997 WL 757701, at 4* (Wis. Ct. App. 1997)(denying proportionality claim of a 15-year-old against a sentence that extended beyond his natural life, the court was not persuaded that based on the petitioner's age alone, the parole eligibility date is excessive or constitutes cruel of unusual punishment).

153. Logan, *supra* note 153, at 689.

154. *See e.g.* Smallheer, *supra* note 1; Oddo, *supra* note 2.

155. Logan, *supra* note 153, at 709.

156. *Id.*

157. *Id.*

158. *See* Stanford v. Kentucky, 492 U.S. 361, 398 (1998) (Brennan, J., dissenting) (citing and discussing studies done on juvenile death row inmates indicating high rates of psychological, intellectual, and emotional disabilities). *See generally* Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 PSYCHOL. PUB. POL"Y & LAW 3 (1997)(providing extensive overview of relevant studies regarding a child's capacity). *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (A 14 year old boy, no matter how sophisticated is unlikely to have any conception of what will confront him).

159. Logan, *supra* note 152, at 709.

160. Holmstrom, *supra* note 149, at 12.

161. Cauffman, *supra* note 47, at 416.

162. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 157 (1997). A recent study on the ability of juveniles to understand their privilege against self-incrimination found that children aged 10 to 12 understood their rights no better than mentally retarded adults and significantly less well than their 13 to 15 year old counterparts. *See* Grisso, *supra* note 158, at 12.

163. Bazelon, *supra* note 4, at 189. "[W]hile most preadolescents struggle to learn the reasoning and analytical skills necessary to make moral choices meaningful...children from disadvantaged backgrounds tend to struggle harder, and with less success." *Id.* For instance, "in a

have a limited capacity to appreciate the irreversibility of their actions or pinpoint why their behavior is criminal."[164]

Even the Supreme Court noted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[165] The Supreme Court also indicated that, because of the special qualitative characteristics of juveniles, this justifies legislatures to treat them differently from adults, which is relevant to Eighth Amendment proportionality analysis.[166]

The decision to commit a crime involves the consideration of potential consequences, and most states enforce laws, such as the legal drinking age, legal driving age, voting rights, and curfews "based on the recognition that children do not possess the same decision-making capacity as adults."[167] "This legal recognition of a child's limited ability to make informed decisions should apply with equal force to the way society responds to children who have exercised that limited choice-making faculty to commit a crime."[168] Age, per se, should not be determinative of proportionality because some juveniles are capable of moral culpability.[169] But age should be a trigger for heightened proportionality analysis, "requiring a special vigilance" among courts with "respect to the background and traits of the young offender to ensure the presence of the culpability prerequisite to the sentence of life without parole."[170]

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study of fourteen juveniles on death row, twelve had been brutally abused physically and five had been sodomized by older family members." Horowitz, *supra* note 56, at 157.

164. Bazelon, *supra* note 4, at 189.

165. Thompson v. Oklahoma, 487 U.S. 815, 835 (O'Connor, J., concurring).

166. *Id.* at 854 (O'Connor, J., concurring).

167. Felcher, *supra* note 56, at 347-348. No state allows minors under age Eighteen to vote or to sit on a jury. *See* Stanford v. Kentucky, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting). Only four states allow minors under Eighteen to marry without parental consent; only fourteen states allow minors to consent to medical treatment; and forty-two states prevent minors from purchasing pornographic material. *See id.* According to Justice Brennan, these restrictions placed on minors reflect "the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern." *Id.* at 395. *See also*, Horowitz, *supra* note 56 (discussing the failure of the criminal justice system to recognize the fundamental differences distinguishing juveniles from adults and how that difference reduces culpability of juvenile offenders).

168. Felcher, *supra* note 56, at 347-348.

169. Logan, *supra* note 152, at 723.

170. *Id. See also* Thompson v. Oklahoma, 487 U.S. 815, 853 (O'Connor, J., concurring) ("Proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."); *see also* Naovarath v. State, 779 P.2d 944, 946 (Nev. 1989)("In deciding whether the sentence [LWOP imposed on a 13-year-old] exceeds constitutional bounds it is necessary to look at both age of the convict and at his probable mental state at the time of the offense."). *See also*, Forst and Bloomquist, *supra* note 14, at 367 (stating that "age per se should be a legally relevant variable in any consideration of capacity to violate the criminal law as well as responsibility for criminal activity.").

