Juvenile Justice on Appeal

MEGAN ANNITTO*

Few situations, if any, in our justice system grant one judge authority without review over matters concerning personal liberty. Close inspection of the juvenile justice system reveals, however, that, in reality, the outcomes of nearly all juvenile delinquency cases are determined by one individual alone, sometimes in the absence of counsel, and usually entirely outside of public view. While there is widespread recognition that appellate practice on behalf of juveniles is lacking, there is little quantitative data available to define the scope of the problem. Aside from ensuring accuracy, the lack of appeals hampers the ability of appellate courts to define the contours of criminal law and procedure in its

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application to juveniles, one of its core appellate functions. The dearth of appellate practice also intersects with the struggles of the juvenile justice system to overcome disparate results for minority children, including confinement. This article provides original empirical data identifying the rate of appeals in fifteen states. The data from the study grounds the discussion about juvenile appeals and informs efforts toward improvements. The article also examines the ways in which this limited appellate practice restricts law development by analyzing appellate case law in juvenile justice over the past ten years.

Public recognition of the institutional role of appellate courts has increased, due in part to cases and studies examining post-conviction determinations of actual innocence—including innocent children. Those findings have resonated with the public and raised important policy and structural questions about the justice system. This renewed attention creates an opportunity to improve and highlight the role of the appellate function in the juvenile justice system as well. Appellate courts in the criminal justice system protect against error and define the rights of the accused, increasing accuracy, public accountability, and transparency. The article examines the repercussions in an area of law where the appellate role and transparency to the public is overwhelmingly absent and calls for states to take a more active role in effectively realizing the right to appeal among juveniles.

INTRODUCTION

> *"There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property . . . ."*[1]

Despite the existence of a right to appeal juvenile delinquency cases in all states, the outcome is nearly always left to a single judge. Although the discretion of judges in juvenile delinquency cases is not "unreviewable," in practical terms, juvenile delinquency cases are rarely subject to appellate review.

Imagine, for example, the situation of Joan, a fifteen-year-old African-American high school student living in a low-income neighborhood. Joan has had no prior contact with law enforcement. Joan and her friend were at a park on the property of the neighborhood high school at 11:30 p.m., a local nighttime hangout where groups of youths congregated. Joan sat on a park bench with her friend as her friend smoked a ciga-

1. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting) (Justice Brennan continued, "and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.").

rette. A few groups of other teens were nearby on the basketball court, including Joan's brother, who put some of his possessions in her bag at one point when he went to the court to play basketball. A fight broke out and a number of police officers responded. As Joan and her friend rose to leave, two officers approached the area where they had been seated. The officers asked them to come toward two police cruisers parked nearby where at least two other officers were present. Having observed Joan's friend throw down her cigarette, one of the police officers inquired what Joan's friend had been smoking. He then asked Joan if he could open the bag she was holding. She shrugged her shoulders, moved the strap of her bag from her shoulder into her hand, and held it forward toward one officer. She did not, however, give a verbal answer. The officer reached forward, opened the bag, and discovered a weapon. Joan was arrested and charged with felony possession of a weapon on school property.[2] Joan did not know that the knife, which belonged to her older brother, was in the bag. Joan's brother had placed the weapon inside with keys and a few other items before playing basketball. He fled from the park when the fight broke out.

Joan appeared in court with her older sister, age seventeen, who accompanied her because her mother could not miss work. Joan waived her right to appear with counsel.[3] She then pled, confused about the process, and later received one year of probation. As a result of her adjudication for a felony in her jurisdiction, Joan's DNA will be included in the state DNA registry under the statute requiring registration of felons, which includes juvenile adjudications.[4] She also will be eligible for enhanced adult sentencing if she is convicted later as an adult.[5]

Age and previous experience with law enforcement are permissible factors for consideration under the totality of the circumstances analysis that applies in the court's analysis of consent to search.[6] In Joan's juris-

2. *See, e.g.*, OHIO REV. CODE ANN. § 2923.122(E)(1) (West 2008); CONN. GEN. STAT. ANN. § 53a-217b(a) (West 2001).

3. Waiver of counsel is common in juvenile courts across the country. *See, e.g.*, PATRICIA PURITZ & CATHRYN CRAWFORD, NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS v (2006), *available at* http://www.njdc.info/pdf/Florida%20Assessment.pdf ("Observers were often troubled by Florida's high rates of waiver of counsel . . . ."). Puritz writes that young children are observed routinely waiving counsel, which often occurs "with a wink and a nod—or even encouragement—from judges." *Id.* at 2. Many states do not require the presence of a parent or guardian for a valid waiver. *See infra* Part II.B.1.

4. See *infra* note 216 and accompanying text (describing DNA collection from juveniles).

5. *See infra* Part II.C.1 and accompanying notes 194–213 (discussing the use of juvenile adjudications as sentencing enhancements).

6. *See, e.g.*, *In re* J.M., 619 A.2d 497, 504 (D.C. 1992) (en banc) (remanding on the issue of consent to a search by a fourteen-year-old and requiring the trial judge to "deal expressly and

diction, age and previous experience with law enforcement have not been explored nor applied in great detail in existing case law. Case law exists, however, to support suppression of the item found in the search of Joan's bag.[7] At trial, it also would have been necessary to show that Joan *knowingly* possessed the weapon.[8] But none of the issues in Joan's case were litigated, and, therefore, will never be discussed on appeal.

Six months later, Joan, whose picture was then included in the juvenile photo book at the precinct after her first arrest, was identified by another teenager in a photo array as having committed a robbery with a knife in the neighborhood. This time, Joan did not waive her right to counsel and the case went to trial. Joan claimed she was innocent but the eyewitness insisted that Joan was the perpetrator. The same judge who handled Joan's prior case presided over her robbery trial. The judge also had a report from probation that Joan's compliance was mediocre. The probation report stated that Joan was hanging around with "gang-involved" youth, a term the office uses when a child reports that he or she knows people in gangs. At trial, Joan lost, despite conflicting testimony by the minor who identified her in the photo array and the actual victim, who was unable to identify Joan. Joan was eventually ordered to confinement in a juvenile facility. Joan's attorney, strapped with a caseload above the recommended norm,[9] had received little appellate training, so Joan's case was not appealed. Joan now has two felony juvenile adjudications on her record, adjudications which contain serious questions about their reliability and accuracy.

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thoroughly with the significance of age before finding that a juvenile has consented to a search"); E.J. v. State, 40 So. 3d 922, 923–24 (Fla. Dist. Ct. App. 2010) (remanding where the court found lack of consent to a search, and holding that whether consent is voluntary is a question of fact to be determined from the totality of the circumstances, one of which is the age of the defendant).

7. *See In re* J.M., 619 A.2d 497, 503 (D.C. 1992) (en banc) (remanding trial court decision and instructing the trial court to consider the fourteen-year-old defendant's age when determining whether the defendant consented to a search); *In re* Daijah D., 927 N.Y.S.2d 342, 343–44 (N.Y. App. Div. 2011) (reversing and dismissing petition where trial court incorrectly ruled that fourteen-year-old girl voluntarily consented to search of her purse when she was stopped and confronted by four police officers and handed an officer her purse upon request). In *Daijah*, the court noted that age and prior experience with the law were necessary factors for the court to consider. 927 N.Y.S.2d at 343; *see also E.J.*, 40 So. 3d at 924 (holding that conduct by a fourteen-year-old with no prior experience with law enforcement who placed her hands on top of the car and stood with her legs apart "[did] not yield the conclusion that she consented but merely acquiesced to the authority around her and what she expected was required in the circumstances").

8. *See, e.g.*, OHIO REV. CODE ANN. § 2923.122(B) (West 2008); CONN. GEN. STAT. ANN. § 53a-217b(a) (West 2001).

9. *See* ABA, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 5 n.19 (2002), *available at* http://www.sado.org/fees/tenprinciplesbooklet.pdf (endorsing the caseload maximums issued by the National Advisory Commission recommending that an attorney be assigned no more than 200 juvenile delinquency cases, 150 felony cases, 400 misdemeanor cases, 200 civil commitment proceedings, or twenty-five appeals in one year).

While Joan's cases are hypothetical, the facts used are not uncommon. The lack of appeals in juvenile practice has been identified as a problem throughout the country by the ABA, scholars, and practitioners.[10] Without a vibrant appellate practice, the legal rights of juveniles suffer and "are often illusory."[11] Not surprisingly, juvenile courts were recently explored as a probable "breeding ground" for wrongful convictions.[12] Moreover, the juvenile delinquency process often remains hidden from any form of public participation due to closed courtrooms in many states, coupled with the lack of right to a jury trial, making appeals one of the only avenues of transparency.[13] Even in the adult criminal context, which remains open to the public, when other public characteristics of the appellate process are curtailed, such as production of written opinions and oral argument, Professor Paul Carrington plainly states, "[w]e should worry about that."[14] When appeals are simply absent, the implications multiply.

The Supreme Court has held that the right to a criminal appeal is not a constitutional right,[15] but appeals are so ingrained in our concept of justice that every state provides the right to file an appeal for both adult and juvenile defendants.[16] Criminal defendants are generally viewed as being able to pursue appeals with frequency.[17] In contrast,

10. The ABA stated that "[a]n alarming aspect of juvenile defense is the infrequency with which appeals are taken." PATRICIA PURITZ ET AL., NAT'L JUVENILE DEFENDER CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 10 (1995), *available at* http:www.njdc.info/pdf/cfjfull.pdf [hereinafter 1995 ABA REPORT]. The report was initially authored by the ABA Juvenile Justice Center, which later became the National Juvenile Defender Center. *See also* Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 898 (2010) (noting that juvenile court defendants rarely make use of appeals).

11. Gary L. Crippen, *Can the Courts Fairly Account for the Diminished Competence and Culpability of Juveniles? A Judge's Perspective*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 403, 411, 414 (Thomas Grisso & Robert G. Schwartz eds., 2000) (stating that children's legal rights are "often illusory" without a healthy appellate practice).

12. *See generally* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 321 (2007); Tepfer, Nirider & Tricarico, *supra* note 10, at 898.

13. *See infra* Part II B.2 (describing the various approaches by many states that have closed courtrooms under different circumstances for juvenile cases).

14. Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459, 469 (2009). Carrington writes that the absence of public proceedings as part of the appellate process, such as oral argument and written opinions, leaves the public without knowledge of the error correction process. *Id*. In the juvenile context, the cause for worry would, by that measure, increase quite significantly.

15. McKane v. Durston, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now, a necessary element of due process.").

16. *See infra* Section I. A. (describing the right to appeal).

17. *See, e.g*., WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL

there is widespread acknowledgement that appeals in the juvenile delinquency context are lacking, even "nearly non-existent."[18] But there is no recent empirical data measuring the infrequency and little exploration of the systemic implications. There is only one published study post-*Gault*[19] containing quantitative juvenile appellate statistical case data; that study includes information for one state during one calendar year, 1990.[20]

The Supreme Court has issued three landmark decisions "that profoundly alter the status and treatment of children in the justice system" in just six years.[21] Notably, two of the cases arose where children were tried outside of the juvenile court as adults.[22] The ability of the justice system to implement and apply the reasoning supporting those opinions depends, in many ways, on the juvenile appeals process, which is infrequent at best. While there is some consideration in the literature about *why* there are few appeals,[23] there is little analysis about how the dearth

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PROCEDURE § 1.3(r) (4th ed. 2004) ("[I]n some jurisdictions, as many as 90% of the defendants who were convicted after trial and sentenced to prison will appeal their convictions."); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 96–97 (1996) (discussing the increased appeals resulting from increased access to counsel by indigent defendants after 1960, particularly after 1983). Posner concluded, "[g]iven a free lawyer, the cost of appealing falls to zero, and the defendant will have no reason not to appeal even if the chances of winning are slight—as they are." *Id.* at 118; *see also* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 470 (2004) (discussing the prevalence of criminal appeals).

18. *See* ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, NAT'L JUVENILE DEFENDER CTR. ET AL., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS 38 (2006), *available at* http://www.njdc.info/pdf/Indiana%20Assessment.pdf ("Appellate practice by local trial offices is nearly non-existent, and the process by which appeals are handled is unclear."); *see also* 1995 ABA REPORT, *supra* note 10, at 10.

19. *See generally In re* Gault, 387 U.S. 1 (1967).

20. Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 233–35 tbl.2 (1994).

21. Marsha Levick, J.D.B. v. North Carolina: *The U.S. Supreme Court Heralds the Emergence of the 'Reasonable Juvenile' in American Criminal Law*, 89 CRIM. L. REP. 753, 753 (2011). The three cases are *Graham v. Florida,* 130 S. Ct. 2011 (2010), *Roper v. Simmons,* 543 U.S. 551 (2005), and *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

22. Graham v. Florida*,* 130 S. Ct. 2011, 2018 (2010); Roper v. Simmons, 543 U.S. 551, 557 (2005).

23. *See, e.g.*, Harris, *supra* note 20, at 217–18. Additionally, the 1995 ABA Report, along with the subsequent series of state assessments performed by the ABA, and, later, the National Juvenile Defender Center, discuss the reasons posited about why appeals are lacking. *See, e.g.*, KEHOE & TANDY, *supra* note 18, at 38. As a whole, the institutional role of the appellate courts in the criminal context receives a "relative lack of scholarly attention" as compared to civil cases. *Cf.* Chad M. Oldfather & Michael M. O'Hear, *Criminal Appeals: Past, Present, and Future*, 93 MARQ. L. REV. 339, 339 (2009) (citing the relative lack of scholarly attention as a primary impetus for a recent conference at Marquette University Law School "to examine enduring and emerging issues relating to the exercise of the appellate function in criminal cases"); *see also* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825,

of appellate process hampers the development of the application of criminal procedural law to juveniles, both procedurally and substantively.

This article focuses specifically on juvenile delinquency appeals. Overall, the discussion examines the effects of the absence of appellate practice on the core appellate court functions: error correction, law-making, and uniformity. It includes recent original data that measures the rate of appeals in fourteen states. It also examines the written appellate opinions available online via Westlaw nationally over a ten year period in order to explore the possible broader effects on the development of the law.

Part I discusses the right to criminal and juvenile appeals and the legal and historical development of this right. It also reviews the limited research and data available about delinquency appeals and discusses factors that contribute to the current dearth of delinquency appellate practice. Part II explores aspects of juvenile practice that distinguish it from criminal cases and characteristics, such as collateral consequences, that are similarly punitive. Part II also examines the absence of appeals as a missed opportunity to address disproportionate minority confinement in the juvenile justice system.

Part III provides empirical data collected from states, revealing the rates of juvenile appeals. Because judicial opinions play a central role in the development of the law, Part IV then analyzes written appellate juvenile delinquency opinions available via Westlaw's database. It isolates opinions that discuss Fourth and Fifth Amendment challenges and challenges to juvenile dispositions.

Part V examines the role of appeals going forward and suggests that states assess the access of the right to appeal by juveniles. Curtailment of the appellate right puts defendants at risk of erroneous convictions.[24] "Appellate courts, through their decisions of cases and the explanations for their decisions, declare, make, and reshape legal doctrine in common-law, statutory, and constitutional fields."[25] If that is not happening at this critical phase of the justice system, what is the impact on rights of juveniles, and what is the communal cost? Judicial engagement with questions in criminal justice can deter unlawful police conduct, promote better law enforcement and training, and influence the

826 (2009) (discussing lack of attention to criminal appeals and why criminal appeals in particular warrant more scholarly attention).

24. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting); *see also* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 514 (1992).

25. DANIEL JOHN MEADOR & JORDANNA SIMONE BERNSTIEN, APPELLATE COURTS IN THE UNITED STATES 4 (1994).

integrity of judicial proceedings.[26] It is also the mechanism by which state courts develop rights under individual state constitutions, an area where criminal procedural law has been a "driving force."[27]

I. Appellate History and Process

A. *Right to Criminal Appeals*

Appellate review is not a constitutional right under the U.S. Constitution.[28] It is, however, recognized as a cornerstone of the justice system, particularly in the criminal context.[29] Sixteen states provide a constitutional right to a criminal appeal,[30] and others extend the right by statute.[31] In a unanimous decision in 1894, the Supreme Court stated that there is no constitutional right to a criminal appeal.[32] In 1983, the Court again reiterated in dicta in *Jones v. Barnes* that "[t]here is, of course, no constitutional right to an appeal . . . ."[33] That conclusion was not left without challenge in that instance. Justice Brennan remarked that it was, in fact, "arguably wrong."[34] Despite this disagreement, however, the Court has ruled consistently with this view since the time it was first announced.[35] Nevertheless, all states extend the right to file a criminal

26. *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States*,* 2010–2011 Cato Sup. Ct. Rev. 237, 256 ("Governments employ about 870,000 law enforcement officers in the United States, and the Fourth Amendment regulates them together with many other government actors."); *cf.* Arthur L. Burnett, Sr., *An Irony: Greater Protection of Individual Rights Now Found in State Courts*, Crim. Just., Spring 2007, at 20, 27 (explaining that a more robust invocation of state constitutional rights in state courts to develop criminal procedure has effects beyond the rights of the accused).

27. Robert F. Williams, The Law of American State Constitutions 125 (2009).

28. *See* McKane v. Durston, 153 U.S. 684, 687 (1894).

29. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("Appellate review has now become an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant."); *see also* Arkin, *supra* note 24, at 578 ("It is difficult to think of another procedural institution of such enormous practical significance that exists wholly outside the constitutional aegis."); Heise, *supra* note 23, at 825 ("[F]ew dispute the appellate process's centrality to justice systems, especially in the criminal context . . . ."); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 379 (1995) ("The appeals process . . . is a widely observed feature of litigation.").

30. Arkin, *supra* note 24, at 516 n.64 (citing fifteen state constitutional provisions and, where relevant, court interpretations finding a right to appeal). These states include Arizona, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Utah, Washington, and Wisconsin. *Id*. In addition, the Pennsylvania Constitution provides a right to appeal that has been interpreted to include criminal and juvenile delinquency cases. Pa. Const. art. V, § 9 (as interpreted by *In re* A.P., 617 A.2d 764, 766 (Pa. Super. Ct. 1992)).

31. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.").

32. *McKane*, 153 U.S. at 687.

33. Jones v. Barnes, 463 U.S. 745, 751 (1983).

34. *Id*. at 756 n.1 (Brennan, J., dissenting).

35. Arkin, *supra* note 24, at 506–07; *see also* Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir.

appeal, with almost all states providing one appeal as a matter of right.[36]

Even though there is no federal constitutional right to appeal, once a state grants the right to appeal, it must provide counsel for indigent defendants in a first appeal, so as not to discriminate against the indigent on equal protection grounds.[37] Some states extend this right beyond the first appeal, providing representation at the post-conviction phase and beyond. For example, the Pennsylvania Supreme Court has held that the right to counsel extends all the way through appeals taken from revocation hearings.[38] Similarly, Pennsylvania courts determined that the right to counsel under state law attaches at the time of arrest, before criminal proceedings have been initiated by an indictment or arraignment.[39] In doing so, many state courts provide broader protections for access to counsel than is required under the U.S. Constitution.[40]

Appellate process serves three essential functions: correction of legal error in the initial proceedings, the opportunity for "law-making" to develop and refine the law, and uniformity in the law's application.[41] In the criminal context particularly, the third function is critical to ensure uniform treatment and consistent practices.[42] Appellate courts provide

1992). In *Billotti*, the Fourth Circuit affirmed the decision that the lack of an automatic right to a criminal appeal in West Virginia was not a deprivation of due process under the Fourteenth Amendment. *Id.*

36. Arkin, *supra* note 24, at 513–514 (discussing the right to appeal, noting that Virginia, West Virginia, and New Hampshire do not provide the right to appellate review in criminal cases, rather review was discretionary). More recently, West Virginia amended its appellate process so that the court must issue a decision explaining its denial of review, altering its discretionary review system slightly. *See* W.V. R. App. P. 5 (effective December 1, 2010); *see also* Jack Rogers, Commentary, *West Virginia Needs an Appellate Court Now*, CHARLESTON DAILY MAIL, Feb. 4, 2011, at A4, *available at* http://www.dailymail.com/Opinion/Commentary/201102031423 (describing the recent change in West Virginia).

37. Douglas v. California, 372 U.S. 353, 356–57 (1963) (citing Griffin v. Illinois, 351 U.S. 12 (1956) (concluding that lack of counsel would amount to a violation of the Equal Protection Clause)).

38. Bronson v. Bd. of Prob. & Parole, 421 A.2d 1021, 1025–26 (Pa. 1980).

39. *See, e.g.*, Commonwealth v. Karash, 518 A.2d 537, 541 (Pa. 1986).

40. *Compare* United States v. Gouveia, 467 U.S. 180, 189 (1984) (holding that the Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings), *with*, e.g., Bronson v. Bd. of Prob. & Parole, 421 A.2d 1021, 1025–26 (Pa. 1980) (holding that, under the Pennsylvania Constitution, the right to counsel extends through appeals and revocation hearing).

41. *See* VICTOR E. FLANGO, NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS: ROLE OF STATE SUPREME COURT OPINIONS IN LAW DEVELOPMENT 1, 142 (2010), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/Appellate&CISOPTR=195; Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 316 (2009); Randall T. Shepard, Essay, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 669 (1988) (As former Chief Justice of the Indiana Supreme Court, Judge Shepard writes, "the law-giving function is pivotal.").

42. ABA STANDARDS FOR CRIMINAL JUSTICE § 21-1.2(b) (2d ed. 1980), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blk.html [hereinafter ABA CRIMINAL JUSTICE STANDARDS].

"psychological cover" in that "an appellate court's correction of an error in any given case tends to foster an environment in which fewer errors are committed in the first instance."[43] With this theory in mind, areas of the law that are underrepresented in appellate practice and lack published opinions suffer.[44] Beyond error correction, appellate review and published opinions play a critical role in the public's understanding and perception of the legal system.[45] Opinions also provide guidance and uniformity to lower courts. Specific to criminal law, the "law giving" function and appellate development of the law also provide guidance and boundaries for police, prosecutors, judges, and defense attorneys.[46]

Although the quality of indigent defense suffers overall,[47] the access to appeal for adult defendants is not generally called into question in the way that it is for juveniles.[48] The largest study documenting the rate of criminal appeals taken found that 16% of federal convictions were appealed.[49] At the state level, estimates are higher, but little data is available.[50] Most appeals are filed by the defendant.[51] In addition, the study of federal appeals found that two-thirds of those appeals were filed by defendants who had pled guilty.[52] The federal government has recently recognized the importance of a greater working knowledge of state criminal appellate systems. Therefore, it has sought to expand the availability of state court appellate data by funding a study that will

43. Oldfather, *supra* note 41, at 317; *see, e.g.*, Richard L. Pemberton & Paul S. Almen, *Significant Weight: The Impact of the Minnesota Court of Appeals upon Civil Litigation*, 35 WM. MITCHELL L. REV. 1297, 1309 (2009) (discussing the effect of intermediate appellate courts twenty-five years after installation in Minnesota and discussing recognition that "district court judges are more cognizant of the possibility of remand and reversal and as a result have issued better-reasoned decisions").

