IT TAKES A VILLAGE TO WAIVE A CHILD . . . OR AT LEAST A JURY: APPLYING *APPRENDI* TO JUVENILE WAIVER HEARINGS IN OREGON*

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The widespread transfer of juvenile offenders to the adult criminal-justice system is bad legal policy. It is a rigid, one-dimensional attempt at solving a problem with many causes, and it has a detrimental effect on public health. Due to the pitfalls of juvenile transfer, a new paradigm of juvenile justice is needed, both nationally and in Oregon. Fortuitously, the Supreme Court's landmark decision in Apprendi v. New Jersey[1] *and the Court's subsequent broadening of the* Apprendi *holding provide a fertile avenue to challenge Oregon's juvenile-waiver laws.*

Through the Apprendi *line, the Supreme Court has interpreted the Sixth and Fourteenth Amendments to require that a jury—not a judge—determines facts that are essential to a criminal defendant's punishment under a beyond-a-reasonable-doubt standard. The* Apprendi *holding is squarely violated when an Oregon judge waives a juvenile to adult court based on judicial fact-finding under a preponderance-of-the-evidence standard.*

Because Oregon's method for waiving juveniles to the adult criminal-justice system and the Supreme Court's Apprendi *jurisprudence cannot be reconciled, Oregon's juvenile-waiver statutes are unconstitutional. By invoking the* Apprendi *line, Oregon practitioners can challenge juvenile-waiver proceedings and, in concert with other legal challenges and policy changes, reform Oregon's juvenile transfer laws.*

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* This article was written by Mark Kimbrell in his personal capacity. The opinions expressed in this article are the author's own and do not reflect the view of the Oregon Judicial Department, Oregon Court of Appeals, or any judge or staff at the Oregon Court of Appeals.

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

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INTRODUCTION

"Juvenile transfer" is the judicial, legislative, or prosecutorial decision to move a juvenile from the juvenile-justice system to the adult criminal-justice system to face criminal prosecution.[2] Some form of transfer exists in every state, and collectively these legal mechanisms make up the contemporary "juvenile transfer regime."[3] States utilize the following laws to facilitate transfer: (1) judicial-waiver statutes that allow a judge to waive a juvenile to adult court; (2) statutory exclusions or automatic-transfer statutes that strip juvenile courts of jurisdiction over a class of juvenile offenders or mandate that a class of juvenile offenders be prosecuted in adult court; and (3) prosecutorial-discretion statutes that permit prosecution of a class of juvenile offenders in adult court.[4] Oregon's juvenile transfer regime, specifically the constitutionality of Oregon's juvenile-waiver laws, is the focus of this article.

Part I of this article discusses the history and public-health consequences of juvenile transfer and why a policy shift in the treatment of juveniles is needed. Part II lays out Oregon's statutory framework for juvenile transfer, with particular focus on judicial-waiver proceedings. Part III describes and analyzes the Supreme Court's decision in *Apprendi v. New Jersey* and the relevant cases that followed that landmark decision. Part III also addresses the repercussions of juvenile transfer in Oregon, why those repercussions constitute punishment, and thus why *Apprendi* applies to juvenile-waiver hearings in Oregon. Finally, Part IV confronts counterarguments and judicial reluctance to enforcing the requirements of *Apprendi* in juvenile-waiver hearings.

2. Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, NAT'L REP. SERIES BULL. (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), Sept. 2011, at 2, 12.

3. *Id.*

4. Robert E. Shepard, Jr., *Evidence Mounts on Wisdom of Trying Juveniles as Adults*, 22 CRIM. JUST. 42, 42 (2008).

I. THE HISTORY AND PUBLIC-HEALTH CONSEQUENCES OF JUVENILE TRANSFER

A. The historical development of juvenile transfer

The current juvenile transfer mechanisms represent a sharp and recent departure from historical notions of juvenile justice. Beginning with the first juvenile court in 1899, states created separate legal systems for juveniles throughout the early twentieth century,[5] accepting their *parens patriae* responsibility to protect and supervise children whose parents had failed to do so.[6] Similarly, the criminal-justice system found it necessary to create a separate judicial wing to serve the needs of juvenile offenders.[7] From its inception, the objective of the juvenile-justice system has generally been the rehabilitation and treatment of young offenders, distinct from the adult criminal-justice system's purpose of affixing criminal responsibility and punishment.[8]