II. SENTENCING AND REDUCED CONFIDENTIALITY OF JUVENILE COURT PROCEEDINGS AND RECORDS

A. *Background*

1. Right to Confidentiality

Based on the theory that juvenile court proceedings are not criminal in nature, the courts established only basic procedural rights for juveniles.[171] Some decisions have broadened juveniles' due process rights, but the Supreme Court has failed to grant juveniles constitutional protections equivalent to those granted to adults.[172] For instance, in *In re Gault*,[173] the court stated that the Constitution requires that fourteenth amendment due process guarantees apply to juvenile proceedings.[174] Yet, the court still maintained discretion in some other areas such as sentencing.[175] Judges could consider the juvenile's race, sex, home environment, and other factors not considered in adult cases.[176]

Although the Sixth Amendment guarantees the right to an impartial jury in all criminal prosecutions,[177] the Supreme Court also failed to grant juveniles the constitutional right to jury trials.[178] In *McKeiver v. Pennsylvania*,[179] the Court, in a plurality opinion, refused to extend the juvenile due process rights established in *Gault* to include the right to a

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171. Coupet, *supra* note 16, at 1314. The atmosphere and organization of the juvenile justice system was intended to give an impression of concern. *See* Smallheer, *supra* note 1, at 265. The focus was on acting in the best interest of the child—not obtaining convictions or adjudicating the child guilty or innocent. *See id.* Because the court operated more like a social agency than a criminal court and sought to rehabilitate the juvenile, constitutional protections were not deemed necessary. *See id.*

172. Hunt, *supra* note 143, at 678. In Lanes v. State, 767 S.W.2d 789, 794 (Tex. Ct. App. 1989), the court summarized the Eighth main cases that explained juvenile rights: (1) protection against coerced confessions, Haley v. Ohio, 332 U.S. 596 (1948); (2) procedural requirements for certification hearings, Kent v. U.S., 383 U.S. 541 (1966); (3) the rights of notice, counsel, confrontation, cross-examination, and protection against self-incrimination, *In Re* Gault, 387 U.S. 1 (1967); (4) proof beyond a reasonable doubt, In re Winshop, 397 U.S. 358 (1970); (5) that a jury trial is not required, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); (6) double jeopardy protections, Breed v. Jones, 421 U.S. 519 (1975); (7) the validity of pre-trial detention, Schall v. Martin, 467 U.S. 253 (1984); and (8) a diminished Fourth Amendment standard applicable to school searches, New Jersey v. T.L.O. 469 U.S. 325 (1985).

173. 387 U.S. 1 (1967).

174. *Gault*, 387 U.S. at 27-30.

175. David Dormont, *For the Good of the Adult: An examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1779-81 (1991).

176. *Id.* at 1780.

177. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In Duncan, the Court held that the right to a jury trial in criminal cases is fundamental to the American scheme of justice. *Id.*

178. Dormant, *supra* note 175, at 1780-1786 (discussing the right to jury trial as it applies to adults and juveniles).

179. 403 U.S. 528 (1971). Sixteen-year-old McKiever was charged with robbery, larceny, and receiving stolen goods. *Id.* at 534. The court denied his request for a jury trial at his adjudication hearing. *Id.* at 535.

jury trial.[180] Although the court recognized serious shortcomings in the juvenile justice system, the Court emphasized that a jury is not necessary for accurate fact-finding in the context of a juvenile proceeding and that other procedural rights adequately protected the accused juvenile.[181]

"Almost all juvenile court proceedings and records remained confidential as recently as the 1960's."[182] Confidentiality comprised a critical part of the juvenile justice system based on the idea that labeling a "juvenile as a law violator would stigmatize a young person."[183] But during the 1980's and 1990's, "support for confidentiality protections began to erode."[184] Nearly all states now allow juvenile fingerprints to be included in criminal history records and authorization of juveniles to be photographed for later identification.[185] "In addition, many states enacted laws that required juvenile records to remain open longer or prevent the sealing or destruction of juvenile records altogether, typically those involving violent or serious offenses."[186]

2. Use of Juvenile Records in Sentencing

"Some states have even passed laws enabling juvenile court records to affect criminal court sentences."[187] At least twenty states allow for the use of juvenile adjudications to enhance adult criminal sentences.[188] Thus, "adjudication in juvenile court begins to entail potentially serious jeopardy for youth."[189] Laws or statutes that permit such practices allow juvenile offense histories to serve as sufficient grounds for increasing

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180. *McKiever*, 403 U.S. at 545.