44. *Cf.* FLANGO, *supra* note 41, at 142 ("The legitimacy of the judicial branch rests largely on the responsibility of judges to explain and justify their decisions in opinions that can be publicly read, analyzed and criticized.") (internal citation omitted). **R**

45. Heise, *supra* note 23, at 827.

46. David Rossman, "*Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 519 (1990).

47. *See, e.g.*, Heidi Reamer Anderson, *Funding* Gideon*'s Broken Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 421–22 (2012); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006); Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 488 (2010).

48. *See supra* Introduction (discussing access to appeals in general).

49. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 185055, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–99 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/ascii/fca99.txt [hereinafter 2001 DOJ REPORT].

50. *See* Arkin, *supra* note 24, at 514; *supra* note 17 and accompanying text (discussing prevalence of appeals); *supra* note 23 and accompanying text (discussing lack of data for state appeals).

51. 2001 DOJ REPORT, *supra* note 49 (stating that 95% of appeals are filed by the defendant).

52. *Id.*

examine cases litigated in 2010.[53]

Yet, even with more robust appellate system at work for adults than juveniles and higher levels of transparency, grave injustices occur.[54] Indeed, the importance of the error-correcting function of appellate courts is illuminated by wrongful convictions.[55] These examples highlight the role of appellate courts, a role that some argue needs expansion and modification in order to properly protect against wrongful convictions.[56] This raises concerns about the juvenile delinquency context, where appeals are filed infrequently.

B. *Right to Juvenile Appeals*

The first juvenile court, which originated in 1899 in Chicago, allowed appeals.[57] Other states subsequently adopted similar models of juvenile courts.[58] As support for the rehabilitative underpinnings of the juvenile court grew, however, access to appeals changed. By 1933, eight states' juvenile courts did not make provisions for appeal or rehearing.[59] The failure to include a provision for appeals reflected the early philosophical beliefs that the judge's central task in juvenile court was to "fix" the child with "care and solicitude[,]"[60] rather than determine guilt or innocence.[61]

53. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, OMB NO. 1121-0329, 2010 SURVEY OF STATE COURT CRIMINAL APPEALS SOLICITATION (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sscca10sol.pdf [hereinafter 2010 DOJ REPORT]. The request for proposals focused "on criminal appeals disposed in calendar year 2010 and aims to obtain information on certain key case characteristics, including the types of criminal cases appealed to state intermediate appellate courts and courts of last resort, in addition to the disposition of criminal appeals, appellate case processing time, and the impact of appellate litigation on trial court outcomes." *Id.* at 3.

54. *See generally* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 94–115 (2008) (discussing an examination of 200 post-conviction DNA cases where the defendants were exonerated after being convicted of rape or murders).

55. *Id.*

56. *See generally* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 591–92 (2009) (describing appellate failure to reverse or detect wrongful convictions, the sources of appellate failure, and presenting proposals for an improved criminal appellate system).

57. Benedict S. Alper, *Juvenile Justice: A Study of Juvenile Appeals to the Suffolk Superior Court, Boston, 1930-1935*, 28 J. CRIM. L. & CRIMINOLOGY 340, 340 (1937).

58. *Id.*

59. In 1933, eight states did not provide the right for juveniles to appeal. Alper, *supra* note 57, at 340 (citing FRANCIS HILLER, N.Y. PROB. ASS'N, JUVENILE COURT LAWS OF THE UNITED STATES (1933)).

60. *In re* Gault, 387 U.S. 1, 15 (1967) (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909)).

61. *See, e.g.*, Mack, *supra* note 60, at 119–20 ("The problem for determination by the judge is not, ['H]as this boy or girl committed a specific wrong[?'], but ['W]hat 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[?']").

Even though some states formed juvenile courts without granting access to appeals, others continued to afford the right. A 1937 study by Benedict Alper in Boston demonstrated that juvenile appeals occurred with relative frequency between 1930 and 1935 in that jurisdiction.[62] Indeed, Alper found that more than one-third of orders committing juveniles to a detention facility were appealed during the five-year period.[63] Even more dramatic, nine of ten of those orders were reversed.[64] The commentary about juvenile courts at the time suggests that this kind of finding was rare, and, thus, surprising. Comments at the time noted unbridled judicial power observed in juvenile courts and limited appeals.[65] Still, the contrast to the way in which appellate practice has developed is startling in comparison to Alper's early study.

By the time the Supreme Court decided the landmark case of *Gault* thirty years later, counsel was commonly absent in juvenile court,[66] and appeals were rare. Indeed, Gerald Gault did not have a right to direct appeal under Arizona law and a habeas petition was his only recourse for relief.[67] After *Gault,* most believed that the Court's emphasis on the child's right to counsel "at every step in the proceedings against him"[68] and judicial discretion to order transcripts would improve access to counsel and appellate practice. That belief and aspiration, however, stands in stark contrast to the current status of appeals in juvenile practice.

The Supreme Court did not separately address whether juveniles have the right to an appeal when it decided *Gault*.[69] The Court, therefore, was silent about the application of its prior reasoning regarding the right to criminal appeals. All states, however, provide juveniles with the

62. Alper, *supra* note 57, at 344.

63. *Id*. Out of 628 orders to commit juveniles to detention facilities, 216 were appealed. *Id.*

64. Alper, *supra* note 57, at 361 (noting that a lower court judge is bound "to be rendered more cautious in his use of commitment orders when he learns that nine-tenths of these appeals are successful").

65. *Gault*, 387 U.S. at 18 (citing Roscoe Pound, *Foreword* to PAULINE YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, at xxvii (1937)).

66. *See id.* at 37–38 n.63 (stating that while a third of the states allowed for representation by counsel in juvenile proceedings, only a few state statutes required "advice of the right to counsel and to have counsel appointed"). For example, some statutes allowed for appointment on request or at the discretion of the court. *Id*.; *see also* TASK FORCE ON JUVENILE DELINQUENCY, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY & YOUTH CRIME 82 (1967) (stating that, out of a survey of 207 juvenile courts serving populations of at least 100,000, a lawyer appeared for less than 10% of juveniles at most courts).

67. *In re* Gault, 387 U.S. 1, 57–58 (1967).

68. *Id.* at 36.

69. *See id.* at 58 ("[W]e need not rule [on the right to appeal] in the present case . . . ."). The *Gault* Court noted that the child "requires the guiding hand of counsel at every step in the proceedings against him[,]" but declined to address the right to counsel for appeals. *Id.* at 36.

right to appeal—at least in theory—just as they do for adults.[70] States primarily extend this right by statute and in some cases, the state constitutional right has been interpreted to apply to juveniles.[71] Interestingly, in Pennsylvania, the locus of the one recent quantitative case study documenting the infrequency of appeals, an appeal is a juvenile's constitutional right.[72]

The six states without statutes addressing juvenile appeals still recognize the juvenile right to appeal through the common law. In addition, appellate courts have held that where the criminal right to appeal is granted by the state, the Equal Protection Clause requires the right to be extended to juveniles.[73] Courts have also specifically held that, under *Douglas v. California*,[74] the right to counsel on appeal for indigent defendants must also extend to juveniles.[75] Some states grant the right to

70. *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 802–03 n.167 (2010) (listing state statutes enumerating juvenile appellate right to appeal in forty-four states). For state statutes that enumerate juvenile appellate rights and answer survey data in Part II, see ALA. CODE § 12-15-601 (2008); FLA. STAT. ANN. § 985.534 (West 2006); GA. CODE ANN. § 15-11-3 (West 2000); OR. REV. STAT. ANN. § 419A.200(1) (West 2009); R.I. GEN. LAWS § 14-1-52(a) (1981); TEX. FAM. CODE ANN. § 56.01 (West 2009); WASH. REV. CODE ANN. § 13.04.033 (West 1990). The states without statutes specifically referencing juvenile appeals are Colorado, Idaho, Kansas, Mississippi, South Carolina, and South Dakota. Fedders, *supra*, at 802–03, n.167. In states where the right to appeal is extended in criminal cases, however, at least one court and scholars have concluded that the right must also be provided to juveniles pursuant to equal protection. *See* Gilliam v. State, 808 S.W.2d 738, 740 (Ark. 1991); *see also* RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 39.02, at 723 (2008).

71. The Pennsylvania constitutional provision addressing appeals has been interpreted to include criminal and juvenile cases. *See In re* A.P., 617 A.2d 764, 766–67 (Pa. Super. Ct. 1992) (interpreting PA. CONST. art. V, § 9); *see also* UTAH CONST. art. VIII, § 5 (providing an appeal of right in all cases except for matters filed originally with the state supreme court).

72. PA CONST. art. V, § 9.

73. *See* State v. Berlat, 707 P.2d 303, 307 (Ariz. 1985) (en banc); *Gilliam*, 808 S.W.2d at 740; People v. Kevin S. (*In re* Kevin S.), 6 Cal. Rptr. 3d 178, 183 (Cal. Dist. Ct. App. 2003); *see also* HERTZ, GUGGENHEIM & AMSTERDAM, *supra* note 70, at 723.

74. 372 U.S. 353 (1963).

75. *See Berlat*, 707 P.2d at 307; *Gilliam*, 808 S.W.2d at 740; *Kevin S.*, 6 Cal. Rptr. 3d at 197 (holding that juveniles have a right to counsel on appeal in California under *Douglas* and that "[t]he Fourteenth Amendment requires that the minor's one and only appeal as of right be full and effective"); State v. Hairston, 946 P.2d 397, 400 (Wash. 1997) (en banc) (acknowledging the juvenile right to counsel on appeal by applying procedures required under *Anders v. California*, 386 U.S. 738 (1967), to counsel for juvenile). In *State v. Hairston*, the court recognized that just as in adult proceedings, appellate counsel must obtain permission from the court to withdraw as counsel where he or she believes there is no good faith basis for appeal. *See Hairston*, 946 P.2d at 537–38. For decisions in federal court, *see* John L. v. Adams, 969 F.2d 228, 237 (6th Cir. 1992) (observing that the "independent constitutional right to counsel for juvenile appeals" is grounded in the Sixth Amendment's right to counsel); United States v. M.I.M., 932 F.2d 1016, 1018 (1st Cir. 1991) (relying on Sixth Amendment cases in the adult context for its finding that "[i]f a juvenile has a right to counsel, and a right to appeal, she must also have the right to counsel on her first direct appeal" (citing Penson v. Ohio, 488 U.S. 75, 84–85 (1988); *Douglas*, 372 U.S. at

an attorney on appeal either expressly in the statute or as interpreted by the court.[76] In at least one state, Pennsylvania, once counsel is assigned, the state requires attorneys to continue representation for juveniles through appeal until a final judgment is ordered.[77] Although, in practice, it is not clear how well this statute is implemented, particularly when youth are encouraged to waive the right to counsel.[78]

After direct appeal, post-conviction relief is not widely available to juveniles.[79] Therefore, after the time to file an appeal has expired or direct appeal has failed, a problem with or challenge to a juvenile adjudication may have no obvious remedy. This problem was clearly illustrated in an example from Pennsylvania[80] and other places receiving less attention, like Illinois.[81] Additionally, juveniles in some instances are precluded from raising habeas challenges, even in the face of lengthy sentences.[82]

355–56)); Reed v. Duter, 416 F.2d 744, 749 (7th Cir. 1969) ("*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty . . . the constitutional safeguards of the Fifth and Sixth Amendments . . . .").

76. *See, e.g.*, IOWA CODE ANN. § 232.133 (West 2007) (as interpreted by Chambers v. Dist. Court, 152 N.W.2d 818, 820–21 (Iowa 1967)); ME. REV. STAT. ANN. tit. 15, § 3404 (1979); N.J. STAT. ANN. § 2A:4A-39 (West 1983); TEX. FAM. CODE ANN. § 56.01 (West 2009); WYO. STAT. ANN. § 14-6-233 (West 2004); TENN. R. JUV. P. 36.

77. PA. R. JUV. CT. P. 150(B) (requiring that counsel shall represent the juvenile until final judgment, including in any proceeding upon direct appeal).

78. See *infra* notes 148–153 and accompanying text (discussing the judicial scandal in Luzerne County, Pennsylvania and juvenile waiver of counsel).

79. *See, e.g.*, People v. A. W. H. (*In re* A. W. H.), 420 N.E.2d 1041, 1042 (Ill. App. Ct. 1981); People v. Thomas (*In re* Thomas), 396 N.E.2d 31, 33 (Ill. App. Ct. 1979); J.A. v. State, 904 N.E.2d 250, 254 n.1 (Ind. Ct. App. 2009), *transfer denied*, 915 N.E.2d 993 (Ind. 2009) (stating that "post-conviction procedures are not available to challenge a juvenile delinquency adjudication . . . ." (citing Perkins v. State, 718 N.E.2d 790, 793 (Ind. Ct. App. 1999))). *But see* State *ex rel.* D.W., 47 So. 3d 1048, 1063 (La. Ct. App. 2010) (advising juvenile of right to post-conviction relief pursuant to applicable state statute).

80. JUVENILE LAW CTR., LESSONS FROM LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY iv (2010), *available at* http://www.jlc.org/sites/default/files/press_release_pdfs/luzerne_exec_summary.pdf (last visited Feb. 12, 2012) [hereinafter LESSONS FROM LUZERNE COUNTY].

81. *See* People v. Jonathon C.B. (*In re* Jonathon C.B.), 958 N.E.2d 227, 264 (Ill. 2011) (Burke, J., dissenting) (discussing the lack of remedy for a juvenile challenging the use of shackles during his trial and noting that an adult would have a remedy in the same situation under the Post-Conviction Hearing Act). The dissent in *Jonathan C.B.* argued that "the majority, while maintaining that juvenile proceedings are not criminal in nature and are more protective of the rights of juveniles, actually places juveniles in a worse position, providing them with less protection than an adult." *Id.*

82. *See, e.g.*, *Ex parte* Valle, 104 S.W.3d 888, 889–90 (Tex. Crim. App. 2003) (holding that article 11.07 of the Texas Code of Criminal Procedure governing applications for writs of habeas corpus may not be used to challenge a juvenile's imprisonment because adjudication of delinquency for committing capital murder is not a felony conviction); *see also In re* R.J.M., 211 S.W.3d 393, 394–95 & n.3 (Tex. Ct. App. 2006) (holding that there is no legislative authority allowing a juvenile to appeal a motion denying him access to counsel to seek post-conviction

After a judicial scandal came to light in 2008 in Luzerne County, Pennsylvania, experts there examined the current system and noted that there are traditionally few appeals of adjudications and *no appeals* of dispositions.[83] Even as information about the unlawful acts of two judges who had sent scores of children to confinement in exchange for payment was revealed, there was no available appellate remedy due to the lack of post-conviction relief available for juveniles.[84] The only remedy available to the petitioners was to file a King's Bench petition with the state supreme court.[85] While this example is extreme, Pennsylvania is certainly not the only state suffering from deficient access to appeals and post-conviction relief for juveniles. In a system with no appeals, states place juveniles at risk with the inherent lack of accountability.

C. *What Is Known About Juvenile Appeals*

The appellate process acts as a check on abuse of power and misapplication of the law and is particularly important in juvenile court.[86] Yet, there is universal agreement that this process is lacking, even astonishingly so, in juvenile practice.[87] When the issue is raised, scholars and policy makers have limited access to statistical data to define the scope of the problem. This leads to common attribution to few sources, only one of which contains statistical case data.

In 1937, the author of an empirical case study of juvenile delinquency appeals in the Boston area lamented that the "literature gives scant attention to [the appellate] phase of the juvenile court problem."[88] After *Gault* was decided in 1967, many believed the provision of counsel would provide more opportunity for appellate practice and would lead to increased discussion.[89] But in 1994, the author of the next empirical study addressing juvenile delinquency appeals, which appears to be the only other quantitative juvenile delinquency appellate study other than Alper's early study, echoed the previous author's lament.[90] He noted—understandably unaware of Alper's study, already over half a century old at that time—that the subject of juvenile appeals had not

DNA testing and analogizing the basis of the reasoning to the lack of specific grant of access to habeas proceedings for juveniles).

83. *See* LESSONS FROM LUZERNE COUNTY, *supra* note 80, at 16.

84. *See id.* at 18.

85. *Id.*

86. *See id*. at 16–17.

87. *See generally* 1995 ABA REPORT, *supra* note 10. R

88. Alper, *supra* note 57, at 342.

89. Mary Beth Ortbals, Comment, *Appellate Review of Juvenile Court Proceedings and the Role of the Attorney*, 13 ST. LOUIS U. L. REV. 90, 105 (1968).

90. Harris, *supra* note 20, at 209.

been the subject of quantitative research in any U.S. jurisdiction.[91] By any standard, that inattention continues.

The quantitative study by Donald Harris includes case statistics from Pennsylvania published in 1994, and scholars cite it frequently when referencing appeals.[92] Using statewide data from 1990, the study is limited to cases where the child was committed to a detention facility at the original disposition.[93] It found that an average of one appeal existed per 100 juvenile cases resulting in detention.[94] It compared the rate of juvenile appeals and adult criminal appeals where defendants were committed to a prison or detention facility and found a dramatic difference: Adult appeals were filed in eleven times more cases, 1% for juveniles and 11% for adults.[95] Next, scholars commonly reference the 1995 ABA Juvenile Justice Center Report and its results of a survey to public defenders and panel attorneys inquiring about the numbers of appeals taken in juvenile cases.[96] The survey revealed that the use of appeals in juvenile practice was rare: A third of the offices reported that they were "not authorized" to take appeals, and nearly half of the offices that were authorized had not taken an appeal in the prior year.[97] It is unclear what source of authorization—whether external funding or internal policies—precluded appellate practice, as it is arguably an equal protection violation if states do not provide juveniles with counsel on appeal.[98] The numerous state assessments performed by the National

91. *Id*. at 210.

92. *Id*. at 220. For examples of literature referring to Harris's data to support the proposition that there are so few juvenile appeals, *see, e.g*., Drizin & Luloff, *supra* note 12, at 294 n.312; Fedders, *supra* note 70, at 812 n.215; Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 220 n.185 (2007); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 243–44 (2002).

93. Harris, *supra* note 20, at 220. The study tracked each case independently from start to conclusion.

94. Harris, *supra* note 20, at 220.

95. *Id*. at 233 tbl. 2.

96. 1995 ABA REPORT, *supra* note 10, at 10; *see, e.g*., Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts*, 54 FLA. L. REV. 577, 633 (2002) (citing to another source discussing the lack of appeals found in the ABA Report); Fedders, *supra* note 70, at 812; David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 564–65 (2006); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 567 (2009); Donna Sheen, *Professional Responsibilities Toward Children in Trouble with the Law*, 5 WYO. L. REV. 483, 505 (2005) (citing the alarming lack of appeals in juvenile practice, which originates from the 1995 study). R

97. 1995 ABA REPORT, *supra* note 10, at 10 (discussing results of a survey of public defenders that revealed that 32% of their offices are not authorized to handle appeals and of those that do handle them, 46% took no appeals in the prior year).

98. See *supra* note 75 and accompanying text.

Juvenile Defender Center also include comprehensive information resulting from in-depth interviews in the field.[99] These reports, in turn, also provide support for conclusions about the lack of juvenile appellate practice and infrastructure across states.[100] Case statistical data is not the focus of these reports, however, and therefore, such data complements these findings to create a more complete picture.

The data in Harris's Pennsylvania study documenting the specific percentages of cases appealed in confinement cases only is now over two decades old. In addition, the nature of juvenile justice has changed during the two decades since that time. The collateral consequences that now attach to juvenile adjudications have increased substantially since 1990, elevating the stakes of the case outcomes.[101] Today, adjudications will remain a part of a person's life in increasing ways.[102] Along with basic liberty interests and risks of confinement, these statutory changes create a heightened need to ensure that juvenile adjudications are reliable findings. For example, juvenile adjudications and criminal convictions are treated the same under certain provisions of the Federal Armed Career Criminals Act and similar state statutory schemes.[103] Courts have upheld this practice based on the reasoning that juvenile adjudications are reliable.[104] Arguably, the lack of appeals diminishes this reliability

99. The individual state assessments performed by the ABA Juvenile Justice Center, and later, the National Juvenile Defender Center, as an outgrowth of the 1995 ABA Report, are commonly cited for insightful descriptive results from interviews with juvenile defenders and juveniles addressing appellate practice. For examples of reports, *see generally* LAVAL S. MILLER-WILSON, NAT'L JUVENILE DEFENDER CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2003), *available at* http://www.jlc.org/sites/default/files/publication_pdfs/PA%20Assesment%20of%20Access%20to%20Counsel.pdf; KEHOE & TANDY, *supra* note 18; KIM BROOKS & DARLENE KAMINE, NAT'L JUVENILE DEFENDER CTR., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS IN OHIO (2003), *available at* http://www.njdc.info/pdf/Ohio_Assessment.pdf; ABA JUVENILE JUSTICE CTR., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2003), *available at* http://www.njdc.info/pdf/mtreport.pdf. R

100. *See, e.g.*, Susanne M. Bookser, *Making* Gault *Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 297, 305 (2004) (citing the Kentucky state assessment for its description of the infrastructure of public defender practice that did not support appeals); Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 117 (2007) (citing NJDC's Pennsylvania assessment addressing "non-existent" appellate advocacy); Wallace J. Mlyniec, In re Gault *at Forty: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 379–80 (2008) (citing various state assessments and the interview results contained within them addressing the infrequency of appeals).

101. *See infra* Part II.C.

102. *See infra* Part II.C.