Until the late 1980s, the legal avenues for transferring juveniles to adult court were limited and fairly unchanged.[9] Juvenile transfer was primarily the product of discretionary judicial waiver, and only the most serious juvenile offenders were transferred.[10] Automatic statutory-transfer mechanisms were rare and usually applied only to

5. Keisha L. David, *Black Faces, Brown Faces . . . Why are We Different than White Faces? An Analytical Comparison of Minority & Non-Minority Juvenile Offenders*, 2 ST. MARY'S L. REV. ON MINORITY ISSUES 49, 52–53 (2000); Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-Term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J. L. & FAM. STUD. 281, 287–88 (2004).

6. David, *supra* note 5, at 52–53; *see also* Task Force on Cmty. Preventive Servs., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, Morbidity & Mortality Wkly. Rep. (Ctrs. for Disease Control, Atlanta, Ga.), Nov. 30, 2007, at 2 (explaining background of juvenile-justice system).

7. David, *supra* note 5, at 52–53.

8. State *ex rel.* Juvenile Dep't of Klamath Cty. v. Reynolds (*In re* Reynolds), 857 P.2d 842, 845 (Or. 1993) (in banc) ("From 1907 to the present, juvenile justice in Oregon has been based primarily on a 'rehabilitation' model, rather than on a 'due process' or 'crime control' model."); *see also* Kent v. United States, 383 U.S. 541, 554–55 (1966) (stating that the objective of the juvenile-justice system is guidance and rehabilitation, "not to fix criminal responsibility, guilt and punishment"); David, *supra* note 5, at 52–53 (discussing the development of the juvenile-justice system as one focused on the interests of the child); Task Force on Cmty. Preventive Servs., *supra* note 6, at 2 (contrasting the adult criminal-justice system, which is "oriented towards punishment," with the juvenile system, which is focused on the rehabilitation of youth).

9. Griffin et al., *supra* note 2, at 1.

10. *Id.* at 8.

murder or other capital crimes.[11] Laws providing prosecutors with the discretionary ability to charge juveniles in adult court were also rare.[12]

In the late 1980s and early 1990s the collective social and political mood began to change in reaction to an uptick in national youth violence and heightened media rhetoric regarding that increase.[13] Between 1987 and 1994, youth violence peaked and legislative enactments broadening juvenile transfer authority from judges to prosecutors or automatic statutory mechanisms followed in nearly every state.[14] The public-health consequences of the wide-spread growth in juvenile transfer have been severe.

B. The public-health consequences of juvenile transfer

Juvenile crime, especially violence, is a pressing public-health concern.[15] An exhaustive review of the public-health effects of juvenile transfer is beyond the scope of this article, yet two easily identifiable and interrelated issues highlight the public-health consequences of the contemporary transfer regime: (1) juvenile victimization and suicide in adult prisons and jails, and (2) modern deterrence of juvenile crime. An examination of these issues shows that the contemporary practice of transferring juvenile offenders to the adult criminal-justice system compounds public-health concerns rather than alleviates them.

Studies show that youth face a far greater risk of violent attacks and suicide once sentenced to adult facilities.[16] The stark victimization statistics are the result of youth in adult facilities often being the smallest and weakest in the population, making them easy targets.[17] Moreover, guards in adult prisons and jails are not trained

11. *Id.*

12. *Id.*

13. *See* Shepard, *supra* note 4, at 43.

14. Griffin et al., *supra* note 2, at 9.

15. *See* Task Force on Cmty. Preventive Servs., *Recommendation Against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence*, 32 AM. J. PREVENTIVE MED. S5, S5 (2007) [hereinafter Task Force on Juvenile Violence].

16. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 8 (2000), http://www.ncjrs.gov/pdffiles1/bja/182503.pdf (finding that youth in adult facilities are more likely to be assaulted and to commit suicide); Shepard, *supra* note 4, at 43.