181. *Id.* at 547.

182. *See* Butts, *supra* note 121, at 55.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* Since 1992, "several states have passed legislation that gives the general public and/or media access to the name and address of a minor adjudicated delinquent for specified serious or violent crimes." OJJDP Research Report: State Response to Serious and Violent Juvenile Crime, p.75 (1996) " In all, 39 states permit the release of a juvenile's name and/or picture to the media or general public under certain conditions." *Id.* "From 1992 through 1995, several states enacted or modified their statutes with respect to notice to schools." *Id.* at 79. "As of 1995, 25 states had statutes or court rules that either increase the number of years for which a serious and violent offender's records must remain open or prohibit sealing or expungement of the record." *Id.* at 85. *See* Oddo, *supra* note 2, at 115.

187. Butts, *supra* note 121, at 55.

188. Sara E. Kropf, *Note: Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentencing Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2175 (1999).

189. Butts, *supra* note 121, at 55. For instance, Illinois and Indiana allow past juvenile offenses to serve as sufficient grounds for increasing the lengths of sentences or imposing consecutive sentences. *Id.* Furthermore, California, Louisiana, and Texas allow the use of juvenile adjudications to serve as the first and second strikes against an adult offender. *Id.* Thus, in these states, a juvenile offender with two prior juvenile court adjudications could face life in prison for a first appearance in adult criminal court. *Id.*

sentence length or imposing first and second "strikes" against an adult offender.[190] Thus, an offender with two prior juvenile adjudications could face life in prison for a first appearance in adult criminal court.[191]

Despite the case law prohibiting the use of prior uncounseled convictions, federal courts must include prior juvenile adjudications in adult sentencing calculations.[192] Federal courts generate their sentencing determinations with guidelines promulgated by the United States Sentencing Commission.[193] The core of the United States Sentencing Guidelines (Guidelines)[194] is a sentencing table, consisting of forty-three base offense levels and six criminal history categories, identifying the applicable sentencing range for offenders.[195] According to the Guidelines, assignment to the highest criminal history category, level VI, includes those classified as career offenders.[196] Juvenile defendants, those Eighteen years of age at the time of offense, who commit crimes of violence or controlled substance offenses and have at least two similar prior felony convictions, are then career offenders.[197] The Guidelines treat prior sentences, imposed in related cases, as one sentence for purposes of calculating the criminal history category.[198] Points are based on the length of the sentence imposed for the prior sentence rather than on the severity or nature of the offense.[199] The reason for enhancing sentences through this

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190. *Id.*

191. *Id.*

192. Robert E. Shepard, *Trying Juveniles in Federal Court*, 9 CRIM. JUST. 45, 47 (1994).

193. Paul M Winters, et al., *Project: Twenty-fourth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1993-1994 Sentencing Guidelines*, 83 GEO. L.J. 1229, 1229 (1995).

194. United States Sentencing Commission, Federal Sentencing Guidelines Manual section Ch.1, Pt.A(4)(h) (1999) [hereinafter U.S.S.G]. The Guidelines are applicable to all offenses committed on or after November 1, 1987. U.S.S.G. Ch.1, Pt.A(1). When a defendant is convicted in federal court, the judge must impose a sentence based on the Guidelines in effect at defendant's sentencing date. *Id.*at Section 1B1.11.

195. The vertical axis of the Sentencing Table is the base offense level. *Id.* at Ch.5, Pt. A. The criminal history category constitutes the horizontal axis of the table. U.S.S.G. Ch.5, Pt.A. The judge determines the appropriate category by totaling the number of criminal history points calculated in the pre-sentencing report. *Id.* section 4A1.1. The points start at zero and have no upper limit. *Id. See* Sentencing Table. A defendant with 13 or more points have a criminal category of VI, regardless if their point total is 14 or 43. *Id.* at Ch.3, Pt.A.