103. *See infra* notes 196–97 and accompanying text. R

104. *See infra* Part II.C.1.

and is a critical part of the dialogue.[105]

The lack of vigor in the appellate process for juveniles is attributed to a variety of causes. Obstacles preventing effective juvenile delinquency appellate practice appear to be similar across jurisdictions, though they vary somewhat according to geography and resources. First, prevalent waiver of counsel in juvenile courts contributes to the lack of appeals.[106] But even when counsel appears, many defenders do not pursue appeals regularly due to lack of resources or other reasons.[107] While failure to file an appeal can result in a claim for ineffective assistance of counsel, juveniles infrequently file such claims due to structural barriers and limited knowledge about the right to appeal or the right to bring a claim for ineffective assistance.[108] Whether or not the rarity of claims for ineffective assistance affects the rarity of the use of *Anders* briefs in juvenile practice is worthy of further exploration.[109]

Next, an overreliance on guilty pleas[110] and a perception that the stakes are lower for juveniles can lead to a decision to allocate resources elsewhere where defenders are overwhelmed by high caseloads.[111] The length of time it takes to resolve appeals may also contribute to the problem, given that many juveniles will have completed their sentences of confinement or probation before the appeal is resolved.[112] There is also a lack of authorization, whether it is real or perceived, for public defenders to handle appeals.[113] In addition, the historical underpinnings of the

105. *Cf.* Findley, *supra* note 56, at 591 ("Indeed, over the past several decades the Supreme Court has increasingly emphasized that our elaborate system for appeals is intended to guard against wrongful conviction of the innocent.").

106. *See* Berkheiser, *supra* note 96, at 633 (discussing the relationship between the frequent waiver of counsel and the low rate of appeals in juvenile cases and noting that opportunities for appeal by those who waive counsel are rare).

107. Fedders, *supra* note 70, at 812; *see also*, KEHOE & TANDY, *supra* note 18, at 38 (describing that the majority of attorneys questioned indicated that time constraints and financial considerations hindered effective representation on appeal).

108. Fedders, *supra* note 70, at 806. (Between 1995 and 2005, over six million youth were adjudicated delinquent; Fedders finds judicial opinions for 290 cases during that time period dealing with ineffective assistance of counsel, only forty-one of which resulted in relief from the appellate court.). *Id.*

109. A search of juvenile delinquency appeals on Westlaw during the time period between July 29, 2001 and July 28, 2011 resulted in only seventeen cases discussing the use of *Anders* briefs filed by defenders; these cases were limited to five states: California, Florida, New York, Ohio, and North Carolina.

110. Drizin & Luloff, *supra* note 12, at 291.

111. Fedders, *supra* note 70, at 812.

112. Interview with Eric Zogry, N.C. Juvenile Pub. Defender (Aug. 2011) (stating that the average time it takes to resolve an appeal in North Carolina is sixteen months, while the average juvenile disposition of probation or confinement in the state is only six months).

113. *See* 1995 ABA REPORT, *supra* note 10, at 53; BROOKS & KAMINE, *supra* note 99, at 21, 33 (discussing a confusion among attorneys about whether representation continued after disposition).

juvenile courts as rehabilitative, as opposed to punitive, create a perception that appeals interfere with the "rehabilitation process."[114]

The belief that the bar is exceedingly high on appeal may also compound this problem. Most courts use a de novo standard of review for questions of law and apply a clearly erroneous standard when reviewing questions of fact in juvenile cases, similar to adult criminal cases.[115] The court generally reviews a dispositional order for an abuse of discretion.[116] A statutory challenge to the disposition may be reviewed de novo.[117]

Other more subtle obstacles vary according to jurisdiction. Some states allow monetary charges to the family of a juvenile whose appeal is unsuccessful.[118] In at least one state, the window to file a juvenile delinquency appeal is only five days, as compared to twenty-one days for adult criminal cases.[119] While shortened filing deadlines for juvenile appeals can expedite the outcome of the case, they should not be prohibitive to a child's ability to exercise the right to file an appeal. Moreover, if they are not accompanied by a requirement that the appeal will be resolved on an expedited basis, the effect can be quite limited.

Finally, defenders in urban areas tend to have high caseloads, which may prevent appellate attention. But there are also problems unique to rural areas. In rural states there tend to be "fewer qualified criminal defense appellate lawyers to provide representation to all indigent defendants who choose to exercise their right to appeal."[120] For example, in one such state, Wyoming, there are three full-time and one

114. Harris, *supra* note 20, at 214, 225; *see also* Welch v. United States, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting).

115. *See, e.g.*, United States v. Juvenile Male, 74 F.3d 526, 528 (4th Cir. 1996) ("We review the question of whether the district court erred in denying the juveniles' motion to dismiss, pursuant to the speedy trial provision . . . under a *de novo* standard of review."); United States v. Sealed Juvenile 1, 192 F.3d 488, 490 (5th Cir. 1999) ("[W]e review factual findings . . . for clear error and the legal conclusions *de novo*."). *But see* United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995) (holding that factual findings are subject to a clearly erroneous standard of review, but "the court's determination of whether a delay is in the interest of justice is reviewed for abuse of discretion.").

116. *See* United States v. Brandon P., 387 F.3d 969, 976 (9th Cir. 2004) (stating that the decision to transfer a juvenile to be prosecuted as an adult is reviewed for abuse of discretion); Phillips v. United States, 238 F. App'x. 89, 95 (6th Cir. 2007) (reviewing a district court decision that denied a juvenile's request for an evidentiary hearing under an abuse of discretion standard).

117. *See* United States v. P.S., No. 97-50042, 1997 WL 632591, at *1 (9th Cir. Oct. 10, 1997) (reviewing a juvenile's appeal on the basis of a statutory violation under a de novo standard).

118. Fedders, *supra* note 70, at 812–13 (noting North Carolina and Georgia statutes).

119. *Compare* ME. REV. STAT. ANN. tit. 15, § 3402(5) (2003), *with* ME. R. APP. P. 2(b)(2)(A).

120. Diane E. Courselle, *When Clinics are "Necessities, Not Luxuries": Special Challenges of Running a Criminal Appeals Clinic in a Rural State*, 75 MISS. L.J. 721, 725 n.5 (2006) (discussing the challenges of criminal appellate advocacy in rural areas and noting that as the only law school in the state, the University of Wyoming College of Law has a clinic that sometimes handles 20% to 25% of the public defender's office appellate caseload in a given year).

half-time appellate attorneys in the public defender's office serving the entire state.[121]

Appeals are more frequent in adult criminal cases.[122] Yet, even with these appeals and additional opportunities for transparency and accountability in the adult criminal context, such as juries and open courtrooms, wrongful convictions raise concern about fairness in the criminal justice system.[123] In many juvenile courts, there is no other opportunity for outside review or decision-making, or even observation by another person—even as an onlooker in court. In that way, juvenile appeals play a critical role.

II. Special Considerations and the Unique Appellate Role in Juvenile Court

"The appellate process furthers fidelity to the law . . . ."[124] Appeals play a unique role in the delinquency context; even beyond providing for accuracy and integrity in the conclusions, they are often the only vehicle for public accountability and transparency. In addition, contrary to a common misperception that juveniles receive only "a slap on the wrist," thousands of juveniles are confined each year and face consequences that will extend beyond adolescence. Finally, the goal to reduce disproportionate minority confinement may be difficult to achieve in a system with such a reduced level of accountability.

A. *Bench Trials and the Absence of Jurors*

Courts prosecuting juveniles as delinquents are not required to grant the right to a jury and therefore most do not.[125] Even in those states that allow jury trials for juveniles, they are infrequently requested.[126] Given the status of appeals, this leaves the reality that juve-

121. *Id.* at 726 n.18. (This includes post-conviction work in the state's capital cases.). *Id.*

122. Harris, *supra* note 20, at 220.

123. *See, e.g.*, Garrett, *supra* note 54, at 57 (discussing a study of post-conviction exonerations); Findley, *supra* note 56, at 591.

124. Robert Schwartz, Exec. Dir., Juvenile Law Ctr., Testimony at Pennsylvania Interbranch Commission on Juvenile Justice (Jan. 21, 2010) (transcript available at http://www.modelsforchange.net/reform-progress/49).

125. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). Ten states grant a jury trial by right in most, if not all, cases. Okla. Const. art. II, § 19 (1990); Alaska Stat. Ann. § 47.12.110(a) (West 2005); Mass. Gen. Laws Ann. ch. 119, § 56(c) (West 1996); Mich. Comp. Laws Ann. § 3.911(a) (West 2003); Mont. Code Ann. § 41-5-1502(1) (1997); N.M. Stat. Ann. § 32A-2-16(A) (West 2009); Tex. Fam. Code Ann. § 54.03(b)(6) (West 2009); W. Va. Code Ann. § 49-5-6(a) (West 2006); Wyo. Stat. Ann. § 14-6-223(c) (West 1981); *In re* L.M., 186 P.3d 164, 170 (Kan. 2008).

126. Drizin & Luloff, *supra* note 12, at 303–04; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 Minn. L. Rev. 965, 1107 (1995).

nile cases are largely determined by one individual.[127] Juvenile trials are generally bench trials. Contrary to a common perception about judicial decision-making, current research on the psychology of judging "cast[s] doubt on the view that judges . . . [can] significantly outperform juries with respect to the same fact-focused inquiries."[128] In their analysis of this issue applied to the juvenile justice system, Guggenheim and Hertz suggest that "there are at least some situations in which trial judges are prone—or at least more prone than jurors and appellate judges—to misconstrue facts in a manner that favors the prosecution."[129] There is reason to believe, therefore, that claims for insufficiency of the evidence may be stronger in juvenile cases due to findings that judges more readily convict on less evidence than do juries.[130] In addition, in bench trials, sufficiency of the evidence is among the more frequent errors found on appeal, which is not the case for appeals of jury trials.[131]

The reasons for this difference are not conclusive, but research offers useful guidance. First, trial judges are generally exposed to inadmissible evidence and collateral reports before fact-finding, such as information about prior offenses.[132] In the adult context, however, they are usually not operating as the finders-of-fact at trial because of the right to a jury trial.[133] In the juvenile system, the judge will make determinations about the admissibility of key evidence despite her role as fact-finder. Therefore, a juvenile judge can be exposed to evidence that virtually proves guilt even though he or she rules that it is inadmissible before proceeding to trial to determine the facts.[134]

Appellate courts uphold this judicial practice.[135] Yet, empirical evidence demonstrates that exposure to such "highly prejudicial information" affects the decision-making of judges.[136] In Joan's hypothetical

127. *See supra* Part II.

128. Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103, 104 (David Klein & Gregory Mitchell. eds., 2010).

129. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 569 (1998).

130. *Id.* at 564.

131. JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT 17 (1989), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.138.7077&rep=rep1&type=pdf.

132. *See, e.g.*, Guggenheim & Hertz, *supra* note 129, at 571–72.

133. *See* U.S. CONST. amend. VI (stating the right to a trial by jury in criminal cases).

134. Guggenheim & Hertz, *supra* note 129, at 571.

135. *See generally id.* at 571–73; *see, e.g.*, Harris v. Rivera, 454 U.S. 339, 346–47 (1981) (per curiam).

136. Guggenheim & Hertz, *supra* note 129, at 572–73 (citing Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997) (discussing empirical evidence concluding that judges may, in fact, be no better than juries at "bas[ing] their decisions squarely on legally admissible information")) (internal citation omitted); *see also* Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore*

case above, for example, the judge would have been exposed to evidence showing that Joan was previously in possession of a knife and to hearsay from Joan's probation officer that she was allegedly affiliated with "gang members." It is difficult to argue that a person with this kind of information will view evidence in a way that is equally objective as a juror without exposure to these extraneous records about the defendant.

Case law demonstrates that juvenile bench trials, the most common form of adjudication for juveniles, result in some convictions based on evidence that "only the most closed-minded or misguided juror" would find to have satisfied the standard beyond a reasonable doubt.[137] Guggenheim and Hertz provide several examples of juvenile bench trial cases reversed by appellate courts during a one-year time period, concluding that the appellate court "easily found" the evidence to be insufficient in such cases.[138] Also, consistent with those findings, an analysis of trial transcripts performed in a New York study in 1984 revealed that almost 50% of the transcripts included appealable errors, such as violations of statutory and due process rights.[139] But it found that few were appealed.[140]

Next, even putting those considerations aside, bench trials lack the features of group decision-making and deliberation present with juries that reportedly enhance the fact-finding process and reduce biases.[141] Judges rely heavily on intuitive versus deliberative decision-making.[142] Groups use deliberative decision-making more frequently than individuals, and research suggests that deliberative decision-making leads to

Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1251, 1251 (2005).

137. Guggenheim & Hertz, *supra* note 129, at 564.

138. *Id.* at 564–65.

139. 1995 ABA REPORT, *supra* note 10, at 23 (citing JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 1, 23 (1984)).

140. *Id.*

141. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (discussing the benefits of the jury process and protecting against individual traits or biases of judges); *see also* Guggenheim & Hertz, *supra* note 129, at 578–79 (describing relevant social scientific studies illustrating the benefits and processes of group decision-making and dynamics that promote deliberation of outcomes).

142. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5, 27–28 (2007) (presenting evidence that judges are predominantly intuitive decision-makers and arguing that intuitive judgments are often flawed). The authors also summarize study results suggesting "that judges rely heavily on their intuitive faculties. . .when they face the kinds of problems they generally see on the bench." *Id.* at 27. The authors do, however, acknowledge the capacity that "judges can sometimes overcome their intuitive reactions and make deliberative decisions" despite a large body of research that would predict otherwise. *Id.* at 28.

more just outcomes with less bias.[143]

Grand juries are also absent from the juvenile process because delinquency cases do not undergo the indictment process.[144] Grand juries are viewed as an instrument that protects against the power of the state and serves to protect individual rights.[145] The absence of grand juries is yet another stage of group decision-making that does not occur in the delinquency context.

Absent juries and grand juries, therefore, the appellate level is the sole opportunity to infuse the benefit of group decision-making into the juvenile justice process. Although it does not replace the value and role of the jury deliberation process, when a case is appealed, at least one group deliberation is formally involved in reviewing the decision. "The logic underlying the use of groups of judges at the appellate stage is straightforward: [D]eliberation among a set of judges is intended to reduce the likelihood of erroneously reversing a correct lower court decision or erroneously affirming an incorrect lower court decision."[146] And with so few appeals, juveniles are left without the benefit of group deliberation of any kind.

B. *Access to Counsel and Closed Courtrooms*

The judicial scandal in Luzerne County, Pennsylvania, which became known to the public as the "Kids-for-Cash" scandal,[147] illuminated in dramatic fashion the importance of the right to counsel for juveniles.[148] The acceptance of bribes by two judges over a five year period between 2003 and 2008 resulted in the illegal confinement of numerous juveniles.[149] The judges' criminal acts led the Pennsylvania Supreme Court to overturn thousands of juvenile adjudications as a result.[150] The scenario invited increased scrutiny of statutory provisions

143. *Id*. at 31. Intuitive decision-making is more likely the pathway "by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system." *Id.*

144. *In re* Gault, 387 U.S. 1, 14 (1967) (stating that a "juvenile is not entitled . . . to indictment by grand jury . . . .") (citing Kent v. U.S., 383 U.S. 541, 555 (1966)).

145. *See* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 705–06 (2008).

146. Wendy Martinek, *Judges as Members of Small Groups*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 73, 73 (David Klein & Gregory Mitchell eds., 2010).

147. *See, e.g.*, Associated Press, *Pennsylvania: Sentence in 'Kids for Cash' Scheme*, N.Y. TIMES, Nov. 5, 2011, at A11; Michael Rubinkam, *Ex-Judge Gets 17½ Years in 'Kids for Cash' Scandal*, PITT. POST-GAZETTE, Sept. 25, 2011, at B4.

148. *See* LESSONS FROM LUZERNE COUNTY, *supra* note 80, at i–ii.

149. *See id*. at 1.

150. Ian Urbina, *Pennsylvania Overturns Many Youths' Convictions*, N.Y. TIMES, Oct. 30, 2009, at A18; *see also* Order, *In Re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003-2008*, related to *In re* J.V.R., No 81 MM 2008 (Oct. 29, 2009), *available at* http://www.jlc.org/sites/default/files/case_files/

that allow waiver of counsel by minors because many of the minors who were involved had waived their right to counsel,[151] making it less likely that any appeal would be filed. The Pennsylvania Supreme Court characterized the behavior by one of the judges, Judge Ciavarella, as an exhibition of "complete disregard for the constitutional rights of the juveniles who appeared before him without counsel . . . ."[152] It also raised important questions about whether the absence of public participation from the juvenile process, paired with lack of counsel to affect appeals, contributed to allowing an environment where these injustices could occur. In that way, waiver of counsel and closed courtrooms can compound the effects of the lack of appeals given their joint role in providing accountability to the public at large.

1. Access to Counsel

Studies report that approximately half of juvenile defendants appear without counsel due to waiver of the right to counsel.[153] This same level of waiver of counsel is not prevalent among adult defendants, although there are certainly compelling questions about pressures to plea, availability of counsel, and adequate resources available to represent all defendants, adult or juvenile.[154] Without counsel, appeals are difficult to realize for juveniles. And it appears that even when counsel appears, appeals are still infrequently filed.[155]

Even before the advent of the increased collateral consequences for juveniles, *Gault* extolled the importance of counsel based upon notions of fundamental fairness. In ensuing years, other courts have all but erased the distinction between the sources of the right to counsel in the juvenile versus adult context, suggesting that the Sixth Amendment is the source of the right for juveniles beyond the dictates of fairness under

Court%20Order%20Adopting%20and%20Approving%20Special%20Master's%20Third%20Interim%20Report%20and%20Recommendatiions.pdf (providing the reasoning and details supporting the expungement of the five years of adjudications) [hereinafter *In Re: Expungement*].

151. *See In Re: Expungement*, *supra* note 150, at 4 (stating that "independent review of the transcripts of individual cases disclosed [Judge] Ciavarella's systematic failure to determine whether a juvenile's waiver of the right to counsel was knowingly, intelligently and voluntarily tendered . . . .").

152. *Id.*

153. Berkheiser, *supra* note 96, at 580.

154. *See supra* note 47 and accompanying text for articles involving a thorough discussion of the pervasive problems of indigent defense across the country. *See also* Jenny Roberts, *Why Misdemeanors Matter*, 45 U.C. Davis Rev. 277, 312 (2012) (providing a more complete discussion of questions raised about availability of representation for adults and pressures to waive counsel, particularly in cases involving misdemeanors).

155. 1995 ABA Report, *supra* note 10, at 7–8, 10; *see infra* Section III (discussing data about the rate of appeal in sixteen states between 2006 and 2011 and waiver of counsel).

Gault.[156] But this principle is not consistently realized and sometimes discouraged.[157] For example, in Georgia, the governing statute dictates appointment of counsel not more than three business days after the person is served or taken into custody.[158] In reference to the stage of court proceedings prior to appointment of counsel, however, one judge there said: "I tell the minor, I will up the sentence if you take it to trial because you could have pleaded and saved us all of this trouble."[159] Therefore, while statutes provide for assignment of counsel, sometimes early in the process, the implementation by individual courts and the influence of local cultural norms may override the words in state statutes. Research that reports local norms, such as assessments performed by the National Juvenile Defender Center, paired with empirical data included in this study, together provide a more complete understanding about the extent to which encouragement or discouragement of waiver of counsel correlates with the rate of appeals.[160]

The Supreme Court requires that a waiver of a constitutional right, such as right to counsel, is knowing and voluntary.[161] It has not addressed the issue separately for juveniles. For purposes of waiver of counsel in the context of questioning and *Miranda* rights, however, the Court's analysis is based upon the "totality of the circumstances" during questioning.[162] There are notable problems with this approach, which

156. *See* John L. v. Adams, 969 F.2d 228, 237 (6th Cir. 1992) (observing that the "independent constitutional right to counsel for juvenile appeals . . . is grounded in the Sixth Amendment's right to counsel . . . ."); United States v. M.I.M., 932 F.2d 1016, 1018 (1st Cir. 1991) (relying on Sixth Amendment cases in the adult context for its finding that "[i]f a juvenile has a right to counsel, and a right to appeal, she must also have the right to counsel on her first direct appeal"); Reed v. Duter, 416 F.2d 744, 749 (7th Cir. 1969) ("*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty . . . the constitutional safeguards of the Fifth and Sixth Amendments . . . .").

157. 1995 ABA REPORT, *supra* note 10, at 7–8; *see, e.g.*, PURITZ & CRAWFORD, *supra* note 3, at 28; *see* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 175 (2007); PATRICIA PURITZ, MARY ANN SCALI & ILONA PICOU, AMERICAN BAR ASS'N & JUVENILE JUSTICE CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23–24 (2002), *available at* http://www.njdc.info/pdf/Virginia%20Assessment.pdf. In one Virginia county it was estimated that "50% of youth waived counsel regardless of the seriousness of the offense." *Id. See also* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV. 125, 125–26 (2007).

158. GA. CODE ANN. § 17-12-23(b) (2011).

159. PATRICIA PURITZ & TAMMY SUN, AMERICAN BAR ASSOCIATION & JUVENILE JUSTICE CTR., GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 9–10, 31 (2001), *available at* http://www.njdc.info/pdf/georgia.pdf.

160. *See infra* Part III, Table 1 for relevant data and further discussion.

161. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

162. Fare v. Michael C., 442 U.S. 707, 724–25 (1979).

many believe is inadequate as applied to juveniles.[163] An ever-increasing number of studies question whether juveniles understand what is happening in their cases or the vocabulary employed by the court, and whether they have the cognitive ability to understand the rights they are giving up when they waive the right to counsel.[164]

The ABA Criminal Justice Standards recommend that youths should not be permitted to waive their right to an attorney without: 1) attorney consultation; 2) a full inquiry from the court into the child's understanding of that right; and 3) an inquiry into his or her capacity to understand and intelligently waive the right.[165] Consider those recommendations in light of Professor Berkheiser's finding that out of ninety-nine cases where youth waived the right to counsel post-*Gault*, eighty of the waivers were overturned on appeal.[166] This finding is even more compelling given the reasonable assumption that many more claims challenging validity of waivers would be overturned on appeal had there been counsel to file the appeal. The same study of juvenile cases found that courts did little to ensure that juvenile waivers were knowing, intelligent, and voluntary.[167] Juvenile court judges were often characterized as finding "waiver by inaction."[168] In addition, more than three-quarters of the cases that were overturned for invalid waivers of counsel had initially resulted in orders of confinement for the juveniles.[169]

An analysis of the laws dictating the practice of waiver of counsel among states reveals a variety of statutory and case law approaches. Most state statutes allow waiver of counsel by juveniles and allow it without advice of counsel.[170] Nor is the presence of a parent required, in many instances, in order for a waiver to be considered knowing and

163. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 173–90 (1984); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 7–12 (2006).