17. VINCENT SCHIRALDI & JASON ZEIDENBERG, THE RISKS JUVENILES FACE WHEN

to protect young offenders.[18] Additionally, youth in adult facilities suffer from rampant mental instability because frequent sexual abuse and violence drives them to desperation.[19] While mental distress also exists in juvenile facilities, these problems are more prevalent in adult facilities.[20] For example, juveniles in adult facilities are five times more likely than adult offenders, and eight times more likely than juvenile offenders in juvenile facilities, to commit suicide.[21]

While deterrence has been the primary rationalization for the structure of the current nationwide transfer regime,[22] studies confirm that recidivism has become the more likely result for youth offenders funneled into the adult criminal-justice system.[23] Multiple studies have concluded that transferred youth recidivate more than similarly situated youth who were retained in the juvenile system.[24] Moreover, juveniles prosecuted in adult court generally recidivate sooner and more frequently.[25] Unfortunately, Oregon does not track the recidivism rates for juveniles placed in the physical custody of the Department of Corrections (DOC), and the Oregon Youth Authority (OYA) cautions against comparing its statistics to other jurisdictions' statistics.[26] Nonetheless, the studies above are likely indicative of the effects of transfer in Oregon.[27]

Trends in violent juvenile crime demonstrate the failures of juvenile transfer. After juvenile violence peaked between 1993 and

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THEY ARE INCARCERATED WITH ADULTS 2–3 (1997), http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf.

18. *Id.*

19. *Id.*

20. *Id.*

21. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7–8 (2011), http://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

22. *See* Task Force on Cmty. Preventive Servs., *supra* note 6, at 2.

23. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), June 2010, at 4–5; Task Force on Cmty. Preventive Servs., *supra* note 6, at 2.

24. Redding, *supra* note 23, at 4–5; Task Force on Cmty. Preventive Servs., *supra* note 6, at 2.

25. Redding, *supra* note 23, at 6.

26. OR. YOUTH AUTH., OYA RECIDIVISM RISK ASSESSMENT—VIOLENT CRIME 5, 15 (2011), http://www.oregon.gov /oya/research/recidivismriskassessment_violentcrimemodelingrisk.pdf; OR. YOUTH AUTH., QUICK FACTS JANUARY 2014 (2014), http://www.oregon.gov/oya/docs/QuickFacts/QuickFacts_Jan2014.pdf.

27. The studies performed came from a variety of states across the country. *See* Task Force on Cmty. Preventive Servs., *supra* note 6, at 2.

1995, it fell steadily until 2004 before leveling out.[28] However, while juvenile violence temporarily stabilized in the late 1990s and early 2000s, it rose between 8%–11% from 2004 to 2007, and has yet to fall below the pre-1988 numbers (the year prior to the spike).[29] Instead, roughly 90,000 juveniles are arrested for violent crimes nationally per year.[30]

Furthermore, juvenile offenders continue to commit acts of violence at a rate higher than any other age group.[31] In fact, over the past twenty-five years juveniles aged ten to seventeen, who constitute less than 12% of the population, have participated in 25% of violent victimizations.[32] Violent juvenile crime in Oregon has generally followed the national trend, with juvenile arrests for violent crime stabilizing and dropping in the early 2000s but rising again between 2004 and 2008.[33]

Based on victimization statistics, recidivism rates, and trends in violent juvenile crime, it appears that widespread juvenile transfer has done more than simply relocate youth-related violence to within penal institutions—transforming juvenile offenders into victims. Rather, juvenile transfer has added a new layer of violence to match the juvenile violence it has failed to remedy in our communities. Hence, juvenile transfer has at best maintained status quo levels of youth-related violence and at worst increased youth-related violence.[34] It has caused an important public-health issue to continue to be a serious problem.

The Oregon legislature took positive steps to mitigate some of the harms created by juvenile transfer. First, Oregon restricts the circumstances in which a juvenile can be detained in an adult jail or

28. *See* Griffin et al., *supra* note 2, at 11.

29. *See id.*

30. *See id.*

31. Task Force on Juvenile Violence, *supra* note 15, at S5.

32. *Id.*

33. OR. COMM'N ON CHILDREN & FAMILIES, OREGON JUVENILE JUSTICE SYSTEM NEEDS AND ANALYSIS: JUVENILE CRIME TRENDS AND RECIDIVISM REPORT 8 (2011), http://www.oregon.gov/oya/docs/QuickFacts/QuickFacts_Jan2014.pdf.

34. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *supra* note 16, at 7–8 (finding youth in adult facilities are more likely to be assaulted and to commit suicide); Redding, *supra* note 23, at 4–5 (finding that for violent offenses, 24% of transferred youth re-offended, while only 16% of retained youth re-offended); Task Force on Cmty. Preventive Servs., *supra* note 6.

incarcerated in an adult prison.[35] Second, Oregon disallows judges from sentencing juveniles waived to adult court to mandatory-minimum prison terms.[36]

However, there are still multiple ways for a juvenile to end up in an adult jail or prison in Oregon,[37] and judges can still sentence juveniles under Oregon's determinative sentencing guidelines.[38] Therefore, regardless of these legislative attempts, the public-health consequences of juvenile transfer persist in Oregon.

In 2012, 130 juveniles were waived or transferred to the adult criminal-justice system in Oregon.[39] Twenty-four juveniles were between the ages of thirteen and fifteen, while 105 were sixteen or older and one was younger than twelve.[40] Of the 130 sent to the adult criminal-justice system, ninety-four received adult sentences.[41] The remaining juveniles were likely acquitted or received some form of alternative disposition.

Considering the negative public-health consequences of juvenile transfer, lawyers can at once protect the interests of juvenile offenders while also safeguarding the public health of their communities by challenging the constitutionality of the laws that funnel juveniles into the adult system. In an effort to facilitate these challenges, this article examines the possibility of using *Apprendi v. New Jersey* to reform the practice of juvenile waiver in Oregon.

II. JUVENILE TRANSFER IN OREGON: A STATUTORY ANALYSIS

An analysis of Oregon's juvenile transfer regime is necessary in order to assess its constitutionality. Generally, the juvenile court has exclusive jurisdiction over individuals under the age of eighteen.[42] Oregon, however, utilizes two distinct mechanisms to transfer juveniles to the adult system: statutory exclusion and judicial waiver.

35. OR. REV. STAT. § 419C.130(1)(b) (2013); CAMPAIGN FOR YOUTH JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON'S YOUTH 52–53 (2011), http://www.campaignforyouthjustice.org/documents/Misguided_Measures_July_2011.pdf.

36. OR. REV. STAT. § 161.620.

37. *See* discussion *infra* Part III.B.2.

38. *See* discussion *infra* Part III.B.2.

39. OREGON YOUTH AUTHORITY, DATA & EVALUATION REPORTS: 2012 DISPOSITIONS 8 (2012), http://www.oregon.gov/oya/reports/jjis/2012/statewide_dispositions_2012.pdf.

40. *Id.*

41. *Id.*

42. OR. REV. STAT. § 419C.005(1) (2013).

The latter is the primary focus of this article, as it involves judicial fact-finding—the core concern of the *Apprendi* line.[43]

A. Oregon's statutory exclusion of juveniles

In 1994, Oregon voters passed Ballot Measure 11, which dictated stern mandatory minimums for sixteen violent and sexual felonies and commanded automatic adult prosecution of certain juveniles who committed those crimes.[44] In recent years, the Oregon legislature has amended the law by adding six more offenses and increasing sentences.[45] Under Ballot Measure 11, two statutes, read together, exclude certain juvenile offenders from juvenile court jurisdiction.[46] The first statute commands that fifteen-, sixteen-, and seventeen-year-olds charged with Ballot Measure 11 offenses "shall" be prosecuted as adults in criminal court[47] and given presumptive sentences for each enumerated offense.[48] The second statute further effectuates the exclusion by ordering the juvenile court to "dismiss, without prejudice, the juvenile court proceeding and enter any order necessary to transfer proceedings concerning that juvenile."[49]

B. Oregon's waiver provisions

Oregon's juvenile-waiver provisions are scattered throughout multiple statutes, and their application depends upon a juvenile's age and circumstances.[50] Under one statute—pertaining to juveniles between the ages of fifteen and seventeen—a juvenile accused of one or more listed offenses, including any Class A and B felonies and a

43. *See* discussion *infra* Part III.A.