196. U.S.S.G. section 4B1.1.

197. Winters et al., *supra* note 192, at 1244.

198. U.S.S.G. section 4A1.2. In regards to offenses committed prior to age eighteen section 4A1.2(d) of the Guidelines reads: (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under section 4A1.1(b) for each such sentence. (2) In any other case, (A) add 2 points under section 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days of the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under section 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). *Id.*

199. *Id.* at Sec. 4A1.1. Three points are added for each prior sentence exceeding one year and a month in length regardless of whether the prior offense was forgery, drug dealing, or murder. *Id.*

method is because the Sentencing Commission "sought to punish recidivism and to protect the public from future criminal behavior."[200]

3. Use of Juvenile Records in Sentencing in the Tenth Circuit: *United States v. McKissick*[201]

a. Facts

On December 7, 1997, a shooting took place in the parking lot of a nightclub in Oklahoma City.[202] The police arrested Mr. McKissick and Mr. Ziegler, the suspects, for discharging a firearm from a motor vehicle shortly after the shooting.[203] The police also found cocaine in Mr. McKissick's car and cocaine on Mr. Ziegler.[204] The trial court convicted Mr. McKissick of being a felon in possession of firearm, possession of crack cocaine with intent to distribute, and use of a firearm during, and in relation to, a drug offense.[205] The court convicted Mr. Ziegler of crack cocaine possession.[206] Both defendants appealed.[207] In relation to the sentencing of Mr. Ziegler, the court of appeals held that "prior state court convictions of the defendant, tried as an adult for offenses occurring when he was a juvenile, could be counted in determining applicability of federal mandatory life sentence."[208]

b. Sentencing

Mr. Ziegler contended that "the district court violated his rights to equal protection under the law when it used Oklahoma drug convictions both as predicates for the 21 U.S.C. Section 841(b)[209] enhancement and as convictions resulting in three criminal history points, each under U.S.S.G. Section 4A1.2(d)."[210] Mr. Ziegler argues that "he was treated

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200. "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." *Id.* sec. 4A introductory commentary.

201. 204 F.3d 1282 (10th Cir. 2000).

202. *McKissick*, 204 F.3d at 1287.

203. *Id.* at 1288.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1282.

209. *Id.* at 1300. *See also* 21 U.S.C. Section 841(b). 21 U.S.C. Section 841(b)(1)(A) requires a mandatory life sentence if the defendant committed the instant offense "after two or more prior convictions for a felony drug offense have become final." 21 U.S.C. Section 841(b)(1)(A).

210. *McKissick*, 204 F.3d at 1300; *See also* U.S.S.G. Section 4A1.2(d). For offenses committed prior to the age of eighteen, if the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under Section 4A1.1(a) for each such sentence. 4A1.2(d)(1). For any other case, (A) add 2 points under section 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within the five years of his commencement of the instant offense; (B) add 1 point under

differently than similarly situated persons because some states do not allow the unsealing of juvenile records, and the states differ on the ages and crimes for which persons under eighteen can be prosecuted as adults."[211]

The Tenth Circuit reviewed the equal protection claim "under the rational basis standard to determine whether the challenged sentence was based on arbitrary distinction or upon a rational sentencing scheme."[212] In drug trafficking cases involving fifty grams or more of cocaine base, 21 U.S.C. Section 841(b)(1)(A)[213] requires a mandatory life sentence if the defendant committed the instant offense after two or more prior convictions for a felony drug offense have become final.[214] Although U.S.S.G. § 4A1.2(c)(2) provides that juvenile status offenses are never counted as a prior sentence, the statute requires three points to be added if the defendant committed the prior offense to the age of eighteen and if the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month.[215]

The Tenth Circuit concluded that "the use of Mr. Ziegler's felonies as predicate offenses for the section 841 enhancement did not deprive him of equal protection under the law."[216] The court looked at congressional intent and concluded that Congress "left certain aspects of sentence enhancement to the laws of the states and that the language of the statute tied" the definition of the term felony to the state's clarification of the crime as a felony."[217]

The court looked at Mr. Ziegler's conviction as an adult for the two Oklahoma felonies.[218] "Although states have different criteria for determining when a juvenile can be charged as an adult," the court stated that the different criteria did not "render the sentencing scheme irrational any more than relying on the state's various definitions of felonies."[219] The court held that "Mr. Ziegler's assertion that similarly situated juveniles might be treated differently because some states allow the unsealing of

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section 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). 4A1.2(d)(2).

211. *McKissick*, 204 F.3d. at 1301.

212. *Id.* at 1300; Chapman v. U.S., 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

213. *See* 21 U.S.C. Section 841 (b)(1)(A).