164. *See* Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 27–28 (2006).

165. *See* Sheen, *supra* note 96, at 513–14 n.155 (citing ABA CRIMINAL JUSTICE STANDARDS, *supra* note 42, at 5–8.2).

166. Berkheiser, *supra* note 96, at 609.

167. *Id*. at 611.

168. *Id*. at 612 (citing case law from Maryland, Ohio, Oregon, and South Dakota appellate courts). Berkheiser discusses the reversal of a juvenile case by the South Dakota Supreme Court where the trial court had assumed that the juvenile "had waived his right to counsel by appearing without an attorney." *Id*. at 613 (citing *In re* R.S.B., 498 N.W.2d 646, 647 (S.D. 1993)). This is particularly troubling and noteworthy given the affirmative duty now placed on defendants to verbally invoke the right to remain silent under Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010).

169. Berkheiser, *supra* note 96, at 645.

170. *See, e.g*., ME. REV. STAT. ANN. tit. 15 § 3306 (1978); NEV. REV. STAT. ANN. § 62D.030(4) (West 2004); N.H. REV. STAT. ANN. § 169-B:12(II) (2011); WASH. REV. CODE

voluntary.[171] Some states lack statutes specifically addressing the issue of waiver by juveniles. In that instance, courts in those states have permitted waivers that the court deems knowing and intelligent.[172] Some of those states require the presence of a parent or guardian,[173] but others do not. Rhode Island, Alabama, and Oregon do not have statutes addressing waiver by juveniles, and, in applying the adult standard of waiver, none of them require parental presence.[174]

There are some states, however, that afford greater protections surrounding juvenile waiver of counsel. Iowa's law—a rare example—states that the right to counsel is not waivable by juveniles.[175] In New York, the minor is presumed to lack the knowledge and maturity to enter an effective waiver, and the law requires a full hearing with representation of counsel.[176] Texas also strictly limits the conditions under which a juvenile may waive.[177] Under West Virginia case law, waiver of counsel will be considered knowing and intelligent only with the advice of coun-

§§ 13.40.140(9), (10) (1981); DEL. FAM. CT. R. CRIM. P. 44(a) (requiring waiver in writing unless it is made in court on the record or in the presence of the custodian); UTAH JUV. P.R. 26(d).

171. *See, e.g.*, WASH. REV. CODE §§ 13.40.140(9), (10) (allowing waiver of counsel for juveniles age twelve and above if the waiver is "express" and "intelligently made" after being informed of the right; a parent or guardian shall provide waiver for children eleven and under); UTAH JUV. P.R. 26(e) ("A minor fourteen years of age and older is presumed capable of intelligently comprehending and waiving the minor's right to counsel . . . and may do so where the court finds such waiver to be knowing and voluntary, whether the minor's parent, guardian or custodian is present.").

172. *See, e.g.*, *In re* T.D.W., 493 S.E.2d 736, 738 (Ga. Ct. App. 1997) (applying same standard as adults for valid waiver); Dellwo v. R.D.B. (*In re* R.D.B.), 575 N.W.2d 420, 423 (N.D. 1998); State *ex rel.* Juvenile Dep't v. Afanasiev, 674 P.2d 1199, 1200 (Or. Ct. App. 1984) (applying the standard from State v. Verna, 498 P.2d 793, 797 (Or. Ct. App. 1972)); *In re* John D., 479 A.2d 1173, 1178 (R.I. 1984); *In re* R.S.B., 498 N.W.2d 646, 647 (S.D. 1993); *Alabama: Juvenile Indigent Defense Data & Information*, NAT'L JUV. DEFENDER CENTER, http://www.njdc.info/sd/alabama.php (last updated Aug. 2005) (explaining that the adult waiver standard is used for juveniles) [hereinafter *Alabama Data*]; *see also* COLO. R. JUV. P. 3(a)(2); *In re* J.F.C., 660 P.2d 7, 8 (Colo. App. 1982) (requiring the presence of an adult to meet the knowing and intelligent standard for juvenile waivers).

173. *See* Garaas v. D. S. (*In re* D. S.), 263 N.W.2d 114, 120 (N.D. 1978); *see also* COLO. R. JUV. P. 3 (all waivers of constitutional rights by a juvenile must be in the presence of a parent); *In re* J.F.C., 660 P.2d 7, 8 (Colo. App. 1982) (applying the standard that when a juvenile waives a constitutional right, it must be done in the presence of a parent or guardian).

174. *See, e.g.*, *John D.*, 479 A.2d at 1178. Instead, in Rhode Island, the court "must scrutinize the admonitions given by the trial justice to the juvenile and his parent, if present, with the utmost exactitude and care to be certain that they meet the requirements for adults that have been laid down by this court and by the Supreme Court of the United States." *Id.* The validity of a waiver of rights by juveniles is assessed based on the totality of the circumstances. *In re* Kean, 520 A.2d 1271, 1276 (R.I. 1987); *see also Afanasiev*, 674 P.2d at 1200; *Alabama Data*, *supra* note 172.

175. IOWA CODE ANN. § 232.11(2) (West 1990).

176. N.Y. FAM. CT. ACT § 249-a (McKinney 2011).

177. TEX. FAM. CODE § 51.09 (West 1997) (permitting waiver of the right to counsel by children); *but see* TEX. FAM. CODE § 51.10(b) (West 2003) (preventing waiver in transfer hearings to criminal court, adjudication and dispositions hearings, and hearings prior to commitment to the Texas Youth Commission for disposition modification).

sel.[178] In New Jersey, the statute permits waiver only after consultation by the child and the parent with counsel.[179] In Montana, juveniles may not waive counsel if they face the potential of commitment to a state facility for more than six months.[180]

Implementation of the waiver in practice can be more revealing than the statute's text. For example, in some jurisdictions without special provisions, juveniles appear regularly with counsel and are not discouraged from exercising this right. In Maine, for example, where juveniles may waive the right without consulting counsel,[181] representation by counsel is not commonly waived and children are reportedly not pressured to do so.[182] In contrast, it is estimated that 75% of accused juveniles are not represented by counsel in Wyoming courts.[183] Many of the youth waive their right to counsel without fully understanding their

178. A juvenile can waive the right to counsel if the waiver is knowing. *See* W. VA. CODE § 49-5-9(a)(2) (2007). The Supreme Court of Appeals of West Virginia has held that a juvenile's waiver of a constitutional right is valid and knowing only if it is done upon the advice of counsel. State *ex rel*. J. M. v. Taylor, 276 S.E.2d 199, 204 (W. Va. 1981). In Vermont, a child's waiver is only valid with advice of counsel, along with additional enumerated statutory requirements. The constitutional rights of any child, including the Sixth Amendment right to counsel, is valid only when: (a) there is a factual and legal basis for the waiver; (b) the attorney has investigated the relevant facts and law, consulted with the client and guardian ad litem, and the guardian ad litem has consulted with the ward; (c) that the waiver is in the best interest of the ward; and (d) that the waiver is being entered into knowingly and voluntarily by the ward and also by the guardian ad litem. VT. R. FAM. P. 6(d)(3). In addition, in a delinquency case, the child's knowing and voluntary consent shall be required with respect to the waiver. VT. R. FAM. P. 6(d)(4).

179. N.J. STAT. ANN. § 2A:4A-39(b)(1)–(2) (West 1983).

180. MONT. CODE ANN. § 41-5-1413 (2005).

181. ME. REV. STAT. ANN. tit. 15 § 3306 (1979).

182. *See* JUDITH B. JONES, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, ACCESS TO COUNSEL 8 (2004), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf ("In Maine, waiver of counsel is not a problem. Many district judges spend time explaining the right to counsel to juveniles and their parents, and some judges refuse to accept waivers of counsel until a youth has spoken to an attorney."); *see also* AMERICAN BAR ASS'N JUVENILE JUSTICE CTR. & NEW ENGLAND JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (2003), *available at* http://www.njdc.info/pdf/mereport.pdf (reporting interviews confirming that waiver of counsel is not an issue and judges regularly refuse to accept a plea before juveniles speak with their attorneys); *but cf.* 1995 ABA REPORT, *supra* note 10, at 8.

183. ACLU OF WYO. NAT'L CHAPTER, INEQUALITY IN THE EQUALITY STATE: THE DAMAGED JUVENILE JUSTICE AND DETENTION SYSTEM IN WYOMING 31 (2010), *available at* http://www.aclu-wy.org/news-commentary/pub/040611juvejus_report.pdf. The report found that the problem was "particularly acute in municipal and circuit courts," where juveniles are being tried as adults. *Id.*

rights.[184] And, not surprisingly, few appeals are recorded there.[185]

The low number of appeals, however, is not limited to cases where juveniles did not have counsel.[186] The notion of "role confusion[,]" where lawyers fall into a "best interest" framework rather than acting as zealous advocates, is an underlying problem preventing the prominence of the constitutionally mandated role of the defender.[187] "One of the most pervasive systemic barriers [to zealous juvenile defense] is how the role of the juvenile defense attorney is misunderstood."[188] Therefore, in states with weak protections against waiver of counsel, guaranteeing juvenile representation of counsel is only the first step toward ensuring that the state constitutional or statutory right to appeal is realized. Additionally, where appellate rates remain low despite strong protections against waiver of counsel at trial, more inspection of defense systems is warranted.

2. Courts Closed to the Public

States vary in their approaches about whether to open juvenile proceedings to the public. The majority of states exclude the public and the media, with exceptions.[189] Others allow delinquency proceedings to be primarily open with some restrictions if the public's presence would be

184. *Id.* Wyoming is the only state that is not in substantial compliance with the Juvenile Justice Delinquency Prevention Act. *See* Sheen, *supra* note 96, at 486 (as of 2010, it was still out of compliance). This is particularly troubling when one considers that Wyoming has the nation's highest rate of incarcerated juveniles. Aaron LeClair, *Wyoming Leads Nation in Rate of Incarcerating Youth*, Community Just. Network for Youth (Oct. 6, 2011, 11:19 AM), http://www.cjny.org/index.php?option=com_content&view=article&id=586:wyoming-leads-nation-in-rate-of-incarcerating-youth&catid=6:news-and-updates (citing Annie E. Casey Found., No Place for Kids: Case for Reducing Juvenile Incarceration, (2011), *available at* http:/ http://www.aecf.org/OurWork/JuvenileJustice/~/media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf); ACLU of Wyo. Nat'l Chapter, *supra* note 183, at 15–16 ("Wyoming has one of the highest juvenile detention rates in the nation, and in 2008 ranked second nationwide for percentage of children under 18 in custody.").

185. *See* Sheen, *supra* note 96, at 505.

186. *See generally* Kehoe & Tandy, *supra* note 18, at 37–38; 1995 ABA Report, *supra* note 10, at 10; Tex. Appleseed, Selling Justice Short: Juvenile Indigent Defense in Texas 14 (2000), *available at* http://www.njdc.info/pdf/TexasAssess.pdf; *see also infra* Section III (discussing the low average rate of appeals in states, such as New Jersey and Texas, with protections against waiver of counsel for juveniles).

187. *See generally* Patricia Puritz & Robin Walker Sterling, *The Role of Defense Counsel in Delinquency Court*, Crim. Just., Spring 2010, at 16.

188. *Id.*

189. *See* Ala. Code § 12-15-129 (1995); Alaska Stat. § 47.10.070(c) (2005); Cal. Welf. & Inst. Code § 676 (West 2012) (providing that the public has no right of access to juvenile court hearings with exceptions for cases involving charges of violent crimes, including carjacking, drive-by shooting, and felony criminal street gang activity); Conn. Gen. Stat. Ann. § 46b-122 (West 2011); Del. Code. Ann. tit. 10, § 1063(a) (West 1995); D.C. Code § 16-2316(e) (2005) (with some exception allowing the press if privacy of child and family are protected); Ga. Code

harmful in some way.[190] From the juvenile's perspective, the policy implications of closed courtrooms can cut both ways. While closed proceedings protect privacy on the one hand, open proceedings are beneficial because they improve transparency and can serve to minimize abuses.[191] In the wake of Pennsylvania's judicial scandal, where two judges accepted payment for ordering juveniles into confinement to specific facilities, for example, the state's special commission emphasized the critical role of transparency and emphasized the importance of public

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ANN. § 15-11-78(a) (West 2010) (proceedings are closed in general but open to the public for certain designated felonies or if child has prior adjudications); HAW. REV. STAT. § 571-41(b) (West 2010); 705 ILL. COMP. STAT. ANN. 405/1-5(6) (West 2006) (excluding the public but allowing the news media while granting the court the authority to prohibit disclosure of the minor's identity); KY. REV. STAT. ANN. § 610.070(3) (West 1998); MASS. GEN. LAWS ch. 119, § 65 (1996) (juvenile proceedings are closed except where juvenile is indicted); MINN. STAT. ANN. § 631.045 (West 2007); MISS. CODE ANN. § 43-21-203(6) (West 1979); MO. ANN. STAT. § 211.171(6) (West 2004); NEB. REV. STAT. § 43-277 (1997) (statute is silent, but under NEB. REV. STAT. § 43-2,108 (1997) juvenile court records are not public); N.H. REV. STAT. ANN. § 169-B:34 (2004); N.D. CENT. CODE ANN. § 27-20-51(1) (West 2003); OKLA. STAT. ANN. tit. 10A, § 1-4-503(A)(1) (West 2010); OR. REV. STAT. § 419B.035 (2010) (court records are closed to the public); 42 PA. CONS. STAT. ANN. § 6336(d) (West 1972); R.I. GEN. LAWS ANN. § 14-1-30 (West 1961); S.C. CODE ANN. § 63-3-590 (2008); S.D. CODIFIED LAWS § 26-7A-36 (1996); TENN. R. JUV. P. 27 (2011); UTAH CODE ANN. § 78A-6-114 (West 2008) (as interpreted by Kearns-Tribune Corp. v Hornak, 917 P.2d 79, 82–83 (Utah Ct. App. 1996)); VA. CODE ANN. § 16.1-302(c) (West 1996) (court shall be closed unless youth is over fourteen and charged with felony equivalent); WASH. REV. CODE ANN. § 13.40.140(6) (West 2007); W. VA. CODE ANN. § 49-5-2(i) (West 2007); WIS. STAT. ANN. § 48.299 (West 2009); WYO. STAT. ANN. § 14-6-224(b) (West 2004); MINN. R. JUV. DELINQ. P. 2.01; MINN. R. JUV. DELINQ. P. 18.05 (closed to the public unless the child is sixteen and charged with the equivalent of a felony); MO. SUP. CT. R. 122.01 (hearings are generally open to the public, but subject to some exceptions); N.J. CT. R. 5:19-2(2); VT. STAT. ANN. tit. 33, § 5523(c) (West 1995), *repealed by* 2007 VT. ADJ. SESS. § 13.

190. ARK. CODE ANN. § 9-27-325(i) (West 2011); COLO. REV. STAT. ANN. § 19-1-106(2) (West 1987); FLA. STAT. ANN. § 985.035(1) (West 2007); IDAHO CODE ANN. § 20-525(1) (West 1997) (proceedings are open if the juvenile is fourteen years or older and the offense would be a felony charge if committed by an adult); IND. CODE ANN. § 31-32-6-3 (West 1997) (open to the public if charge is equivalent of a felony for an adult); IOWA CODE ANN. § 232.39 (West 1988); LA. CHILD. CODE ANN. art. 879(B) (2011) (open to the public for a crime of violence or repeat offender); MICH. COMP. LAWS ANN. § 712A.17(7) (West 1999) ("[T]he court may close the hearing of a case . . . if the court finds that closing the hearing is necessary to protect the welfare of the juvenile witness or the victim."); MICH. COMP. LAWS ANN. § 712A.28(2) (West 1999) (records are presumptively public); MONT. CODE ANN. § 41-5-1502(7) (1997); NEV. REV. STAT. ANN. § 62.D010 (West 2004); N.M. STAT. ANN. § 32A-2-16(B) (West 2009); N.C. GEN. STAT. ANN. § 7B-2402 (West 1999); OHIO REV. CODE ANN. § 2151.35(A) (West 2002); TEX. FAM. CODE ANN. § 54.08(a); IOWA R. JUV. P. 8.32 (1)–(2) (2002) (the court may exclude the public but juvenile records in delinquency cases are public in general, unless public is excluded from the courtroom); N.Y. R. CT. 205.4(b); OHIO R. JUV. P. 27(A)(1), cmt. (may close hearing to the public but must first conduct a hearing about closure decision).

191. *See* LESSONS FROM LUZERNE COUNTY, *supra* note 80, at ii, vi. After the judicial scandal in Luzerne County, Pennsylvania, the Special Commission report on reform emphasized that "[r]eforms must begin with the right mandates, but they must also be accompanied by accountability and transparency." *Id.* at 2; Increasing accountability and transparency was one of the six recommendation sections; *Id. see also* Drizin & Luloff, *supra* note 12, at 297. R

accountability.[192]

C. *Collateral Consequences*

Juvenile defendants now face significant collateral consequences, more so than they did in the 1980s.[193] As the collateral consequences of juvenile adjudications become more severe, thorough appellate review is even more significant for minors. The courts acknowledge the significance of collateral consequences by ruling that these consequences prevent appeals from becoming moot, even where a child has already served the terms of confinement or other punishment.[194] Yet, their significance remains under-acknowledged with the lack of procedural fairness present in many juvenile courts. This section focuses on those consequences that relate to the criminal justice system.[195]

1. Adult Sentencing Enhancements and Predicate Offenses

Juvenile adjudications may be counted as criminal convictions for purposes of adult sentencing under both federal and state law.[196] As the practice emerged in recent years, federal and state courts have upheld the use of juvenile adjudications to enhance adult sentences, despite the absence of juries and their supposed status as "non-convictions."[197] The

192. Lessons from Luzerne County, *supra* note 80, at ii.

193. *See,* e.g., Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 Nev. L.J. 1111, 1114–15 (2006)

194. *See* T.S.G. v. Juvenile Officer (*In re* T.S.G.), 322 S.W.3d 145, 148 (Mo. Ct. App. 2010) (noting that narrow exceptions to the mootness doctrine include collateral consequences and applying it in the juvenile delinquency context); *In re* Stanley F., 908 N.Y.S.2d 127, 129 (N.Y. App. Div. 2010) ("[B]ecause there may be collateral consequences resulting from the adjudication of delinquency, the appeal . . . has not been rendered academic."); *In re* S.J.C., 304 S.W.3d 563, 568 (Tex. App. 2010) ("[Collateral consequences that satisfy the mootness exception in the delinquency context include] the retention of the adjudication by the court and juvenile officers, the use of such records in assessing future punishments, and the publishing of the juvenile record in the event the individual is later charged with a felony."). In addition, "an adjudication of delinquency could effect [sic] admission to a profession, the armed services or private employment." *Id.* at 569. *See also* Commonwealth v. Keon K., 875 N.E.2d 498, 499 n.1 (Mass. App. Ct. 2007) (reviewing commitment to detention issue based on mootness exception recognizing that juvenile adjudication has potential collateral consequences in future criminal proceedings, such as at sentencing and when setting bail).

195. For a more complete discussion of civil considerations such as housing and education, see generally Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?,* 79 N.Y.U. L. Rev. 520 (2004).

196. *See* Pinard, *supra* note 193 at 1114–15 (noting the use of juvenile adjudications in adult sentencing enhancements); *see also* Redi Kasollja, Comment, *Criminal Law—First Circuit Upholds Constitutionality of Juvenile Convictions as Predicate Offenses Under the Armed Career Criminal Act*—United States v. Matthews, *498 F.3d 25 (1st Cir. 2007)*, 41 Suffolk U. L. Rev. 369, 373 (2008).

197. *See, e.g.*, United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007); United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005); People v. Huber, 139 P.3d 628, 632–33 (Colo. 2006) (en banc); Nichols v. State, 910 So. 2d 863, 865 (Fla. Dist. Ct. App. 2005) (per curiam);

majority of courts rejected the argument that the use of juvenile adjudications as sentencing enhancements is unconstitutional under the *Apprendi v. New Jersey*[198] and *Blakely v. Washington*[199] requirement that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[200]

The Supreme Court stated that the use of prior criminal convictions was a limited exception to the general rule that a jury finding was necessary.[201] This ruling led to the question about whether juvenile adjudications fit within the scope of that exception and most courts entertaining the question upheld the practice.[202] The courts relied in part on due process protections provided to juveniles, such as the requirement of proof beyond a reasonable doubt and the right to counsel, to "ensure the accuracy of the fact-finding proceedings without the need for a jury."[203] Because *McKeiver v. Pennsylvania* held that lack of juries would not threaten the reliability of fact-finding proceedings,[204] courts held that the *Apprendi* Court's concerns with procedural safeguards requiring the reliability of fact-finding proceedings were satisfied.[205] But even before *Apprendi*, the reasonableness of using juvenile adjudications in this manner generated lively debate and disagreement.[206] Moreover, there are questions about the fairness of this policy outside of the issue

Ryle v. State, 842 N.E.2d 320, 322 (Ind. 2005) (upholding the use of juvenile adjudications in adult sentencing enhancements); State v. Hitt, 42 P.3d 732, 740 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); State v. McFee, 721 N.W.2d 607, 617 (Minn. 2006); State v. Weber, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005) (holding that a defendant's prior juvenile adjudications can be considered prior convictions for purposes of sentencing enhancement under *Apprendi* and *Blakely*), *aff'd*, 149 P.3d 646, 660 (Wash. 2006). The Federal Armed Career Offender Act permits adjudications to be used as enhancements. 18 U.S.C. § 924(c)(1), (5) (2006); *see also* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (2001). *But see* United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001) (limiting the prior conviction exception to "prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt"); State v. Brown, 879 So. 2d 1276, 1290 (La. 2004) (holding that juvenile adjudications cannot be used to enhance felony convictions pursuant to LA. REV. STAT. ANN. § 15:529.1 (2010)).

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

199. Blakely v. Washington, 542 U.S. 296, 301 (2004).

200. *Apprendi*, 530 U.S. at 490; *see also Ryle*, 842 N.E.2d at 323; *Hitt*, 42 P.3d at 740; *Weber*, 112 P.3d at 1292.