44. OR. CRIMINAL JUSTICE COMM'N, LONGITUDINAL STUDY OF THE APPLICATION OF MEASURE 11 AND MANDATORY MINIMUMS IN OREGON, at vii (2011), http://www.oregon.gov/cjc/SAC/Documents/measure_11_analysis_final.pdf.

45. *Id.*

46. OR. REV. STAT. §§ 137.705, .707.

47. OR. REV. STAT. § 137.707(1)(a).

48. *Id.* § 137.707(4).

49. *Id.* § 137.705(2)(c).

50. *See, e.g.*, *id.* §§ 419C.349–.352 (allowing juvenile court to waive a youth to circuit, municipal, or justice court for prosecution as an adult if the youth is fifteen years or older and is alleged to have committed certain criminal offenses); *id.* § 419C.364 (allowing court to enter subsequent waivers for a youth to be prosecuted in adult court if he or she is sixteen years old or older and has already been waived into adult court); *id.* § 137.707(1)(a) (requiring adult prosecution of a youth who has been charged with aggravated murder or other specific offenses if the youth was fifteen, sixteen, or seventeen years of age at the time of the offense).

variety of Class C felonies, is granted a hearing where the juvenile judge decides whether to waive the juvenile to adult criminal court.[51]

In deciding whether to waive a juvenile into adult court, a judge is required to consider the juvenile's amenability to rehabilitation, the community's need for protection, the manner in which the juvenile committed the offense, the gravity of harm suffered as a result of the offense, and a variety of other factors.[52] The statute permits a judge to waive the juvenile to adult court if—via consideration of the factors—the judge determines by a preponderance of the evidence that retaining jurisdiction is not in the best interests of the juvenile and society.[53] As part of the waiver process, a juvenile judge may also enter an order commanding that the juvenile be sent to adult court in all future criminal cases.[54]

A separate statute lays out the waiver requirements for juveniles younger than fifteen.[55] It applies to a smaller number of serious offenses.[56] If a youth is accused of one of the listed offenses, the

51. The listed offenses include murder, Class A or Class B felonies, Class C felonies, including escape in the second degree, assault in the third degree, coercion, arson in the second degree, robbery in the third degree, any Class C felony where the youth used or threatened to use a firearm, or any other felony or misdemeanor if the youth and state stipulate to the waiver. *Id.* § 419C.349(b)(2).

52. The other factors are:

> [t]he amenability of the youth to treatment and rehabilitation given the techniques, facilities and personnel for rehabilitation available to the juvenile court and to the criminal court which would have jurisdiction after transfer; the protection required by the community, given the seriousness of the offense alleged; the aggressive, violent, premeditated or willful manner in which the offense was alleged to have been committed; the previous history of the youth, including: prior treatment efforts and out-of-home placements; and the physical, emotional and mental health of the youth; the youth's prior record of acts which would be crimes if committed by an adult; the gravity of the loss, damage or injury caused or attempted during the offense; the prosecutive merit of the case against the youth; and the desirability of disposing of all cases in one trial if there were adult co-offenders.

Id. § 419C.349(4).

53. *Id.*

54. *Id.* § 419C.364.

55. *Id.* § 419C.352.

56. The offenses are: "[m]urder or any aggravated form thereof under ORS 163.095 or 163.115; [r]ape in the first degree under ORS 163.375 (1)(a); [s]odomy in the first degree under ORS 163.405(1)(a); or [u]nlawful sexual penetration in the first degree under ORS 163.411(1)(a)." *Id.* § 419C.352(3).

waiver determination is the same as above.[57] The sum total of these two statutes is that a juvenile may be waived to adult court after a judicial investigation and determination that waiver is appropriate.