214. *Id.* at Section 841(b)(1)(A)(viii).

215. U.S.S.G. Section 4A1.2(c) and (d)(1).

216. *McKissick*, 204 F.3d at 1301.

217. *Id.* Congress requested the creation of the Sentencing Guidelines to prohibit the abuses and biases occurring under the system of discretionary sentencing. Dormont, *supra* note 175, at 1771-1772. Congress intended for the Guidelines to ensure that courts treat similarly situated defendants the same. *Id.*

218. *McKissick*, 204 F.3d at 1301.

219. *Id.*

juvenile records, is inapplicable" since Mr. Ziegler had been "convicted as an adult."[220]

4. Other Circuits

Like several other circuits, the Tenth Circuit accepted the constitutionality of the sentence enhancement provisions without question.[221]

Certain types of prior sentences are generally part of the defendant's criminal history calculations, however, the circuit courts do not always agree as to what constitutes an includable prior sentence. [222] In *United States v. Unger,*[223] the First Circuit ruled that uncounseled juvenile proceedings count towards the criminal history scoring.[224] In *United States v. Matthews,*[225] the Second Circuit held that, because the state statute did not eliminate all trace of the prior adjudication and allows consideration of youthful offender adjudication in later proceedings, a youthful offender adjudication in the state is not an "expunged" conviction for purposes of sentencing under the Guidelines.[226] Therefore, the court concluded that the district court properly included the defendant's youthful offender adjudication in calculating his criminal history category.[227]

In *United States v. Asburn,*[228] the Fifth Circuit held that a juvenile conviction, automatically set aside under a state statute, properly received the prior sentence designation.[229] Finally, in *United States v. Bar-*

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220. *Id.*

221. *See* United States v. McKissick, 204 F.3d 1282.

222. U.S.S.G. section 4A1.2(c). According to the Guidelines, sentences for offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic violations, public intoxication, and vagrancy do not count towards criminal history scoring. *Id.* To work around these constraints the Guidelines "place no caps on the number of points an adult may acquire from his juvenile record." Dormont, *supra* note 171, at 1774.

223. 915 F.2d 759 (1st Cir. 1990), cert. denied, 498 U.S. 1104 (1991).

224. *Unger*, 915 F.2d at 761-62. Unger allegedly engaged in a variety of criminal conduct as a juvenile, including breaking and entering, receiving stolen goods, and assault and battery. *Id.* at 763. In failing to prove this conduct, the state could not convict Unger of these offenses, but instead found him guilty of being wayward. *Id.* Two years later, an adult court judge used this wayward finding to increase his criminal history score, imposing the maximum sentence. *Id.* at 760.

225. 205 F.3d 544 (2nd Cir. 2000).

226. *Matthews*, 205 F.3d at 548. The defendant was convicted of possession of a firearm by a felon in violation of 18 U.S.C.S. Section 922(g)(1)(1994). *Id.* at 545. In calculating his sentence, the lower court used the defendant's youthful criminal adjudications to magnify his sentence under the U.S. Sentencing Guidelines Manual Section 4A1.1, 4A1.2. *Id.*

227. *Id.* at 548-549.

228. 20 F.3d 1336 (5th Cir.), opinion reinstated in part on reh'g en banc, 38 F.3d 804 (1994), cert. denied, 115 S. Ct. 1965 (1996).

229. *Asburn*, 20 F.3d at 1343. The defendant appealed the sentence given to him after he pleaded guilty to 2 counts of bank robbery. *Id.* at 1337. The court held that the "set aside" provision "should not be interpreted to be an expungement under 4A1.2(j) in calculating the defendant's criminal history category". *Id.* at 1343. The court reasoned that because the youth convictions had been "set aside for reasons unrelated to innocence or errors of law" that they were properly used to calculate the defendant's criminal history category. *Id.*

ber,[230] the Sixth Circuit upheld a sentence enhancement based on the defendant's extensive criminal history dating back to the age of twelve.[231] The court accepted the government's contention that the defendant's current criminal history category did not reflect the seriousness of the defendant's past criminal conduct or the likelihood that he would commit other crimes, and thus the court granted the government's motion for upward departure in sentencing.[232]

In contrast, the Seventh Circuit held, in *United States v. Kozinski,*[233] that a sentence of supervision not based on a finding of guilt received improper consideration as a prior sentence.[234] Yet, in *Nicholas v. United States,*[235] the Supreme Court allowed the use of a prior uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction that did not, by itself, justify imprisonment.[236]