201. *Blakely*, 542 U.S. at 301.

202. See *supra* note 197 for a list of the relevant cases that ruled on the issue of the use of juvenile adjudications.

203. *See, e.g.*, *Weber*, 112 P.3d at 1293.

204. McKeiver v. Pennsylvania, 403 U.S. 528, 544–47 (1971).

205. See *supra* note 197 for a discussion of cases partaking in this analysis.

206. Tonya K. Cole, Note, *Counting Juvenile Adjudications as Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 339–42 (1998).

presented under *Apprendi*. These questions are due to underlying differences between the way that juvenile and criminal cases are tried in practical terms.[207]

The fact that the appellate function is nearly non-existent in many juvenile cases is increasingly relevant to court reasoning that relies on assurances of accuracy and due process.[208] With so few appeals, it is difficult to determine whether due process requirements are actually met.[209]

Next, in some states, juvenile adjudications may be used as predicate offenses to enhance charges.[210] Where it is not expressly stated in the statute, there is little case law from adult criminal or juvenile courts about whether courts may allow the practice without explicit statutory guidance.[211] This lack of case law makes it difficult to gauge the prevalence of the practice, but the Ohio Supreme Court recently upheld the use of a prior juvenile adjudication to enhance an adult charge into a felony.[212] Previously, in at least two states, courts held that prior adjudications could not be used to enhance charges in juvenile court, as they did not constitute "convictions."[213] Other state statutes expressly allow juvenile adjudications to count as predicates.[214] In that situation, a juve-

207. *See generally* Berkheiser, *supra* note 96, at 646; Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 BERKELEY J. CRIM. L. 65, 90–95 (2010).

208. *See, e.g.*, Welch v. United States, 604 F.3d 408, 429–32 (7th Cir. 2010) (Posner, J., dissenting) (disagreeing with the majority decision by concluding that juvenile adjudications should not be used as criminal convictions for enhancement purposes, and discussing the lack of appeals and other factors as support for his conclusion).

209. *See* Berkheiser, *supra* note 96, at 607–08 (discussing why the right to counsel in juvenile courts is nearly "fictional").

210. *See, e.g.*, State v. McFee, 721 N.W.2d 607, 614 (Minn. 2006) (listing juvenile adjudications that qualify as predicate offenses that will enhance later charges under Minnesota law); State v. Adkins, 951 N.E.2d 766, 769 (Ohio 2011) (holding that state constitutional prohibition on retroactive statutes did not preclude allowing a prior juvenile adjudication to be considered a prior criminal offense for purposes of enhancing charge for operating a motor vehicle under the influence of alcohol). *See generally* John Mahoney & Cynthia McCollum, *DW's Cautionary Tale*, 37 WM. MITCHELL L. REV. 769, 794–817 (2011) (noting the numerous instances where Minnesota authorizes juvenile adjudications to enhance adult misdemeanor charges to felony charges).

211. *See* Mahoney & McCollum, *supra* note 210, at 782 (discussing the absence of any reported Minnesota case that directly addressed the use of prior adjudications as charge enhancements as an impetus for the article).

212. *Adkins*, 951 N.E.2d at 769–70.

213. *In re* J.E.M., 890 P.2d 364, 368 (Kan. Ct. App. 1995) (holding that prior adjudication for theft could not be used to enhance charge from a misdemeanor to a felony in juvenile court under the state's theft statute); *In re* Welfare of L.G.S., 568 N.W.2d 182, 183 (Minn. Ct. App. 1997) (holding as a matter of first impression that prosecutor could not enhance a misdemeanor assault because the youth's prior adjudication did not constitute a prior "conviction" within the meaning of the statutory enhancement scheme).

214. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/24-1.6(a)(3)(D) (West 2011) (allowing a prior

nile adjudication for certain crimes is treated the same way as a criminal conviction and enhances an adult charge from a misdemeanor charge to a felony charge.[215]

2. DNA Registration

All states now require the collection and entry of DNA by persons convicted of certain crimes into state databases linked to the Federal Combined DNA Index System (CODIS).[216] While initially limited to serious crimes, collection has expanded and some states include misdemeanors.[217] In addition, while federal law was the first to require collection before a conviction,[218] states are rapidly passing laws that require all or some arrestees to submit DNA samples.[219] Juveniles are increasingly included in the registration where states have decided to equate adjudications with convictions.[220] Currently, about half of the states also require DNA from felony arrestees.[221] Some of these states also require juveniles arrestees to provide DNA sampling.[222]

As this area of law quickly expands, courts are now faced with unique questions about juvenile DNA collection. Courts have generally upheld statutes requiring collection from juveniles.[223] Unlike other juve-

juvenile adjudication for a felony to result in a felony firearm possession charge that would otherwise be a misdemeanor).

215. *See* Mahoney & McCollum, *supra* note 210, at 794–817 (describing the practical implications of using juvenile adjudications as predicate offenses).

216. Federal funding and creation of CODIS allowed for the link between state and federal systems. Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brook. L. Rev. 127, 128 (2001). All states enacted enabling legislations to develop a linked system between the state and the federal databases. *Id.*

217. *See, e.g.*, Ark. Code Ann. § 12-12-1006 (West 2011); Del. Code Ann. tit. 29 § 4713(b)(1) (West 2012), Md. Code Ann., Pub. Safety § 2-504(a) (West 2012).

218. 42 U.S.C. § 14132(a)(1)(B)–(C) (2006).

219. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-102a (West 2012); Fla. Stat. Ann. § 943.325 (West 2012), N.C. Gen. Stat. Ann. § 15A-266.3A (West 2011).

220. As of 2010, thirty-five states required at least some juveniles to submit to DNA testing. *See State Laws on DNA Databanks: Qualifying Offenses, Others Who Must Provide Sample*, Nat'l Conf. on St. Legislatures (Feb. 25, 2010), http://www.ncsl.org/issues-research/justice/state-laws-on-dna-data-banks.aspx.

221. Sarah Hammond, *The DNA Factor*, State Legislatures (June 2010), at 13, *available at* http://www.ncsl.org/LinkClick.aspx?fileticket=MBCbsaSBQxQ%3d&tabid=20358.

222. *See, e.g.*, Ariz. Rev. Stat. Ann. § 8–238.A (1996); Fla. Stat. § 943.325(2)(g), (3)(a) (2000) (including juveniles in the provision requiring "qualifying offenders" to submit to DNA testing at the time of arrest for felonies or attempted felonies); Kan. Stat. Ann. § 21-2511 (West 2009); N.J. Stat. Ann. § 53:1-20.18 (West 1994) (requiring DNA from every juvenile arrested for certain violent crimes).

223. *See, e.g.*, People v. Calvin S. (*In re* Calvin S.), 58 Cal. Rptr. 3d 559, 563 (Cal. Ct. App. 2007) (upholding statute requiring juvenile to submit DNA sample after adjudication for felony car theft as valid government interest under the Fourth Amendment); People v. Lakisha M. (*In re* Lakisha M.), 882 N.E.2d 570, 582 (Ill. 2008) (holding that collection of DNA swab from a juvenile and inclusion in state database did not violate the Fourth Amendment or the privacy

nile records attached to adjudication, DNA will not be expunged or destroyed when the juvenile becomes an adult.[224] The collection and retention of juveniles' DNA raises compelling issues relevant to the importance of appeals in the juvenile system, three of which are included here. First, in many instances, a juvenile adjudication will require the same DNA registration requirement as it would for an adult, raising the importance of a correct case outcome. Second, where states require DNA from arrestees, the outcome of the case at trial or appeal will determine the defendant's ability to have the sample removed and destroyed.[225] In order to have a DNA sample of a juvenile or adult arrestee destroyed and removed from the registry, state laws require the case to be dismissed.[226] Otherwise, the arrestee's DNA sample will be retained in the state database, linked to CODIS. Third, DNA registration of a juvenile and the subsequent retention of the sample can affect the families of juveniles due to law enforcement's ability to conduct intrafamilial DNA searches.[227] Therefore, the reliability of the outcome at the trial level and access to appellate review is related to the collection of DNA upon both arrest and conviction.

clause of the Illinois Constitution); *In re* Welfare of M.L.M., 781 N.W.2d 381, 389 (Minn. Ct. App. 2010) (upholding constitutionality of statute requiring DNA collection from juveniles adjudicated delinquent for a misdemeanor under statute that applies to "those who have been adjudicated delinquent for an offense that *arises from the same set of circumstances as a charged felony*"); *see also* State v. Poitra, 785 N.W.2d 225, 231–32 (N.D. 2010) (holding that a juvenile does not have the right to an attorney or parental notification when police have a warrant to collect his DNA).

224. Statutes that require the collection of DNA upon arrest typically contain expungement provisions to provide a mechanism for deletion only if there is an acquittal or dismissed not based upon a person's juvenile status. *See, e.g.*, *infra* note 225 and accompanying text. R

225. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13–610(M) (West, Westlaw through legislation effective February 16, 2012 of the Second Regular Session of the Fiftieth Legislature) (allowing expungement of DNA only where defendant's case results in dismissal or acquittal and upon application by the defendant); FLA. STAT. ANN. § 943.325(16) (West, Westlaw through 2012 Second Regular Session of the Twenty-Second Legislature through February 16, 2012) (expungement of DNA permitted only upon submission of a court order by the defendant proving case dismissed); N.C. GEN. STAT. ANN. § 15A-266.3A(h)–(i) (West, Westlaw through S.L. 2012-1 of the 2011 General Assembly) (dictating parameters of removal of DNA upon dismissal of the case).

226. Sarah B. Berson, *Debating DNA Collection*, NAT'L INST. OF JUST. J., Nov. 2009, at 11.

227. *See generally* Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison & Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 255–59 (2006); Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J.L. & TECH. 309, 318–22 (2010).

3. Sex Offender Notification and Registration Act

Sex offender registration for juveniles is another example of significant consequences extending beyond the juvenile court's age jurisdiction and the importance of ensuring accuracy. The federal Sex Offender Notification and Registration Act (SORNA)[228] was amended in 2006 to require states to pass uniform sex offender registration and community notification laws applicable to juveniles above the age of fourteen.[229] At the time of its passage, over thirty states had some form of sex offender registration for juveniles.[230] For example, Delaware law treated juveniles the same as adults for purposes of its registration requirements beginning in 2001 and the statute contains no minimum age.[231] Some states did not include a community notification requirement for juveniles with sex offenses; rather, only law enforcement could view the registry.[232] The federal legislation sought to provide a uniform framework across jurisdictions.[233] Under SORNA, states that fail to "substantially implement" its provisions are entitled to less funding from Byrne Justice Assistance Grants.[234]

Under SORNA, states are required to implement registration for juveniles found delinquent for certain sex offenses.[235] While federal law requires registration for youths over the age of fourteen based upon a tiered level of offenses, states are permitted to pass more restrictive statutes based upon age or offense.[236] For example, some states do not have

228. 42 U.S.C. § 16911 (2006).

229. *Id.* §§ 16911(8), (10), 16912(a).

230. Roxanne Lieb & Scott Matson, *Sex Offender Registration: A Review of State Laws*, Wash. St. Inst. for Pub. Pol'y, 13–20 (July 1996), http://wsipp.wa.gov/rptfiles/regsrtn.pdf.

231. *See* Fletcher v. State (*In re* Matter of Fletcher), No. 0404010688, 2008 WL 2912048, at *3 (Del. Fam. Ct. Jun. 16, 2008); Del. Code Ann. tit. 11 § 4121(a)(4)b (West, Westlaw current through 78 Laws 2011, chapters 1–203 and technical corrections received from the Delaware Code Revisors for 2011 Acts) (providing that any juvenile charged as an adult and found delinquent of enumerated offenses will be subject to registration under the statute).

232. *See* Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is there a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 Cath. U. L. Rev. 817, 830–31 (2008) (discussing the variations among states with regard to community notification and registration requirements applicable to juveniles).

233. The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30, 210 (May 30, 2007).

234. 42 U.S.C. § 16925(a) (2006).

235. *Id.* § 16911 (defining juveniles at least fourteen years old that commit an offense comparable or more severe than "aggravated sexual abuse" as sex offenders); The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30, 212 (May 30, 2007).

236. *See* The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,216 (May 30, 2007) ("[T]he inclusions and exclusions in the definition of 'conviction' for purposes of SORNA do not constrain jurisdictions from requiring registration by additional individuals—e.g., more broadly defined categories of juveniles adjudicated delinquent for sex offenses—if they are so inclined.").

an age minimum at which registration will be required.[237] Under SORNA, a juvenile must register the same information as an adult, including his personal information.[238] Such information includes, but is not limited to, a photograph, address, and vehicle information.[239] With some exceptions for good behavior, the government generally retains this information for a minimum of fifteen years—possibly for life.[240] Residency restrictions also apply, affecting where a juvenile can reside.[241] Under the required federal statutory scheme, a person who fails to comply with continued registration will be charged with a felony.[242] Therefore, a child adjudicated delinquent may later be charged with a felony if he fails to comply with the registration requirements whether he or she fails to do so as a juvenile or later as an adult; for offenses deemed as Tier Three, a person must appear in person every three months for life.[243]

Disagreements about the overly inclusive SORNA provisions as applied to juveniles have generated considerable discussion.[244] Most states have opted not to fully conform with SORNA; Delaware, Florida, Michigan, Nevada, South Dakota, and Wyoming are the only states that the federal government deemed to be in full compliance as of 2011.[245] Many states, nevertheless, require juvenile sex offenders to register in at

237. Jessica E. Brown, Note, *Classifying Juveniles "Among the Worst Offenders": Utilizing* Roper v. Simmons *to Challenge Registration and Notification Requirements for Adolescent Sex Offenders*, 39 STETSON L. REV. 369, 379 (2010).

238. *Cf.* The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30, 210, 30, 220–23 (May 30, 2007) (explaining the registration requirements for "sex offenders").

239. *Id.*

240. *Id.* at 30, 232.

241. *See generally* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007) (discussing sex offender residency restrictions).

242. *See* 42 U.S.C. § 16913(e) (2006) (requiring states to impose a minimum prison sentence of one year for sex offenders who fail to comply with registration requirements).

243. *Id.* § 16916(3).

244. *See* Chrysanthi Leon, David L. Burton & Dana Alvare, *Net Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 129 (2011); Krista L. Schram, Note, *The Need for Heightened Procedural Due Process Protection in Juvenile Sex Offender Adjudications in South Dakota: An Analysis of* The People in the Interest of Z.B., 55 S.D. L. REV. 99, 113–16 (2010) (discussing community notification provisions for minor sex offenders and public website dissemination of the information and arguing that youths are denied procedural due process under the current statutory scheme); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 478–81 (2010).

245. Press Release, Dep't of Justice, Office of Justice Programs, Justice Department Announces Four More Jurisdictions Implement Sex Offender Registration and Notification Act (May 12, 2011), *available at* http://www.ojp.gov/newsroom/pressreleases/2011/SMART11102.htm.

least some capacity.[246]

Overall, the prevalence of sex offense arrests among juveniles is comparatively low and represented less than one percent of the juvenile delinquency arrests in 2008.[247] A disproportionate number of juvenile delinquency opinions published in recent years, however, involve sex offenses.[248] As states litigate the constitutional, procedural, and statutory issues raised by sex offender registration, the issue is likely to continue to generate appellate attention. This notable appellate attention was due, in large part, to juvenile sex offender registration requirements implemented by states, along with state efforts to comply with SORNA post-2006. These laws raise constitutional challenges and have created issues of first impression for state courts in recent years.[249] For example, most recently, an Ohio court of appeals ruled that the juvenile court provision requiring sex offender registration violated procedural due process to the extent that it prematurely required automatic lifetime sex offender registration by a juvenile without the opportunity to present rebuttal evidence

246. *Juvenile Sex Offender Registration and SORNA*, NAT'L CONF. ON ST. LEGISLATURES (May 2011), http://www.ncsl.org/issues-research/justice/juvenile-sex-offender-registration-and-sorna.aspx.

247. Out of 2.11 million juvenile arrests in 2008, there were 17,840 arrests for sex offenses, as compared to 439,600 for property crimes. *See* CHARLES PUZZANCHERA, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE ARRESTS 1, 3 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf.

248. *See, e.g.*, United States v. Juvenile Male, 255 P.3d 110, 111 (Mont. 2011) (upon remand from the United States Supreme Court, holding that juvenile's duty to remain registered as a sex offender with the state was not contingent upon his federal supervision order); *In re* D.C.N., 264 P.3d 517 (Mont. 2011) (upholding trial court's requirement to register as a sex offender); Divide Cnty. Sheriff's Dep't v. M.W. (*In re* M.W.), 785 N.W.2d 211, 212 (N.D. 2010); *In re* Harrison, 992 A.2d 990 (R.I. 2010) (sexual assault case dealing with statutory interpretation); *In re* Miguel A., 990 A.2d 1216, 1218 (R.I. 2010); *In re* Richard A., 946 A.2d 204 (R.I. 2008) (upholding sex offender registration requirement for juvenile sex offender and rejecting argument that registration as a sex offender should give rise to constitutional right to jury trial in delinquency proceedings); People *ex rel*. Z.B., 757 N.W.2d 595 (S.D. 2008); State v. Larry T., 697 S.E.2d 110, 112 (W. Va. 2010). Notably, sex offenses appeared in 11% of juvenile appellate opinions, or 389 out of 3,426, cases over a ten-year period. *See infra* Part IV (discussing the substance of juvenile delinquency appellate opinions that were studied for the period between July 2001 and July 2011 and the methods of the search to approximate the grouping of juvenile delinquency appeals).

249. *See, e.g.*, State v. Fletcher, 974 A.2d 188, 190–95 (Del. 2009) (discussing two issues of first impression regarding the interaction between the state's sex offender registration statute and its juvenile expungement statute); State *ex rel.* B.P.C., 23 A.3d 937, 953–54 (N.J. Super. Ct. App. Div. 2011) (remanding for a hearing to determine whether a youth was fully aware of the consequences of his guilty plea and the resulting requirement to register for life as a sex offender for sexual contact in the fourth degree when evidence of his knowledge was unclear); *Richard A.*, 946 A.2d at 212–214 (upholding statute requiring sex offender registration for juveniles and rejecting the argument that registration as a sex offender gives rise to a constitutional right to a jury trial in delinquency proceedings); *Z.B.*, 757 N.W.2d at 600 (finding an equal protection violation for the harsher treatment of juveniles under the state's sex offender registration law, which did not provide juveniles a chance to have their names removed from the registry via a suspended sentence).

of rehabilitation upon completion of a program.[250] Also, in 2011, a New Jersey appellate court held that a juvenile's plea was not valid where it was unclear from the record whether the juvenile's attorney informed him that he would have to register as a sex offender.[251] As states litigate the constitutional, procedural, and statutory issues raised by sex offender registration, alleged juvenile sex offenses are likely to continue to generate appellate attention.

The prevalence of juvenile-sex-offense appellate opinions indicates that, at least in these instances, there is recognition that the consequences for juveniles are severe. Still, while the issue seems to stir more appellate attention than others, most cases involving sex offender registration still appear to go unchallenged on appeal. For example, while it is unknown how many juveniles have been required to register as sex offenders nationally, in Michigan alone approximately 3,563 juveniles were registered as sex offenders as of February 2010.[252] Yet, there are few appellate opinions discussing such cases in the state. The requirement to renew his or her registration generally remains part of a juvenile's life for a minimum of fifteen years in Michigan.[253] Adult sentencing consequences, enhanced charges, DNA registration, and sex offender registration are just four examples of areas where juvenile adjudications and accompanying errors can have lifelong consequences. Policies employing the wide-reaching use of juvenile adjudications and courts interpreting them should carefully consider the implications of infrequent review and lack of access to appeals when considering when juvenile case outcomes are reliable.

D. *Disproportionate Minority Confinement*

Each decision-point in the juvenile justice system is crucial to understanding the overall disparities for minorities in the system. Undeniably, however, it is a judge who makes the final determination to send a child home or to send him or her to a locked facility. Indeed, progress toward reducing disproportionate minority confinement in the juvenile justice field "is obstructed by the constant and misdirected citation of extrajudicial factors as the only causes contributing to disparities."[254]

250. *In re* W.Z., 957 N.E.2d 367, 381 (Ohio Ct. App. 2011).

251. *B.P.C.*, 23 A.3d at 953–54 (reversing in part and holding that there was insufficient evidence to demonstrate that juvenile was aware of the penal consequence of sexual offender registration).

252. David Alire Garcia, *Juveniles Crowd Michigan Sex Offender Registry*, THE MICH. MESSENGER (Feb. 10, 2010, 7:27 AM), http://michiganmessenger.com/34538/juveniles-well-represented-on-mich-sex-offender-registry.

253. MICH. COMP. LAWS ANN. § 28.725(10)–(11) (West, Westlaw through P.A.2012, No. 52, of the 2012 Regular Session, 96th Legislature).

254. JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE

State statutes generally provide judges with broad discretion in making the decision to confine a juvenile.[255] Studies show that judges issue more severe sanctions to youth of color than to white youth for similar behavior.[256] In addition, black youth are ordered by judges into residential confinement at a 27% greater rate than white youth.[257] But 64% of the youth handled by the juvenile system are white, and only 33% are black.[258]

Though disparate treatment of minorities in the justice system is not a new problem and surely not a problem that is limited to the juvenile system, attention to disproportionate minority contact and confinement of juveniles has increased in recent years.[259] In 1992, the reduction of minority confinement became a core requirement of the Juvenile Jus-

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QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 10 (2008), *available at* http://www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf.

255. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 848–49 (1988) ("[T]he contemporary juvenile sentencing provisions of most states reflect their Progressive origins. Following an adjudication of delinquency, the state statutes typically offer a range of sentencing alternatives—dismissal, probation, out-of-home placement, or institutional confinement—and give the juvenile court judge broad discretion to impose an appropriate disposition."); 1995 ABA REPORT, *supra* note 9, at 36-37 (courts have "very broad discretion" when ordering disposition for juveniles).

256. BELL & RIDOLFI, *supra* note 254, at 9; *see generally* Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY, 392 (1996). The report found that the effect of race was pronounced at each stage of the juvenile court processing system and also had a significant effect on the outcome of the case. *Id*. Professor Barry Feld characterizes Bishop and Frazier's study as "one of the most sophisticated and comprehensive studies of juvenile justice dispositional decision-making." *See* BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION, 1, 969 (3d. ed. 2009).