Oregon's statutory exclusion for Ballot Measure 11 offenses also contains a reverse-waiver provision.[58] This provision applies after a juvenile who was originally charged with a Ballot Measure 11 offense pleads guilty or is convicted of a lesser included offense that is covered by the primary juvenile-waiver statute.[59] And it only applies if the district attorney moves to invoke the provision.[60] Once it is invoked, the judge conducts the same inquiry dictated by the juvenile-waiver statutes and decides whether or not to retain the juvenile in adult court for sentencing under the adult guidelines or to return the juvenile to juvenile court for sentencing.[61]

III. *APPRENDI V. NEW JERSEY*: A CONSTITUTIONAL REMEDY TO EASE THE PUBLIC-HEALTH CONSEQUENCES OF JUVENILE TRANSFER IN OREGON

In an effort to identify constitutional shortcomings, a critical examination of Oregon's juvenile-waiver proceedings through the lens of the Supreme Court's relevant Sixth Amendment and Fourteenth Amendment jurisprudence is necessary. In the following section, the requirements of the Supreme Court's landmark decision *Apprendi v. New Jersey* are catalogued and analyzed. Next, Oregon's judicial-waiver proceedings are shown to fall within the province of *Apprendi*, as they entail judicial fact-finding that has very serious consequences for juvenile offenders.[62] Finally, the mechanics and consequences of applying *Apprendi* to juvenile-waiver laws in Oregon are explored.

57. *Id.* § 419C.352(2).

58. *Id.* § 137.707(b).

59. *Id.*

60. *Id.* § 137.707(5)(b)(A).

61. *Id.*

62. *See id.* § 419C.349 (stating grounds for waiver); *id.* § 419C.352 (providing grounds for waiver for youth under age fifteen); *id.* § 419C.364 (providing subsequent order for waiving cases); *id.* § 137.707(7)(b) (providing circumstances for mandatory adult prosecution of juvenile offenders).

A. The Constitutional Requirements of Apprendi v. New Jersey

In *Apprendi v. New Jersey*, the defendant pled guilty to two counts of possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb after firing indiscriminately into an African-American family's home.[63] At the plea hearing, the trial judge heard police testimony that the defendant did not want the family in the neighborhood because they were "black."[64] Based on this testimony the judge found by a preponderance of the evidence that the crime "was motivated by racial bias."[65] The judge sentenced the defendant under New Jersey's hate-crime law to a prison term that exceeded the statutory maximum for the two charges.[66] On appeal, the Supreme Court rejected the enhanced sentence as constitutionally repugnant.[67]

The Supreme Court in *Apprendi* held that any fact, other than a prior conviction, that "exposes a defendant to a sentence in excess of the statutory maximum must be found by a jury, not a judge, and must be established beyond a reasonable doubt."[68] The Court refused to draw a distinction between elements of the offense and a sentencing factor; instead, it held that the Sixth and Fourteenth Amendments apply to both.[69] Justice Stevens, writing for the majority, reasoned that due process jury protections extend to determinations that go not only to the defendant's guilt or innocence but also to the length of his sentence.[70] Therefore, any fact that increases a defendant's punishment is treated as an element of the crime and must be found by the jury beyond a reasonable doubt.[71]

Two years later in *Ring v. Arizona,* a defendant was convicted by jury trial of first-degree murder, armed robbery, and conspiracy to

63. Apprendi v. New Jersey, 530 U.S. 466, 469–70 (2000).

64. *Id.* at 469.

65. *Id.* at 471.

66. *Id.* at 470.

67. *Id.* at 476–77.

68. *Id.*; Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishments, and Adult Process*, 61 HASTINGS L.J. 175, 180 (2009).

69. *Apprendi*, 530 U.S. at 476–77, 490.

70. *Id.* at 484.

71. *Id.* at 506–09, 511.

commit armed robbery.[72] The statutory scheme in Arizona allowed the trial judge to impose either life in prison or increase the punishment to death if the judge found certain aggravating circumstances.[73] The judge in *Ring* sentenced the defendant to death under the scheme.[74] In holding the judge-imposed sentence was unconstitutional, the Supreme Court rejected Arizona's argument that the defendant was sentenced within the range approved by the jury's guilty verdict.[75] The Court held that a jury determination is required for any factor that exposes a defendant to a greater sentence than was otherwise available,[76] and under Arizona's framework, the sentence available was life in prison, not death.[77] Therefore, the judge's finding of statutory aggravators violated *Apprendi*.[78]