These failed challenges to the constitutionality of the use of prior juvenile adjudications to enhance adult sentences illustrates that the courts are resistant to limiting the harsh effects of punitive sentencing on young offenders and unwilling to consider how the lack of procedural safeguards available to juveniles in juvenile courts harm convicted adult offenders with juvenile records.[237]

5. Analysis

Although juveniles do not have the same due process rights that adults receive,[238] juvenile offense records are regularly used to lengthen subsequent adult criminal sentences.[239] This trend appears to demand a higher standard of due process rights, such as the right to a trial by jury.[240] The *McKiever* court's decision to deny juveniles the right to a

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230. 200 F.3d 908 (6th Cir. 2000).

231. *Barber*, 200 F.3d at 914. In addition to his adult record, the defendant had nine juvenile convictions for which he was assessed no criminal history points. *Id.* at 909. The court held that the offenses were properly considered as part of a recidivism inquiry and the sentence increase was affirmed. *Id.* at 912.

232. *Id.* at 910.

233. 16 F.3d 795 (7th Cir. 1994).

234. *Kozinski*, 16 F.3d at 812. The court held that the Sentencing Guidelines made clear that "a prior sentence is any sentence previously imposed upon adjudication of guilt whether by guilty plea, trial, or plea of nolo contendere." *Id.* at 911. (citing U.S.S.G. Section 4A1.2(a)(1).

235. 114 S. Ct. 1921 (1994).

236. *Nicholas*, 114 S. Ct. at 1928. The court emphasized that "sentencing courts have not only taken into consideration prior convictions, but also considered a defendant's past criminal behavior, even if no conviction resulted from that conduct." *Id.*

237. *See* Hunt, *supra* note 142, at 658-669 (discussing implications for the future of the juvenile justice system and the effects of recent punitive sentencing).

238. Butts, *supra* note 121, at 51.

239. Kay Redeker, *Comment: Solidifying the Use of Juvenile Proceedings as Sentence Enhancement and Clarifying Second-Degree Murder*, 37 WASHBURN L.J. 483, 486 (1998).

240. Hunt, *supra* note 142, at 645. "The right to a jury trial allows gives offenders bargaining power to discuss a plea agreement with prosecutors," furthermore "It may also be more difficult to obtain the unanimous guilty verdict necessary for a jury to convict an offender that to convince a

jury trial was based on two assumptions: (1) "juvenile proceedings result in treatment, not punishment," and (2) "juvenile proceedings will not detrimentally affect the juvenile when she reaches the age of majority."[241] These assumptions are not accounted for in the United States Sentencing Guidelines.[242] Thus, courts upholding the use of section 4A1.2(d) base their decision on an erroneous understanding of the "constitutional underpinnings that allow juveniles dispositions absent a jury trial."[243] "If a sentence was imposed under the guise of therapy, it should remain a therapeutic sentence; it should not be allowed to metamorphosize into a criminal conviction at the prosecution's convenience."[244]

Because juveniles do not have the same constitutional protections as adults, arguably, juveniles convicted without a jury or represented by counsel—unless the jury trial is validly waived—are unconstitutionally convicted.[245] Therefore, using such juvenile convictions to enhance later adult sentences under the Guidelines is called into question.[246] The Guidelines allow courts to use prior juvenile adjudications to enhance adult sentences by adding points to a defendant's criminal history score—treating juvenile confinements like adult sentences to the detriment of the adult defendant.[247] When juveniles may face additional confinement as an adult because of juvenile delinquency, then juveniles are entitled to the same protection that juries provide to adults.[248] However, commentary in the Guidelines and Supreme Court case law prohibit courts from using prior unconstitutional adjudications to enhance later sentences.[249] So, if a prior juvenile adjudication is unconstitutional be-

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single judge of an offender's guilt" which increases the likelihood that a juvenile will be found guilty. *Id.*

241. Dormont, *supra* note 175, at 1790. The *McKiever* court based its decision on the fact that a finding of delinquency being significantly different from than a finding of criminal guilt. *McKiever*, 403 U.S. at 540. The court assumed that the juvenile delinquency proceeding would not stigmatize the child a criminal. *McKiever*, 403 U.S. at 552. (White, J., concurring). *See also* Dormont, *supra* note 175, at footnote 105.