257. CRYSTAL KNOLL & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2007 2 (2010), *available* at https://ncjrs.gov/pdffiles1/ojjdp/230168.pdf [hereinafter 2007 DOJ REPORT].

258. *Id*.

259. *See generally* NEELUM ARYA, FRANCISCO VILLARRUEL, CASSANDRA VILLANUEVA & IAN AUGARTEN, CAMPAIGN FOR YOUTH JUSTICE & NAT'L COUNCIL OF LA RAZA, AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE 5–8 (2009), *available at* http://www.campaignforyouthjustice.org/documents/Latino_Brief.pdf; JAMES BELL, LAURA JOHN RIDOLFI, MICHAEL FINLEY & CLINTON LACEY, W. HAYWOOD BURNS INST., THE KEEPER AND THE KEPT: REFLECTIONS ON LOCAL OBSTACLES TO DISPARITIES REDUCTION IN JUVENILE JUSTICE SYSTEMS AND A PATH TO CHANGE 2 (2009), *available at* http://www.burnsinstitute.org/downloads/BI%20Keeper%20Kept.pdf; CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, NATIVE AMERICAN YOUTH AND THE JUVENILE JUSTICE SYSTEM 1 (2008), *available at* http://www.nccd-crc.org/nccd/pubs/2008_Focus_NativeAmerican.pdf; JOSÉ D. SAAVEDRA, NAT'L COUNCIL OF LA RAZA, JUST THE FACTS: A SNAPSHOT OF INCARCERATED HISPANIC YOUTH (2010), *available at* http://www.nclr.org/index.php/site/pub_download/just_the_facts_a_snapshot_of_incarcerated_hispanic_youth; Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work*, 13 D.C. L. REV. 71, 71 (2010).

tice Delinquency and Prevention Act (JJDPA).[260] The JJDPA has led policy makers to explore more effective ways to reduce minority confinement and attempt to understand its causes,[261] but the disproportionate minority contact reduction requirement of the JJDPA remains "understudied, unacknowledged, or unknown to many."[262] This core requirement has remained in place, however, and it has been difficult to realize improvements. It does not include a quota or percentage reduction goal, but rather requires states to assess whether they have disproportionate minority representation in the juvenile justice system—both contact and confinement rates. If this problem is present, they must determine the reasons for the disproportion and create an intervention plan for reduction.[263]

While the negative consequences of the lack of appeals extend to all youth, a recent study of exonerated youth is informative about the effects on minority youth.[264] The data revealed that out of 103 juvenile exonerees, nearly three-quarters of them were minority youth.[265] Fifty-nine (57.3%) were African-American and fifteen (14.6%) were Latino.[266] Twenty-five (24.3%) were white and the race of the remaining four juveniles was unknown.[267] The study highlights why great care must accompany trials and their appellate review for all youth, but it also illustrates the greater risk for minority youth. A study on juvenile wrongful convictions revealed that convictions were based on false confessions by police-induced questioning, prosecutorial misconduct via violations of *Brady v. Maryland*, unreliable witness statements, and false guilty pleas.[268] Lack of protections against wrongful convictions, including vigilance and oversight about the factors that lead to them, reveals the danger to minority youth and implicates efforts to reduce disproportionate minority contact and confinement.

260. *See* 42 U.S.C. § 5633 (2006) (requiring states to submit reports detailing how they have designed their juvenile delinquency prevention efforts and system improvements to reduce the disproportionate number of juvenile minorities as a condition of 25% of their grant allocation).

261. *See, e.g.*, Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 471 (2005) (studying disproportionate minority confinement for African-American youth in Iowa).

262. Michael J. Leiber & Nancy Rodriguez, *The Implementation of the Disproportionate Minority Confinement/Contact (DMC) Mandate: A Failure or Success?*, 1 RACE & JUST. 103, 104 (2011).

263. *See* 42 U.S.C. § 5633 (2006) (requiring states to submit reports detailing how they have designed their juvenile delinquency prevention efforts and system improvements to reduce the disproportionate number of juvenile minorities as a condition of 25% of their grant allocation).

264. Tepfer, Nirider & Tricarico, *supra* note 10, at 902.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 904–15.

For those states with the highest rates of disproportionate confinement of African- American children, those children are incarcerated at a rate that is between "twelve and twenty-five times" that of white children.[269] For Latino youth, New Hampshire has the greatest disparity, incarcerating them at a rate of more than seventeen times that of white children.[270] In those states with higher numbers of Native American children, the disproportionate rates of confinement are also significant. Nationally, Native Americans are detained at two-and-a-half times the rate of white children.[271] Data describing disproportionate minority contact and confinement are not representative of minority youth simply committing more crimes than other youth. For example, nationally, Latino youth are admitted to state facilities at higher rates than whites, even when charged with the same crimes, sometimes at rates twelve times higher than white youth.[272] African-American youth are arrested at twice the rate of white youth despite research showing that white youth are just as likely or more likely to be involved in the use and sale of drugs.[273] Minority youth are also arrested, charged, and detained at higher rates.[274]

These disparities have been difficult for state juvenile justice systems to address. There must be accountability and inquiry at all points in the decision-making process to eliminate disparities.[275] The realization of effective appeals are one more potential way to address discrepancies in decisions that lead to juvenile confinement and the steps that precede the judge's ultimate decision. In the examination of juvenile delinquency opinions available for review, few indicated challenges to dispositions.[276]

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269. Gary Ford, *The New* Jim Crow*: Male and Female, South and North, From Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America's Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 345 (2010); *Race and Incarceration in the United States*: Human Rights Watch Press Backgrounder, HUM. RTS. WATCH (Feb. 27, 2002), http://www.hrw.org/legacy/backgrounder/usa/race/ [hereinafter HUM. RTS. WATCH].

270. HUM. RTS. WATCH, *supra* note 269, at tbl. 7.

271. *See* HARTNEY, *supra* note 259, at 6.

272. JESSICA SHORT & CHRISTY SHARP, CHILD WELFARE LEAGUE OF AM., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7–8 (2005), *available at* http://www.cwla.org/programs/juvenilejustice/disproportionate.pdf.

273. JEFF ARMOUR & SARAH HAMMOND, NAT'L CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 4 (2009), *available at* http://www.ncsl.org/print/cj/minoritiesinjj.pdf.

274. *Id.*

275. *See* Bishop & Frazier, *supra* note 256, at 392. "Because the juvenile justice system consists of multiple decision points, it is essential that researchers track cases from arrest to final disposition through as many stages as possible." *Id.*

276. *See infra* Part IV.B.3 (describing the author's examination of appellate opinions addressing challenges to juvenile dispositions).

III. APPELLATE RATES FOR JUVENILE DELINQUENCY CASES

Juvenile caseloads make up a small percentage of incoming cases in state trial courts, comprising an average of two percent of all cases heard.[277] That small percentage, however, represents an estimated 1.7 million juvenile delinquency cases processed by state courts in a given year.[278] According to the most recent data, there were 81,015 children residing in juvenile detention and correctional facilities in 2008.[279] This represents a decline from 2006, when there were 92,093 confined juveniles,[280] just as the numbers of juvenile cases processed have declined.

It is unknown how many of those cases were ever reviewed by an appellate court. In order to inform the discussion about juvenile appeals, I conducted empirical research by surveying the director of every states' administrative office of the courts, including the District of Columbia.[281] The data set includes the results of this study from the fourteen states that were able to provide information allowing for the determination of an approximate rate of appeals filed.[282] Thirty-eight states, as well as the District of Columbia, responded in some fashion.[283] Twenty-five of

277. CONFERENCE OF STATE COURT ADM'RS, BUREAU OF JUSTICE STATISTICS & NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 51 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx.

278. *See* 2007 DOJ REPORT, *supra* note 257, at 1. This number remained steady between 2000 and 2007. *Id*.

279. SARA HOCKENBERRY, MELISSA SICKMUND & ANTHONY SLADKY, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2008: SELECTED FINDINGS 2 (2011), *available at* www.ncjrs.gov/pdffiles1ojjdp/231683.pdf.

280. SARA HOCKENBERRY, MELISSA SICKMUND & ANTHONY SLADKY, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2006: SELECTED FINDINGS 5 (2009), *available at* www.ncjs.gov/pdffiles1ojjdp/228128.pdf.

281. The data included here is a result of statistical information based upon a survey sent to all states requesting data that included: 1) the number of incoming delinquency cases filed; 2) the number of cases resolved by a final appealable order; 3) the number of youth committed to a detention facility or other residential placement; 4) the number of juvenile delinquency appeals actually filed with intermediate appellate courts; 5) the outcome on appeal; 6) the number of juvenile delinquency appeals resolved via written opinion if available; and 7) whether the jurisdiction precludes a juvenile's appeal of pretrial rulings after a plea is entered in delinquency cases. This article utilizes the data, where available, derived from responses submitted to questions 1, 2, and 4.

282. See *infra* Table 1 for a listing of the fourteen states providing sufficient data.

283. An additional twenty-five states (and the District of Columbia) responded; respondents indicating they could not provide the data or did not follow up with appellate data were: Arkansas, California, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Mexico, New York, Nevada, North Dakota, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, South Carolina, South Dakota, and the District of Columbia.

those states responded without appellate data, and some expressed that they would be unable to provide any of the requested information.

The number of juvenile delinquency appeals and the rate at which they are filed in a given state is difficult to obtain. In order to form an approximate number of the rate of appeals by defendants, the request included the number of final appealable orders (i.e., adjudications of guilt) and the number of actual appeals filed. State jurisdictions track cases and capture data in a variety of ways. As one example, North Carolina records each individual count in a delinquency complaint as a separate "case" in their data system.[284] The most common data gap is that many states do not independently record the number of juvenile delinquency appeals filed. Rather, they are grouped together with other types of juvenile cases, such as child abuse and neglect.[285] As a result, annual court reports providing appellate and other case statistics do not report the number of juvenile delinquency appeals separately. In fact, a review of numerous state court reports available online revealed that only Minnesota specifically designates the number of delinquency appeals filed with its Court of Appeals in its annual report.[286]

In response to the data request sent to each state, fourteen states were able to provide data allowing for determination of the rates of appeals. Limitations include self-selection with regard to survey responses and the inability to track specific outcomes on a case-by-case basis as was performed in the Harris study.[287] For example, some cases may be filed in 2006 with an appeal filed in 2007. But overall, the data

284. E-mail from Megan Wilson, N.C. Data Analyst, to author (Aug. 28, 2011) (on file with author).

285. *See, e.g.*, SUPREME COURT OF NEVADA, ANNUAL REPORT OF THE NEVADA JUDICIARY: FISCAL YEAR 2009 24 (2009), *available at* http://www.nevadajudiciary.us/index.php/view documentsandforms/func-startdown/2896/ (reporting that juvenile and family cases account for five percent of the Supreme Court caseload); SUPREME COURT OF OHIO, ANNUAL REPORT 2010 28 (2011), *available at* http://www.supremecourt.ohio.gov/Publications/annual_reports/annual report2010.pdf (reporting that juvenile, domestic, and probate cases account for approximately four percent of the Ohio Courts of Appeal caseload); NEW JERSEY JUDICIARY, ANNUAL REPORT OF THE NEW JERSEY JUDICIARY 2001–2002 15 (reporting that the Family Division accounted for thirty-nine percent of the filings the Appellate Division of the Superior Court received).

286. *See* MINNESOTA JUDICIAL BRANCH, MINNESOTA COURT ANNUAL REPORT OF 2008, 1, 16 (2009), *available at* http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/ AR_Working_08.pdf (reporting the number of juvenile delinquency appeals filed in 2008 but not the number of juvenile delinquency filings). The number of delinquency filings for 2008 were accessed separately in Minnesota Juvenile Justice Advisory Committee, Annual Report and Recommendations to the Minnesota Governor and State Legislature, 25 (2010), *available at* https://dps.mn.gov/entity/jjac/Documents/2010_JJAC_Report.pdf. Minnesota did not provide the data in response to the survey for the years requested, so it is not included in the reporting data.

287. *See* Harris, *supra* note 20, at 209–10, 220, 223; Drizin & Luloff, *supra* note 12; Fedders, *supra* note 70; Feld, *supra* note 92; Redding, *supra* note 92; and accompanying text for discussion on the methods used in Harris' study of Pennsylvania data from 1990.

provides an effective starting point in the discussion about the reliability of these case outcomes and provides a broader data set than has been available previously.

A final judgment, whether by plea or trial, is generally required before an appeal may be taken of issues, such as suppression.[288] Therefore, a juvenile who loses a critical suppression hearing, for example, would make a conditional plea before appealing the suppression ruling. In some instances, such as Colorado, the entry of pleas is not conditional and appeals are permitted prior to plea for pretrial rulings.[289] But even where pleas are not conditional, they do not preclude a challenge based on the validity of the plea.[290]

Table 1 illustrates data which includes the average annual numbers for four years, from 2007 through 2010, unless otherwise indicated.

TABLE 1. AVERAGE RATES OF APPEAL IN JUVENILE DELINQUENCY CASES FROM 2007-2010

States	Average Cases Filed	Delinquency Findings	Average Number of Annual Appeals Filed	Rate of Appeal
Florida*	57605	35139±	587	0.0167
Maryland*	17465	4179	47	0.0113
Washington	19104	10889	107	0.0098
Oregon	5285	4030	29	0.0072
Alaska	884	444	2.6	0.0058
Vermont	853	394	1.44	0.0036
Idaho	14046	8568±	28	0.0032
Colorado	12212	7449±	22.6	0.0030
Wisconsin	9070	5532±	20.2	0.0036

288. *See* HERTZ, GUGGENHEIM & AMSTERDAM, *supra* note 70, at 281 (explaining that in some jurisdictions the entry of a guilty plea waives all right to appellate review of errors committed prior to the plea but that an increasing number of jurisdictions authorize appellate review of pretrial suppression rulings after the entry of a guilty plea); *see, e.g.*, N.Y. FAM. CT. ACT § 330.2(6) (McKinney 1985) (describing that a suppression motion is not precluded by the entry of an admission and may be reviewed after an ensuing finding of delinquency).

289. People v. Neuhaus, 240 P.3d 391, 397–98 (Colo. App. 2009). In addition, Georgia allowed conditional pleas by case law but then reversed the decision three years later. Mims v. State, 410 S.E.2d 824, 825–26 (Ga. Ct. App. 1991) (authorizing conditional guilty pleas from different kinds of court rulings and setting forth procedures), *abrogated by* Hooten v. State, 442 S.E.2d 836, 837–41 (Ga. Ct. App. 1994) (holding that conditional guilty pleas would no longer be authorized).

290. *See, e.g.*, Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 877–78 (2010) (describing case law establishing the types of claims that survive a non conditional guilty plea, such as ineffective assistance of counsel and sentencing issues that arise after a plea).

Texas*	29376	19306	52	0.0026
New Jersey	38176	25577	43.5	0.0017
Alabama	30198	14077	23.25	0.0016
Utah	27,604	16,838±	11	0.00066
Rhode Island	5776	4404±	1.25	0.00028
Average Rate of Appeal				0.0051

*Data for Florida and Texas is from 2010; Maryland's data is for 3 years, 2008 to 2010. ±Indicates states that state reported the total number of cases filed and the number of appeals but was unable to report the number of juvenile delinquency findings that resulted in final appealable orders. On average, the U.S. Department of Justice estimates that in 2008, the most recent year the statistic is available, 61% of total cases filed resulted in findings of juvenile delinquency.[291] Therefore, the number of appealable orders in these states is derived by using the federal government's estimated percentage.

The study revealed that juvenile delinquency appeals are taken, on average, at a rate of 5.1 per 1,000 cases where a juvenile was adjudicated delinquent[292] Six of the states that responded to the survey are among the top seventeen states in terms of the numbers of youth who are living in confinement.[293] For example, Texas is second only to California[294] for the number children living in detention. In Texas, there were fifty-two delinquency appeals filed in the entire state in 2010, at a rate of 2.6 per 1,000 total guilty adjudications.

Florida had the highest appellate rate of any reporting state, with close to a 2% rate of appeals. Rhode Island and Utah reported the lowest appellate rates, with less than one appeal per 3,000 cases in Rhode Island and less than one appeal per 2,000 cases in Utah (6.6 per 10,000). The National Juvenile Defender Center Report assessing access to counsel and quality of representation in juvenile delinquency proceedings in Florida in 2006 described the appellate practice among defenders.[295]

291. *Charles Puzzanchera*, et al., NAT'L CTR. FOR JUVENILE JUSTICE,, JUVENILE COURT STATISTICS 2008, 1, 45 (2011), *available at* http://www.ncjj.org/pdf/jcsreports/jcs2008.pdf.

292. The average rate of appeal was 5.1 appeals per 1000 cases where a child was found delinquent. (Data on file with author).

293. *Kids Count Data Center: Persons Residing in Juvenile Detention and Correctional Facilities by Age Group (Number) – 2006*, Annie E. Casey Found., http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?order=D&loct=2&dtm=319&by=v&tf=17&ind=42&ch=a&sortid=113 (last updated June 2008) [hereinafter *Kids Count Data Center*]. That includes Texas (second), Florida (third), Colorado (twelfth), Alabama (thirteenth), New Jersey (fifteenth), and Washington (seventeenth). In addition, according to the National Center for Juvenile Justice, 25% of juveniles adjudicated delinquent are placed outside of the home. CHARLES PUZZANCHERA, BENJAMIN ADAMS & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2006-2007 1, 59 (2010), *available at* http://www.ncjj.org/PDF/jcsreports/jcs2007.pdf. Accordingly, utilizing the federal government's 25% estimate for the rate of placement, the rate of appeal for cases resulting in out-of-home placement pursuant to the data of the author's study would be just less than 2.5%.

294. *See Kids Count Data Center*, *supra* note 293.

295. PURITZ & CRAWFORD, *supra* note 3, at 48.

Although it observed that appeals were lacking, the report concluded that there was evidence of an awareness of the importance of appeals.[296] While the appellate rate remains low in Florida at 2%, the state's practices warrant further exploration given that it is substantially higher than the rate in other states. Indeed, according to the data, appeals are filed at approximately 3.5 times the rate of other states.[297] The appellate rate—even hovering at 2%—appears to significantly enhance the development of case law. Nearly 15% of juvenile delinquency opinions available nationally over the past ten years were generated out of Florida appellate courts.[298]

There is an intuitive association between lack of appellate practice and high rates of waiver of counsel in juvenile cases; without counsel, it is reasonable to assume that it is difficult for juveniles to file appeals and that frequent waivers of counsel account for low numbers of appeals. A comparison of states based on the data, however, suggests that reasons for the lack of appeals are more complex and are not fully explained by presence or absence of counsel. For example, Texas does not permit juveniles to waive the right to counsel in most instances,[299] and yet the appellate rate remains slightly less than three appeals per 1,000 cases. This suggests that other factors contribute to the lack of appeals and requires further exploration. This is also troubling given that Texas has the second highest number of juveniles in juvenile detention and correctional facilities in the country.[300] New Jersey also has strong protections against waiver of counsel by youth, and, yet, its appellate rate of 1.7 appeals per 1,000 cases resulting a juvenile delinquency findings is the same as Alabama, which provides no additional provisions against juve-

296. *Id*. The prosecution appears to actively file appeals there, which may contribute in part to the difference. *See* PURITZ & CRAWFORD, *supra* note 3, at 48. The Florida Assessment report cites one conversation where investigators learned appeals were "rare and *usually taken by the State*." *Id*. (emphasis added) (internal quotation marks omitted). This is in contrast to studies indicating that 95% of appeals are taken by defendants. *See* 2001 DOJ REPORT, *supra* note 49, at 3. For the applicable statute, see FLA. R. APP. P. 9.145(c) (iterating the appeals that may be taken by the state in juvenile delinquency cases, including dismissals of any part of a delinquency petition if the order is entered before commencement of a hearing, suppression rulings, and disposition decisions).

297. Florida's appellate rate is nearly 2 percent at 0.0167 and is approximately 3.5 times the rate of the national average found at 0.0051. *See infra* Table 1. While nationally, close to 5 cases out of 1,000 are appealed, Florida's rate equals nearly 17 appeals per 1,000. *Id.*

298. *See infra* Part IV.A.

299. TEX. FAM. CODE ANN. § 51.09 (West 1997) (permitting waiver of the right to counsel by children). *But see* TEX. FAM. CODE ANN. §51.10(b) (preventing waiver in transfer hearings to criminal court, adjudication and dispositions hearings, and hearings prior to commitment to the Texas Youth Commission for disposition modification).

300. According to U.S. Census Data, Texas had 8247 youth incarcerated, second only to California and accounting for nearly 9% of the total number of juveniles in detention nationally. *Kids Count Data Center*, *supra* note 293.

nile waiver of counsel. In Wisconsin, a state with a similar rate of appeals as that of Texas, juveniles below fifteen may not waive the right to counsel.[301] Utah, with one of the lowest appellate rates reported, has a statute which presumes that children who are age fourteen and older are competent to waive their right to counsel without a parent or attorney present.[302]

In the Florida juvenile defender assessment, observers also noted inappropriate and high rates of waiver of counsel.[303] After 2008, however, the state codified the juvenile's right to consult with counsel before the juvenile will be permitted to waive the right to counsel.[304] For a juvenile's waiver of counsel to be valid, the juvenile's counsel, parent, custodian, or relative must attest that the juvenile's waiver was knowing and voluntary.[305]

In addition, it appears that even where, as in Utah, the right to appeal is a state constitutional right,[306] the source of the right has little impact on access to appeals. In Utah, despite the constitutional right to appeal for juveniles, the appellate rate is less than one appeal per 2,000 appealable orders in delinquency cases. Not surprisingly, as a result, there is also little case law there discussing the application of criminal law and procedure to juveniles within the state. Only twelve juvenile delinquency appellate opinions are publicly available over ten years between 2001 and 2011.[307]

Without a "model state" to look to, it is difficult to identify a successful set of rules and how much of a difference preclusion of waiver *alone* makes on access to appeals. The documentation of the lack of appellate process in juvenile justice raises numerous questions but can also inform the discussion going forward. In addition to the risks created by less opportunity for error correction, fewer appeals result in an underdeveloped body of law to guide adjudication of cases. What rights suffer as a result? How does the infrequency of appeals affect the court's ability to provide guidance to the community and law enforcement? How does the lack of guidance and review affect minority populations and efforts to reduce disproportionate minority confinement? The lack of

301. WIS. STAT. § 938.23(1m) (2009).

302. UTAH JUV. P. R. 26(e).

303. PURITZ & CRAWFORD, *supra* note 3, at 2. Although recently, the law was changed to provide more protections against waiver. *See infra* notes 299–302 and accompanying text.

304. FLA. R. JUV. P. R. 8.165(a).

305. FLA. R. JUV. P. R. 8.165(b)(3).

306. UTAH CONST. art. VIII, § 5 (providing that "there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause").

307. The search was conducted on Westlaw in Utah State Court opinions using the terms "su(juvenile & delinquen! & appeal!)" between July 29, 2001 and July 28, 2011.

appeals raises concerns about the wisdom of policies utilizing juvenile adjudications in the same way that adult convictions are used.

IV. Appellate Opinions in Juvenile Delinquency Cases

Appellate opinions play a critical role in the public's understanding, and, to a large extent, scholarly analysis of the law.[308] Case opinions are "the cases that provide the reasoning available to courts and litigants that rest at the heart of a common law system."[309] Although commentators disagree about "the proper *scope* of courts' rights-making activities, they do not dispute the value of the basic rights-making function."[310]

While an analysis that is limited to written opinions is different from looking at all appeals resolved, written opinions provide insight into the development of the law. In the criminal and juvenile context, they inform and guide law enforcement interactions with the public. Interactions with juveniles may differ based upon considerations of developmental maturity and age and, therefore, necessitate case law dictating the contours of these principles. In addition, there are unique procedural issues that arise in juvenile court that are different from criminal court and require statutory interpretation. Some examples are the standard for a juvenile waiver of counsel, the use of conditional pleas, statutory interpretations related to transfer hearings to adult court, and the application of the validity of guilty pleas in the absence of advice about collateral consequences.

Courts have recognized the difference between police interactions with juveniles versus adults[311] and the difference in applying punishment to juveniles,[312] principles that are constantly evolving with societal understanding of adolescence. Given that cases resolved with judicial opinions are the cases that "announce and influence legal doctrine,"[313] it follows that their examination is critical. Therefore, the next portion of this appellate analysis examines the characteristics of publicly available opinions using Westlaw's online legal database. The characteristics examined include geography and bases of appeal.

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308. Heise, *supra* note 23, at 827.

309. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. Rev. 1451, 1465 (2009); *see also* Ortbals, *supra* note 89, at 105 ("Many juvenile court judges would welcome some guides to follow, and the best means of supplying standards to insure [sic] uniformity of practices is an appellate court decision on the matter.").

310. Nancy Leong, *Making Rights*, 92 B.U. L. Rev. 405, 411(discussing the law-making function of appellate courts as proper and desirable).

311. *See infra* Part IV.B.1–2.

312. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 553 (2005*); see also infra* Part IV.B.1–2.

313. Eisenberg & Miller, *supra* note 309, at 1465.

A. *Frequency and Distribution of Opinions*

This section provides unique data about juvenile delinquency appellate opinions nationally over ten years, from 2001 through 2011. The number of juvenile delinquency appellate opinions available during this ten-year period was 3,426.[314] Almost half of these opinions are from only three states: Florida, Ohio, and New York.[315] In fact, New York appellate court opinions accounted for 20% of the total delinquency opinions available nationally in the ten-year period and Ohio and Florida account for nearly 15% each.[316] For Florida, the high number corresponds with the higher rate of appeals filed, as evidenced by Florida's appellate statistical data that was provided for this study. New York and Ohio were not able to provide the information for the study but the volume of opinions reasonably suggests a more active appellate practice. In addition, the sheer volume of cases in those three states is significant; they are also three of the top six states with the highest numbers of juveniles residing in detention facilities, which likely contributes to the higher number of appeals taken.[317] Given the low appellate rate and the fact that not all cases result in opinions, few written decisions are issued in the delinquency context in a given state per year.

B. *Bases of Appeal*

There is little information about the most common bases of appeal in juvenile delinquency cases, though it is logical that the patterns would follow adult criminal cases absent jury instruction issues and specific sentencing guideline errors. Suppression issues are among the most common bases of appeal in criminal appeals.[318] The development of criminal procedural jurisprudence and its application toward juveniles are a central focus of this article. Therefore, the opinions available in the

314. This search was performed on Westlaw by searching the case summary using the terms "SU (juvenile & delinquen! & appeal!)" between July 29, 2001 and July 28, 2011.

315. This search was performed on Westlaw by searching the case summary using the terms "SU (juvenile & delinquen! & appeal!)" for cases between July 29, 2001 and July 28, 2011 and then searching within those results using the terms "CO (FL OH NY)" which resulted in 1,623 cases.

316. This search was performed on Westlaw by searching the case summary using the terms "SU (juvenile & delinquen! & appeal!)" for cases between July 29, 2001 and July 28, 2011 and then searching within those results using the terms "CO (NY)" which resulted in 722 cases.

317. *See Kids Count Data Center*, *supra* note 293. However, California and Texas, the two leading states in numbers of confined youth, account for significantly lower numbers of opinions available than do New York, Florida and Ohio as measured using the technique described in note 273.

318. CHAPPER & HANSON, *supra* note 131, at 1, 15–17 (studying issues raised in the first level of appeal by sampling five different geographically diverse state courts of appeal). Jury instructions were raised in 30% of adult criminal cases but are largely inapplicable in the juvenile delinquency context. *Id.* at 4.

review of appellate decisions were searched for suppression issues arising from searches and confessions, along with challenges to dispositional orders.

1. Fifth Amendment

Within the universe of cases analyzed, about 9% of the cases contained discussion about Fifth Amendment issues or referenced *Miranda.*[319] This included explorations unique to juveniles, such as the role of age in the court's analysis related to custodial interrogation,[320] the test for whether a school official acts as an agent of law enforcement for questioning purposes,[321] and whether or not the right to protect against self-incrimination applies to the dispositional phase of a delinquency proceeding.[322] Indeed, the most significant decision addressing juveniles and *Miranda* during this time period reached the Supreme Court in *J.D.B. v. North Carolina.*[323] The case addressed the role of a child's age in a court's determination about when there is custodial interrogation triggering the necessity of *Miranda* warnings.[324] The issue before the Court was whether police questioning of a thirteen-year-old boy at school was a custodial interrogation that should have triggered *Miranda* warnings.[325] The Court reversed the North Carolina Supreme Court's holding that age was not a permissible factor in custodial analysis under *Miranda*.[326] In doing so, it held that age is a permissible factor:

> It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.[327]

The case has significant import in a formerly unclear area of law. It involved a scenario that plays out with frequent occurrence: Everyday, police encounter and question children, whether at school, on the street,

319. The author of this article searched using the terms ("Fifth Amendment" Miranda "U.S.C.A. Const. Amend 5."). The search resulted in 310 cases out of 3426.

320. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402–03 (2011).

321. *See, e.g.*, *In re* T.A.G., 663 S.E.2d 392, 395 (Ga. Ct. App. 2008) (holding that school official was acting as an agent of police where administrator testified about her conferrals with police authorities about what questions to ask or what information she "missed" in her own questioning of the student).

322. K.C. v. State (*In re* K.C.), 257 P.3d 23, 27 (Wyo. 2011) (holding that the Fifth Amendment right against self-incrimination does not apply to the dispositional phase of a delinquency proceeding).

323. 131 S. Ct. 2394 (2011).

324. *Id.* at 2398.

325. *Id.* at 2398–99.

326. *Id.* at 2408.

327. *Id.* at 2398–99.

or at the police station—sometimes with a parent present, but often without. Courts already consider the age of the interviewee when determining whether waiver of *Miranda* rights is "knowing, intelligent and voluntary" under the totality of circumstances analysis.[328] Prior to *J.D.B.*, however, it was less clear what role age plays in the preliminary analysis about whether an interrogation was custodial, thereby triggering *Miranda* rights.

The case illustrates the implications resulting from lack of appeals and case law, as many states did not have relevant case law about the role of age in the courts' custodial analysis related to *Miranda* rights. The State of North Carolina and its amici, which included thirty states' attorneys general, argued that a child's age is not relevant to the custody analysis, no matter how young the child.[329] The National Association of District Attorneys was also among the amici for the state.[330] The Court was closely divided in its opinion by a vote of five to four; however, the majority opinion was forceful in its conclusion that "in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age."[331]

Previously, seven state courts had refused to consider age as relevant to the custodial inquiry.[332] Three state courts previously deemed age a relevant factor to the custodial inquiry.[333] Twenty states had no pertinent case law cited by either party or amici as relevant to the issue.[334] Some state courts may be silent on the issue due to the procedu-

328. Fare v. Michael, 442 U.S. 707, 725 (1979).

329. *Id.* at 2402, 2406 (noting that the State of North Carolina and its amici argued that age was not relevant to the custodial analysis at issue). For the list of states' attorneys general included in one amicus brief in support of the respondent, *see* Brief of Indiana et al. as Amici Curiae in Support of Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121).

330. Brief of the National District Attorneys Association as *Amicus Curiae* in Support of Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121).

331. *Id.* at 2405.

332. State v. Turner, 838 A.2d 947, 963 (Conn. 2004); *In re* J.F., 987 A.2d 1168, 1175 (D.C. 2010) (declining to consider the juvenile's age); People v. Croom, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) ("Given the Supreme Court's emphasis on objectiveness, we decline to consider defendant's age when determining whether he was in custody for *Miranda* purposes."); State v. Bogan, 774 N.W.2d 676, 681–82 n.1 (Iowa 2009); State v. Morton, 186 P.3d 785, 794 (Kan. 2008); *In re* W.B. II, No. 08CA18, 2009 WL 961500, at *7 (Ohio Ct. App., Mar. 27, 2009); CSC v. State (*In re* CSC), 118 P.3d 970, 977–78 (Wyo. 2005).

333. *See, e.g.*, *In re* Jorge D., 43 P.3d 605, 608–09 (Ariz. Ct. App. 2002); People v. Howard, 92 P.3d 445, 450 (Colo. 2004) (en banc); *In re* Joshua David C., 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997).

334. A review of all briefs available on Westlaw that were filed with the Supreme Court in *J.D.B. v. North Carolina* did not reveal additional case law. For examples of the briefs searched by the author, *see* Brief for Petitioner, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (No. 09-11121); Brief for the Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121) 2011 WL 439564; Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief Amicus Curiae of the American Civil Liberties Union in Support of

ral norms or statutes within the state that already provide greater protections for juveniles against coerced confessions.[335] For the most part, however, the lack of clarity and discussion about the relevance of age in the custodial analysis provides an example of the lack of judicial opportunity to refine the rights of juveniles through appellate discussion. Without this opportunity, there is a lack of guidance available for law enforcement, trial courts, prosecutors, and defenders representing juveniles.

2. FOURTH AMENDMENT

Search and seizure issues are among the more common issues raised and litigated in criminal appeals.[336] Within the database of cases at issue in the previous ten years in the juvenile delinquency context, however, only about 6% included discussion of Fourth Amendment issues.[337] This small group of opinions over the past ten years demonstrates how fact patterns involving juveniles' constitutional rights benefit from judicial discussion in this criminal procedural context. Fourth Amendment law is uniquely fact-specific.[338] Therefore, in the juvenile context, it is necessary for courts to discuss and consider the effects of age, prior experience with the law, and tendency to acquiesce to authority to determine whether the child gave consent to search. The effect of age on consent to search is an underdeveloped area of law,[339] and without appeals to test or explain it, it may remain as such. This inevitably impedes transfer of knowledge about juvenile decision-making and ado-

Petitioner, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief of Center on Wrongful Convictions of Youth, et al., as *Amici Curiae* in Support of Petitioner, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief of Indiana et al. as Amici Curiae in Support of Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief of Juvenile Law Center, *et al.* as *Amici Curiae* in Support of Petitioner, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief of the National District Attorneys Association as *Amicus Curiae* in Support of Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121); Brief for the United States as Amicus Curiae Supporting Respondent, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121).

335. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-137 (West 2011); N.M. STAT. ANN. § 32/A-2-14(E) (West 2009); W. VA. CODE ANN. § 49-5-2(*l*) (West 2007) (providing that any statements made to police by children under the age of fourteen, independent of custodial considerations, may not be used against them).

336. Gregory D. Totten, Peter D. Kossoris & Ebbe B. Ebbesen, *The Exclusionary Rule: Fix It, But Fix it Right: A Critique of* If It's Broken, Fix It: Moving Beyond the Exclusionary Rule, 26 PEPP. L. REV. 887, 909–10 (1999).

337. 224 cases resulted from a search within 3,426 juvenile delinquency appeals cases using the terms "U.S.C.A. Const.Amend. 4."

338. *See* Kerr, *supra* note 26, at 237 ("The course of Fourth Amendment law slowly develops through the process of case-by-case adjudication.").

339. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 133 (2009) ("[W]hile age clearly matters to assertion of Fourth Amendment rights . . . , courts have yet to reach any consensus over how this is so, and tend to use adult-like tests despite brief nods to the impact of youth.").

lescent development into a well-developed body of law.[340] It follows that juveniles' rights are impeded by this lack of development.[341] Other Fourth Amendment issues beyond the question about whether there was consent to search also arise in the juvenile context.[342]

While age is a permissible factor for courts to consider under the totality of the circumstances about whether a child gave consent to search,[343] the role or weight that courts give to a young person's age lacks uniform application. In the appellate opinions where the Fourth Amendment gave rise to a challenge pertaining to juvenile defendants in this study, specific issues related to the age and status as a minor were pertinent, and, at times, critical. In the instances where courts confronted relevant suppression motions, some courts provided guidance and discussion.[344] Age was, at times, a deciding factor with regard to consent.

340. *Id.*

341. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 358 MINN. L. REV. 349, 394 (1974) ("If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.").

342. *See, e.g.*, Commonwealth v. Vanya V., 914 N.E.2d 339, 344–45 (Mass. App. Ct. 2009) (Berry, J., concurring) (holding that the search of a juvenile's bag was not a legitimate inventory search where the police department's policy was insufficiently precise); State *ex rel.* R.M., 974 A.2d 1110, 1113 (N.J. Super. Ct. App. Div. 2009) (upholding search of minor as a valid search incident to arrest where the police officer observed him with a friend out in public after established juvenile curfew and the child said he did not have identification).

343. *In re* J.M., 619 A.2d 497, 502 (D.C. 1992) (en banc).

344. *See, e.g.*, *In re* Daijah D., 927 N.Y.S.2d 342, 343–44 (N.Y. App. Div. 2011) (reversing and dismissing petition holding that fourteen-year-old girl did not legally consent to search of her purse when she was stopped and confronted by four police officers and was not informed she had the right to say no to the search even though she unequivocally gave her purse to the officer). The *Daijah* court noted that age and prior experience with the law was a necessary factor in whether the child gave consent to the search. *Id. See also* E.J. v. State, 40 So. 3d 922, 923–24 (Fla. Dist. Ct. App. 2010) (reversing trial court that failed to discuss age, prior experience with the law, and the fact that the child did not know that she could refuse a search in considering constitutionality of a search and whether child consented); *In re* I.R.T., 647 S.E.2d 129, 134 (N.C. Ct. App. 2007) (acknowledging that in the Fourth Amendment context "[t]here has not been an explicit holding by the courts of this state as to whether the age of a defendant or juvenile is a relevant inquiry in determining whether a reasonable person would feel free to leave" and holding that the age of a juvenile is a relevant factor in determining whether a seizure has occurred). For other scenarios related to juvenile status, *see* State v. Aaron R., No. 29,001, 2010 WL 3969604, at *6 (N.M. Ct. App. Jan. 19, 2010) (reasonable suspicion was created where child ran away from a police officer on a school day during school hours and refused an order to stop where officer was investigating a 911 call for a robbery in the vicinity); State v. Gage R., 243 P.3d 453, 456 (N.M. Ct. App. 2010) (reversing the trial court and holding that individualized suspicion was required in order to justify school security officer's search of juvenile's backpack). In *Gage R.*, the mere presence of a juvenile in an area where "everyone hangs out to smoke" outside a school campus, absent a reason to suspect that any particular student was in possession of contraband, did not give rise to a constitutionally sound search. *Id.* Related to minor status, where a juvenile consented to a search of his car but indicated that "only his mother had a key to the console," an appellate court held that search of the console was unlawful. J.J.V. v. State, 17 So. 3d. 881, 885–86 (Fla. Dist. Ct. App. 2009). The court ruled that the statement by the juvenile about his mother as the proprietor of the key showed that he was "at least reluctant, if not unwilling" to consent to a search of the

Consider a state court's analysis determining that a fourteen-year-old did not give legal consent to the search of her purse even where there was no factual dispute concerning her actions in handing her purse to the police.[345] In contrast, in other cases, the effect of age was largely ignored and the court applied the same standard that is applied to adults.[346] The role of age in judicial analysis continues to vary across states and even within them.[347]

In addition, more than a quarter of the Fourth Amendment cases included search issues mentioning schools. Courts continue to discuss and apply the United States Supreme Court's decision in *New Jersey v. T.L.O*[348] that the Fourth Amendment applies to searches by school officials.[349] Those searches must be justified at inception but can be based upon a "reasonableness" standard rather than the probable cause standard, leaving many issues for state courts to resolve.[350] State courts have considered whether individual state constitutions provide a broader level of protection to students[351] and have applied different factors to deter-

locked area. *Id.* at 885; *see also* State v. Doe, 233 P.3d 1275, 1280 (Idaho 2010) (holding that the trial court's attempt to require parental submission to urine testing as part of juvenile's probation was a violation of the parent's Fourth Amendment right).

345. *See Daijah D.*, 927 N.Y.S.2d at 343.

346. *See, e.g.*, *In re* D.H., 673 S.E.2d 191, 193 (Ga. 2009) (upholding consent based upon a reasonable person standard where two officers approached two fifteen-year-old juveniles after receiving a tip related to drug activity and requested to search their pockets). The *D.H.* court did not discuss the effect of age or prior experience with police in determining that it was a lawful "first-tier consensual encounter." *Id.* at 193. *See also* State v. R.H., 900 So. 2d 689, 691–92 (Fla. Dist. Ct. App. 2005) (reversing suppression of drugs found on juvenile and holding that consent was valid and encounter with officers was consensual where juvenile was approached by two officers at 1:00 a.m. in a parking lot "notorious" for narcotic and other crimes with no discussion of age). The *R.H.* court drew upon case law discussing police encounters with adults and made no reference to the precise age of the minor, only that he appeared to be sixteen to eighteen to the officer upon her approach. *Id.* at 691.

347. *Compare* E.J. v. State, 40 So. 3d 922, 924 (Fla. Dist. Ct. App. 2010) (reversing trial court that failed to discuss age, prior experience with the law, and the fact that the child did not know that she could refuse a search in considering constitutionality of a search and whether child consented), *with* I.R.C. v. State, 968 So. 2d 583, 587 (Fla. Dist. Ct. App. 2007) (affirming denial of suppression motion where juvenile was removed from classroom by police deputy and asked to consent to search of his bag after being informed that he was under suspicion for possession of marijuana). The *I.R.C.* court made no mention of the juvenile's age and gave little significance to his testimony that he did not know that he could refuse the search. *I.R.C.*, 968 So. 2d at 587. The court also indicated that the defendant failed to overtly argue that his age played a role. *Id.; see also* State v. A.L., 956 So. 2d 1215, 1215 (Fla. Dist. Ct. App. 2007) (reversing suppression based upon consent with no discussion of role of age in voluntariness).

348. 469 U.S. 325 (1985).

349. *Id.* at 333.

350. *Id.* at 341–42.

351. *See, e.g.*, State *ex rel* Juvenile Dep't v. M.A.D., 233 P.3d 437, 444–45 (Or. 2010) (en banc) (affirming the instant search but declining to extend the *T.L.O.* standard and suggesting that reasonable suspicion alone without "specific articulable facts" may not meet the permissible threshold for a search by school officials under Article 1, Section 9 of the Oregon Constitution).

mine whether a search was, in fact, based upon reasonable suspicion or justified at its inception.[352] Where school officials act in conjunction with police officials, courts must determine a police officer's level of involvement with the search to decide whether the more lenient reasonableness standard versus probable cause applies.[353] Next, the court must determine whether the search was conducted in a proper manner.[354]

Common fact patterns also tend to repeat themselves, revealing law enforcement tendencies to develop suspicion toward juveniles related to affiliation with other juveniles or presence in groups,[355] provoke questions about being out late at night, or prompt other civil violations. These scenarios present common questions about how police can legally interact with and engage juveniles. Where officers handcuffed and subsequently performed a pat-down of a teenager who was walking with another teenager while the other teen smoked marijuana, the court held

But see In re D.D., 554 S.E.2d 346, 350–51 (N.C. Ct. App. 2001) (fully adopting the *T.L.O.* reasonableness standard for search by school officials without distinction).

352. *See, e.g.*, *In re* Juvenile 2006–406, 931 A.2d 1229, 1234 (N.H. 2007) ("[T]he development of the factual record in this case demonstrates to us the need to provide further guidance regarding the factors that both school administrators and trial courts should consider to determine whether a search of a student is justified at its inception. . . . Courts around the country have adopted various sets of factors."). The *Juvenile* court acknowledged its adoption of Florida's list of factors. *Id.*; *see also* D.G. v. State, 961 So. 2d 1063, 1064–65 (Fla. Dist. Ct. App. 2007) (finding reasonable suspicion where vice principal's search was based upon statement by another student that juvenile "may have been in possession of marijuana" even though student had made an incorrect accusation in the past; that fact was not enough to "rebut the presumption of reliability"); *In re* K.C.B., 141 S.W.3d 303, 305–06 (Tex. Ct. App. 2004) (reversing trial court and requiring suppression where school official searched student's shorts based upon an anonymous tip that student had drugs in his underwear).

353. *See, e.g.*, People v. K.S. (*In re* K.S.), 183 Cal. App. 4th 72, 83–84 (Cal. Ct. App. 2010) (affirming trial court's conclusion that *T.L.O.'s* reasonableness standard applied to vice principal's warrantless search of student's locker); R.D.S. v. State, 245 S.W.3d 356, 365 (Tenn. 2008) ("The issue of whether probable cause or reasonable suspicion should be applied to law enforcement officers conducting a search of a student in a school setting is a matter of first impression in Tennessee.").