242. *Id.* at 1791. *See also* U.S.S.G. § 4A1.2(d).

243. Dormont, *supra* note 175, at 1791.

244. *Id.* at 1794.

245. Kropf, *supra* note 188, at 2179. To deny juveniles due process rights, that ensures that criminal trials are conducted fairly and that similarly situated defendants are afforded the same constitutional protections, ignores the purpose and intent of the Due Process Clause and the Sixth Amendment. *Id.* at 2180. "Failure to apply constitutional protections such as due process rights to juvenile proceedings was justified under the 'legal fiction' of protective confinement and rehabilitation instead of criminal punishment." Coupet *supra* note 16, at 1314.

246. Kropf, *supra* note 188, at 2179.

247. Dormont, *supra* note 175, at 1792.

248. *Id.* at 1795.

249. Kropf, *supra* note 188, at 2179.

cause the juvenile did not receive fundamental due process rights, then under the Guidelines the court cannot use the prior conviction.[250]

On the other hand, one could argue that "sentencing adults who have a significant criminal history as first offenders is tantamount to offering a double discount."[251] "[T]he offender received a discount at the juvenile level (first juvenile offense) and should not be accorded a second completely fresh start.[252] However, "juvenile priors should not carry the same weight as adult previous convictions."[253] Perhaps a compromise would be to use the juvenile record to disentitle an adult of first-offender status—but not to extend its influence much more than that.[254] In fact, many sentencing guideline systems do just that, namely, counting juvenile adjudications, but with strict limiting standards.[255]

CONCLUSION

"The current juvenile justice system lacks a coherent and consistent policy on how to deal with juveniles."[256] Although the Due Process Clause attempts to ensure that criminal trials are fair and that similarly situated defendants have the same constitutional rights, juveniles do not have the equivalent due process rights as adults.[257] But due process issues in juvenile adjudications extend beyond the individual juvenile's trial.[258] When courts use the Sentencing Guidelines to enhance adult sentences, the courts "unconstitutionally ignores the different protections afforded the juveniles and the different policies that underpin the juvenile justice system."[259]

Historically, the law protected juveniles, but with a perceived increase in juvenile crime rates and violent juvenile crimes, the prospect of

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250. *Id.*

251. Julian V. Roberts, *Article: The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 326 (1997). "The importance of targeting repetitive violent offenders is clear from the juvenile record provisions in many states." *Id.* at 330. According to a Bureau of Justice Statistics study the presence of juvenile offenses was one of the most significant predictors of adult reconviction. *Id.* at 327.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* "The guidelines in Florida count all prior convictions but only if they occurred within a three year period proceeding the commission of the primary offense." *Id.* "In Kansas, the age of the offender is a determining factor" with juvenile adjudications extinguishing "once the adult reaches twenty-five years of age." *Id.*

256. Leta R. Holden, *Tenth Circuit Survey: Juvenile Law*, 73 DENV. U. L. REV. 843, 856 (1996).

257. Kropf, *supra* note 188, at 2180.

258. *Id.*

259. Dormont, *supra* note 175, at 1770. *But see* Mills, *supra* note 14 (arguing that (1) juveniles have almost all of the constitutional protections given to adult criminals, (2) the Guidelines reinforce the important goal of recidivism, and (3) by using juvenile crimes to enhance adult sentences, the Guidelines realistically address the nature and increase of juvenile crime).

a uniform standard by which to treat juveniles seems unpromising.[260] However, the "get tough on crime" rhetoric has prompted reformers to enact legislation that threatens to replace the juvenile justice system as a forum for dealing with juvenile delinquents as adult criminals.[261] Sentencing policies, such as Eighth Amendment proportionality analysis in juvenile cases and the expungement of juvenile records, "threaten to constructively dismantle the system that has protected juveniles" and valued rehabilitation over punishment.[262] Perhaps in the future new efforts will begin to reflect the original intent of the juvenile justice system—rehabilitation and reform, which are more effective than punishment.[263]

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260. Burnstein, *supra* note 29, at 902.

261. Coupet, *supra* note 16, at 1346.

262. *Id.* Children are vulnerable to the effects of long sentences in adult prisons and will not just spend time there but will essentially be raised in the prison environment. *See* Felcher, *supra* note56, at 347.

263. *Id.*