354. *See, e.g.*, *In re* Elvin G., 910 N.E.2d 419, 420 (N.Y. 2009) (remanding due to insufficient record to determine whether a search occurred where juvenile claimed that principal asked all students to stand and empty their pockets).

355. *See, e.g.*, People v. Antonio B. (*In re* Antonio B.), 82 Cal. Rptr. 3d 693, 698 (Cal. Ct. App. 2008) (holding that the handcuffing of the juvenile resulted in an illegal arrest and involuntary search where action was done solely based upon action of friend); *see also* R.W. v. State, 913 So. 2d 505, 513 (Ala. Crim. App. 2005) (affirming denial of suppression and noting that when police responded to 911 call that "[a]ll of the [young] men, including R.W., were fidgeting and appeared nervous, and R.W., at one point, had his hands inside his shirt"); *In re* K.P., 951 A.2d 793, 796 (D.C. 2008) (rejecting the argument by the government that even if police did not have a justification to stop the defendant, the police were justified in stopping the group of juveniles "*either* [as] participants in the [threats] *or* [as] witnesses to it who could provide material information about the event and the . . . identity of the [perpetrator]" (quoting Williamson v. United States, 607 A.2d 471, 476 (D.C. 1992))) (internal quotation marks omitted); People v. Mario T. (*In re* Mario T.), 875 N.E.2d 1241, 1245 (Ill. App. Ct. 2007) (police search of juvenile based upon fear for safety after encountering four males required suppression).

that the search was unlawful.[356] In addition, a Florida appellate court reversed the search of a teenager who was in a parked car at 4:30 a.m. in a high crime area, concluding that being out late at night, by itself, does not warrant reasonable suspicion of criminal activity.[357] In some instances, the appellate court noted the dramatic level of error. In its reversal of a lower court's failure to suppress evidence based upon a search of a fourteen-year-old passenger in a car, a Florida appellate court stated, "[t]hat the court erred in [failing to suppress] was most likely not lost on the state, which did not argue otherwise in its brief."[358] Another decision was reversed where the trial court failed to suppress the fruits of a search following the stop and arrest of a juvenile for smoking a cigarette.[359] Additionally, in at least some instances, courts acknowledged the need to independently analyze state constitutional provisions.[360]

3. DISPOSITION

In order to most accurately measure the prevalence of challenges to dispositional decisions, opinions throughout a one-year time period were searched manually to determine how many dispositions were specifically challenged and the success rate of those challenges.[361] There were 278 juvenile delinquency opinions in total for July 2010-2011; about 12%, or thirty-two of those opinions, described a challenge that was specific to the disposition that the court ordered in the case.[362] Nine cases—nearly one-third—were opinions issued by New York appellate courts. Forty percent, or thirteen cases, were reversed at least in-part and remanded. Reversals included judges overstepping authority, displaying

356. *Antonio B.*, 82 Cal. Rptr. 3d at 698.

357. T.R.T. v. State, 982 So. 2d 1209, 1211 (Fla. Dist. Ct. App. 2008).

358. E.J. v. State, 40 So. 3d 922, 924 (Fla. Dist. Ct. App. 2010).

359. *In re* Calvin S., 930 A.2d 1099, 1102 (Md. Ct. Spec. App. 2007).

360. A.M. v. State, 891 N.E.2d 146, 150 (Ind. Ct. App. 2008) (upholding search but also discussing the need to conduct a dual analysis under the Fourth Amendment and Indiana's Constitution because Section 11 [of the Indiana Constitution's] purpose is to "protect from unreasonable police activity those areas of life that Hoosiers regard as private") (internal quotation marks omitted).

361. Because it is difficult to isolate challenges to the actual disposition given the frequency with which the term "disposition" appears in opinions, the author searched for juvenile delinquency appeals between July 29, 2010 and July 28, 2011, located "disposition" within the search, and then read the 192 cases to determine which ones included challenges to the actual disposition.

362. *See, e.g.*, *In re* Akilino R., 921 N.Y.S.2d 70, 71 (N.Y. App. Div. 2011) (upholding trial court's order of probation at disposition); *In re* Anthony N., 921 N.Y.S.2d 73, 74 (N.Y. App. Div. 2011) (upholding the trial court's imposition of a conditional discharge instead of an adjournment in contemplation of dismissal); *In re* Tafari S., 922 N.Y.S.2d 448, 449 (N.Y. App. Div. 2011) (affirming lower court's order of confinement); *In re* A.O., 342 S.W.3d 236, 238 (Tex. Crim. App. 2011) (affirming order of confinement to the Texas Youth Commission).

bias, improperly applying statutory provisions, and failing to articulate reasons for more restrictive placements or probation terms.[363]

The review of appellate delinquency opinions issued in any given year reveals that there are comparatively few written appellate state court opinions available. This is consistent with the survey data reflecting appellate filings. With so few appeals filed, states should question the reliability and accuracy of juvenile adjudications. In addition, with little guidance available to courts and law enforcement, current juvenile courts are not well positioned to further develop the law.

V. The Appellate Role Going Forward

There is increased public recognition that appellate courts must play a greater role in policing the accuracy of criminal trials.[364] Despite the importance of appeals in general, and, specifically, in the criminal context, there have been "few systematic efforts to examine case processing in state appellate courts,"[365] and even less effort targeted towards assessing juvenile delinquency appeals. The rate of appeals culled from states' responses raises potential questions about the reliability of adjudications, the quality of representation, the quality and fairness of case-processing, and whether a system lacking in accountability for decision-making can really achieve its goals to reduce disproportionate treatment of minority youth. States should take steps to change that.

A. *Collection of Data*

State judicial branches should collect more robust data in juvenile delinquency cases including, but not limited to, the quantity and basis of appeals, in order to fully assess the juvenile right to appeal in their own jurisdictions. Where the scope of the appellate deficit is unknown, it is more difficult to identify the factors that correlate with the lack of appeals, to confirm the possible causes, and, finally, to understand the depth of the consequences of the lack of appeals. Furthermore, beyond the numbers of appeals taken, some states replied to this study indicating

363. *See, e.g.*, State *ex rel.* S.M., 67 So. 3d 1274, 1277 (La. Ct. App. 2011) (reversing dispositional order); State *ex rel.* B.T., 67 So. 3d 693, 694–95 (La. Ct. App. 2011) (amending adjudication of delinquency where court improperly considered a juvenile adjudication as a "conviction," which would have required confinement); *In re* Kyle FF., 85 A.D.3d 1463, 1463–64 (N.Y. App. Div. 2011) (reversing trial court's disposition ordering probation where the parties agreed to placement in foster care and court independently called probation officer as a witness and crafted a disposition based solely on the evidence the court adduced independently); CT v. State (*In re* CT), 140 P.3d 643, 648 (Wyo. 2006) (reversing and remanding for abuse of discretion where trial court failed to state the reasons for its departure from statute in issuing indefinite probation beyond the maximum term of one year found in statute).

364. *See, e.g.*, Oldfather & O'Hear, *supra* note 23, at 339.

365. 2010 DOJ Report, *supra* note 53, at 3.

that other portions of the request were unknown to the administrative office of the courts, such as the number of cases that resulted in adjudications of a juvenile's guilt or the number of youth ordered into confinement.[366]

The data collected and reported by Washington State can serve as a model starting point for other states seeking to better analyze their juvenile court systems. The Administrative Office of the Courts in Washington records and makes publicly available many categories of case information. This includes the type of offenses that are the basis of complaints, the number of cases that are adjudicated by trial, the number of pleas entered, and dismissals at trial.[367] It also includes the outcomes of juvenile adjudications at disposition, including the number of juveniles ordered into confinement.[368] While information about the appellate data required a special inquiry, the state was able to retrieve that data through its statistical reporting system. Other states, even some that reported, did not have that data available in a centralized way and required more laborious methods to access it.[369]

B. *Assessment of the Right to Appeal*

States should reassess their ability to provide access to appellate review to juveniles. This would signify recognition of the institutional role of appellate courts to provide protection against error, allow for law development, and ensure uniformity in the application of the law. Each of the appellate functions benefits the larger community in addition to ensuring that the rights of its youngest members are protected. With only five out of 1000 cases with findings of guilt are appealed, it is difficult to maintain that minors are protected from error. Furthermore, even in the adult criminal system where the appellate process appears more robust, recent findings of innocence among those convicted have resulted in calls for reform.[370]

366. E-mail from Robert Peake, Bureau Chief, Mont. Office of the Court Adm'r, to author (Jan. 3, 2012) (on file with author) (stating that the Supreme Court system, the state's only appellate court, does not separately record the number of juvenile delinquency appeals from other civil appeals categories, making it difficult to report the number of appeals); E-mail from Kim Nieves, Dir. of Research & Statistics, Admin. Office of the Pa. Courts, to author (Dec. 27, 2011) (describing that the state caseload data record whether a hearing took place before a judge but not the outcome of the case); E-mail from Monica Horn, Office of the State Court Adm'r, Or. Judicial Dept., to author (Aug. 26, 2011) (providing data for the number of appeals and delinquency filings but indicating the limitations in data collection tracking outcomes of cases and number juveniles ordered into confinement by the court).

367. *See generally Superior Court Year-to-Date Caseload Reports*, WASH. COURTS, http://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=freq=y (last updated Mar. 6, 2012).

368. *Id.*

369. *See, e.g.*, E-mail from State of Ohio to author (2011) (on file with author).

370. Findley, *supra* note 56, at 591, 593–601.

Courts have required states to afford juveniles with counsel on appeal.[371] It is unknown to what extent current resource levels and delivery structures affect the low rates of appeals taken.[372] The ABA and the National Juvenile Defender Center have concluded that lack of resources contributes to this aspect of deficient appellate advocacy.[373] In Florida, where appeals were filed at a rate higher than other reporting states in this study, the Chief Assistant Public Defender of the Juvenile Division in one active office stated, "If someone came to me and wanted to build a model office to represent juveniles, I would say to them, if you have ten dollars, put nine of them into having a good system of appellate review."[374] She explained her belief that it is nearly impossible to protect the rights of juveniles without keeping an active appellate practice.[375] States should examine the right to appeal within their jurisdictions and the suggested reasons for lack of appeals, including, but not limited to, insufficient resources, lack of safeguards ensuring valid waivers of counsel, the belief that "less is at stake" for juveniles, length of time to resolution, and confusion among lawyers and courts about the proper role of an attorney defending a child accused of a crime. In addition, states should assess to what extent juveniles are aware of their right to appeal. In some instances, it may be appropriate to have the court inform the juvenile of the right to appeal in a language that the juvenile understands.[376]

The presence and effects of these factors may vary according to geography, even within a specific state. For example, implementation of the right to counsel for juveniles across the country, which plays a critical role in the right to appeal, "is at best uneven and at worst unethical."[377] Potential causes or correlations with the lack of appeals are common and should be targeted more effectively. In states where appellate practice remains weak despite strong protections against waiver of counsel by juveniles, such as in New Jersey and Texas as identified by this study, other causes for weak appellate advocacy must be explored.

371. *See supra* note 76 and accompanying text.

372. "Indigent defense representation is typically provided through some combination of three methods: a public defender office, an assigned counsel system, and a contract system." LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007-STATISTICAL TABLES 1, 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf.

373. 1995 ABA REPORT, *supra* note 10 at 11–12.

374. Interview with Marie Osborne, Chief Assistant Pub. Defender, Miami-Dade Juvenile Div. (Nov. 9, 2011).

375. *Id.*

376. *See* LESSONS FROM LUZERNE COUNTY, *supra* note 80, at iv–v (suggesting that Pennsylvania implement a requirement that the court inform juveniles of the right to appeal).

377. Puritz & Sterling, *supra* note 187, at 16.

This could include the average caseload of the defenders and whether the structure for appeals is under-resourced. Where caseloads exceed suggested maximums, states should add resources to comply with caseload recommendations by the ABA.[378] They should also consider the benefits of including training to complement added resources. Training should target role confusion among attorneys and the bench so that the duty to perform zealous advocacy is clear. At times, it appears that judicial expectations of expediency contribute to the blurred defender role which then deters appeals.

As states study the reasons for the lack of juvenile appeals, they should pay careful attention to the groups of persons it most frequently affects or leaves most vulnerable, such as members of minority groups and indigent juveniles. Structural differences in how public defense is provided within states or counties should also be studied against rates of appeal across states. Whether the rates of appeal differ based upon the assignment of counsel versus the ability to pay for private counsel or vary geographically within a given state could help determine allocation of resources or need for training. State efforts to reduce disproportionate minority contact and confinement within the juvenile justice system have had limited success. States continue to implement action plans to reduce these disparities and report them as required under the JJDPA without effective results.[379] Attention to the appellate process is necessary if states are serious about reducing disparities in minority confinement rates. Appellate attention will crystallize and highlight problems that occur at the outset of the juvenile delinquency process up through the confinement stage. It can also reduce the dangers associated with discretion that is left without any kind of review.

This principle is demonstrated in the context of Fourth and Fifth Amendment rights and at sentencing. First, minority youth are arrested at higher rates,[380] leaving them more likely to encounter Fourth and

378. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 9, at 5 n.19. Only approximately eleven states (Alaska, Colorado, Connecticut, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, Wisconsin, and Wyoming) have adopted caseload standards. *See* LANGTON & FAROLE, JR., *supra* note 372, at Table 7-a. New York State also authorized New York City to adopt the case-cap limits equivalent to the ABA-endorsed model in 2009 through a provision in the state budget. *See* John Eligon, *State Law to Cap Public Defenders' Caseloads, But Only in the City*, N.Y. TIMES, Apr. 6, 2009, http://www.nytimes.com/2009/04/06/nyregion/06defenders.html.

379. "While well-intentioned, this vague requirement has left federal, state, and local officials without clear guidance on how to effectively reduce racial and ethnic disparities." Tara Andrews, *The Case for Reauthorization of the Juvenile Justice Delinquency and Prevention Act*, THE CHAMPION, July–Aug. 2001, at 57, 58 (2011). *See also supra* notes 259–261 and accompanying text for a discussion of questions raised about the effectiveness of the JJDPA to reduce DMC among juveniles. R

380. *See* ARMOUR & HAMMOND, *supra* note 273, at 4.

Fifth Amendment issues as a result of the police encounters. These same youth are then placed at risk in trial courts that, with little appellate guidance, are less likely to address potential wrongdoing by police.[381] In the Fifth Amendment context, guarding against potential errors is particularly critical for confessions in interrogations and pleas by juveniles.[382] Juveniles are at a higher risk of giving false confessions than adults, a risk that increases the younger the children are.[383] The Supreme Court's recent decisions acknowledging the differences in juvenile development have created a pivotal moment in the development of juvenile law.[384] This is particularly true in light of the knowledge about the vulnerability of youth and the risk of false confessions in coercive circumstances. A study of falsely convicted youth found that 31% of exonerated youth that were previously convicted had falsely confessed to the crime, mostly due to police inducement.[385] The number increased to nearly half when isolating younger juveniles ages eleven to fourteen,[386] the age of the juvenile in *J.D.B.*

Healthy appellate review should be one guaranteed safeguard that can partially protect against false confessions. Increased appellate review of juvenile cases would provide courts with the opportunity to discuss admissibility of statements and provide analysis about what kind of police conduct results in coercion, potentially preventing future harms. Case law explaining the boundaries of permissible questioning and encounters between juveniles and police would then provide a resource for future trial courts encountering suppression motions.

Relevant to these criminal procedural questions, the virtual exclusion of the juvenile justice system from the appellate process raises compelling questions about whether a large segment of juvenile law is uniquely isolated from additional protections under state constitutional provisions. State courts have frequently interpreted their state constitutional rights provisions to provide more protection than the minimum required under the U.S. Constitution.[387] Commentators predict the re-

381. *See* Amsterdam, *supra* note 341 and accompanying text (arguing that the court will be less likely to determine police behavior was unreasonable without clear rules providing guidance).

382. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1059 (2010) ("An understanding of the vulnerability of confessions to contamination can also inform courts reviewing trials post-conviction, particularly in cases involving persons vulnerable to suggestion, such as juveniles and mentally disabled individuals whose false confessions are [the subject of the article].").

383. *See* Tepfer, Nirider & Tricarico, *supra* note 10, at 893, 904.

384. *See supra* notes 21–23 and accompanying text (discussing the significance of the recent trilogy: *Roper*, *Graham*, and *J.D.B.*).

385. *Id.* at 904–05.

386. *Id.* at 905.

387. WILLIAMS, *supra* note 27, at 114; *see, e.g.*, Robert J. Cody, *Criminal Procedure and the Massachusetts Constitution*, 45 NEW ENG. L. REV. 815, 820 (2011). Since its first decision

emergence of "New Judicial Federalism" with the current Roberts Supreme Court issuing closely divided opinions on the meaning and application of the Fourth, Fifth, and Sixth Amendments.[388] Given that criminal procedural law is a driving force in that arena,[389] it is a question deserving more attention.

Finally, unchallenged judicial decisions and the risk of abuse of discretion more often affect minority youth because they face more severe punishments.[390] Decisions to confine youth are rarely challenged.[391] While it is true that judges are granted broad discretion, that discretion is not designed to be unfettered. Increased advocacy and attention to the articulation of reasons and bases for confinement in all cases could reduce unnecessary instances of confinement. This is particularly important at a time when states are faced with prison overcrowding issues.

C. *Policy Considerations*

At the state and federal levels, the current unsatisfactory systems of appellate review bring into question the fairness and wisdom of considering juvenile adjudications into adulthood. This includes the use of juvenile adjudications as criminal convictions for predicate offenses and sentencing enhancements, the sex offender registration requirement, and the requirement to submit genetic material for DNA databases. The attachment of measures that endure beyond childhood to adjudications should, at the very least, be accompanied by the same commitments to accuracy and reliability that accompany criminal convictions. When considering or reconsidering such provisions, legislators should take into account how the lack of appeals impacts the accuracy of decisions reached in juvenile cases. Additionally, legislators should consider and address an important, seemingly conflicting reality, whereby juvenile adjudications tend to be considered the equivalent of convictions for

affording expanded protections, the Massachusetts Supreme Judicial Court "has never looked back, and the distance between the rights and protections of persons from unreasonable searches and seizures under Article 14 [of the Massachusetts Constitution] and the Fourth Amendment has grown." *Id.* at 820; *see also* State v. Schwartz, 136 P.3d 989, 990 (Mont. 2006) ("Unlike its federal counterpart, however, Montana's constitutional scheme affords citizens broader protection of their right to privacy. *See* Article II, Section 10. In Montana, therefore, we analyze search and seizure issues in light of our citizens' enhanced right to privacy.").

388. *See* Cody, *supra* note 387, at 816, 832.

389. *See* WILLIAMS, *supra* note 27, at 125.

390. *See supra* notes 254–58 and accompanying text.

391. *See supra* Part IV.B.3 (describing the lack of appellate opinions discussing challenges to juvenile dispositions); *see also supra* note 84 and accompanying text (describing similar findings by experts in Pennsylvania).

purposes of sentencing enhancement[392] and DNA registration,[393] but, quite often, not for post-conviction relief.[394]

Courts and scholars disagree about the role a jury should play in ensuring the accuracy of previous adjudications used for sentencing enhancements. But even beyond that question, the reliability of juvenile adjudications should be questioned based upon the failure to demonstrate the presence of any consistent safeguards. This may include the failure to provide enough resources so that juveniles have access to counsel from trial through a first right of appeal. As the Supreme Court stated in *Gault*, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[395]

Based upon the appellate data, legislators and judges should not automatically assume, and, indeed, should seriously question, the legitimacy of the appellate court process. The data discussed here raises serious questions about whether there are adequate guards against error. This existing data shows that juveniles are not, in fact, provided access to the appellate right contemplated by state statutes, and, in some cases, state constitutions. Research suggests that juvenile bench trials are not immune to this problem and may even be more likely to be reversed on appeal based upon insufficiency.[396] Analysis and research on the psychology of judicial decision-making dispels the notion that bench trials are inherently more reliable.[397]

When the current lack of appellate process is combined with the procedural uniqueness of juvenile cases, it demonstrates an unparalleled lack of transparency and accountability. Because this lack of appellate review by the courts is accompanied by minimal access and participation by the public, the situation is ripe, and almost crying out, for poor outcomes. The data confirms the likelihood that one person alone decides the facts, applies the law, and determines the disposition in the clear majority of juvenile cases in the United States. This current reality runs counter to the foundation of the justice system and to the assurances contemplated for juveniles in *Gault*. Juvenile appellate practice and the consequences of adjudications should be reexamined in light of the data.

392. *See supra* Part II.C.1.

393. *See*, *e.g.*, People v. Lakisha M. (*In re* Lakisha M.), 882 N.E.2d 570, 575 (Ill. 2008).

394. *See, e.g.*, TEX. FAM. CODE ANN. § 51.13(a) (West 2011) (except for purposes of penalty enhancement in subsequent felonies, "an order of adjudication or disposition . . . is not a conviction of crime"); Jordan v. State, 512 N.E.2d 407, 408–09 (Ind. 1987) (holding that "[j]uvenile adjudications do not constitute criminal convictions," and, therefore, post-conviction remedies cannot be interpreted to apply to a juvenile delinquency cases).

395. *In re Gault,* 387 U.S. 1, 18 (1967).

396. *See supra* Part II.A.

397. *See supra* Part II.A.

CONCLUSION

Moving toward a vibrant appellate practice is essential to ensure a just system for juveniles. It would both improve the development of legal doctrine and ensure better protection against the errors that result due to the greater vulnerabilities of young people in the justice system. It would also contribute to a uniform treatment of all youth so that the most vulnerable populations are no longer treated more harshly than their peers. More data collection and targeted interventions could help states breathe new life into the constitutional and procedural rights of juveniles, chief among them, the seemingly elusive right to an appeal. Waiver of rights, lack of transparency, and inconsistent protections of the right to effective counsel create a perfect storm for harm to juveniles in the face of few appeals. With an increase in lifelong consequences of juvenile adjudications—often unknown to players in the system—it is vital to ensure appropriate review. The justice system is designed to protect against and avoid situations where one person has full discretion and decision-making power. States should make a concerted effort to remove the current barriers to access to appeals and, at the very least, reexamine polices attaching lengthy consequences to juvenile adjudications. Most importantly, in a time where recent Supreme Court decisions "herald" a new age of juvenile justice,[398] the justice system must be poised and prepared to usher in this new age and define what these new developments will mean going forward.

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398. *See generally* Levick, *supra* note 21.