The true reach of *Apprendi* began to show in *Blakely v. Washington*[79] and *United States v. Booker*.[80] *Blakely* concerned Washington's sentencing scheme, which provided presumptive sentencing guidelines but also permitted judges to exceed the guideline range by finding "substantial and compelling reasons justifying an exceptional sentence."[81] The trial judge in *Blakely* sentenced the defendant to a prison term less than the statutory maximum for the offense, but the judge exceeded the guideline range through fact-finding that justified an "exceptional sentence."[82] In overturning the sentence, the Court held that a defendant has a right to a jury finding on any particular fact "which the law makes essential to his punishment."[83] Therefore, the maximum sentence a judge may

72. Ring v. Arizona, 536 U.S. 584, 585–86 (2002).

73. *Id.* at 592–93.

74. *Id.* at 594.

75. *Id.* at 603–09.

76. *Id.* at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

77. *Id.* at 592.

78. *Id.* at 585–86 (citing Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

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

80. United States v. Booker, 543 U.S. 220 (2005).

81. *Blakely*, 542 U.S. at 299.

82. *Id.* at 303–05.

83. *Id.* at 304 (internal quotations omitted); *see also Booker*, 543 U.S. at 232 ("The application of Washington's sentencing scheme [in *Blakely*] violated the defendant's right to have the jury find the existence of any particular fact that the law makes essential to his punishment. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant." (quoting

impose is limited to that warranted by "the facts reflected in the jury verdict or admitted by the defendant."[84] In *Booker*, the Supreme Court made clear that the *Apprendi* rule applies to the Federal Sentencing Guidelines in much the same way it applied to Washington's sentencing guidelines in *Blakely*.[85]

The Court in *Booker* rejected the argument that judicial fact-finding was constitutional because federal judges had historically been permitted to impose longer sentences based on particular circumstances.[86] Instead, the Court noted that historical practice was not a "sound guide" for protecting a defendant's Sixth Amendment jury-trial right.[87] As judges' role in fact-finding increased, the jury's correspondingly decreased, and thus the holding was required in order to "preserve Sixth Amendment substance."[88]

The Court continued to demonstrate the flexibility of the phrase "statutory maximum" in *Cunningham v. California* and *Alleyne v. United States*.[89] *Cunningham* confronted California's determinate sentencing law, which included three potential terms for a convicted defendant—a lower, middle, and upper term.[90] Under the California law, a judge was obligated to impose the middle term unless he found, by a preponderance of the evidence, additional aggravating or mitigating factors that justified a lower or upper term.[91] Technically, all three terms were provided by the criminal statute at issue, but the Court rejected the State's argument that the upper term was the statutory maximum.[92] Instead, the Court held that since the judge could impose the upper term only by finding additional facts—outside of those proved to the jury—the true statutory maximum was the presumptive middle term.[93]

This holding aligned with *Ring*, *Blakely*, and *Booker*, and illuminated the meaning of "statutory maximum" under *Apprendi*—the maximum punishment the judge may impose as warranted by the

Blakely v. Washington, 542 U.S. 296, 301, 303 (2004) (internal quotations omitted))).

84. *Blakely*, 542 U.S. at 303.

85. *See Booker*, 543 U.S. at 232.

86. *Id.* at 235–37.

87. *Id.* at 236.

88. *Id.*

89. Cunningham v. California, 549 U.S. 270, 288 (2007).

90. *Id.* at 278 (citing CAL. PENAL CODE § 1170.3(a)(2) (West 2004)).

91. *Id.* at 277.

92. *Id.* at 289.

93. *Id.* at 288.

jury's findings in a particular case and under the dominant sentencing scheme, regardless of its label.[94] Additionally, in *Cunningham*, the Court again rejected the State's argument that the California sentencing scheme "simply authorized . . . the type of fact-finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range."[95]

In *Alleyne v. United States*, the Court held that under *Apprendi* there is no difference between judicial fact-finding that increases the statutory maximum and that which increases the applicable mandatory-minimum sentence a defendant faces.[96] In *Alleyne*, the mandatory minimum for the defendant's crime was five years in prison, but if the defendant "brandished a firearm" in the course of the crime, the mandatory minimum rose to seven years.[97] The jury made no finding with respect to the defendant brandishing a firearm; nonetheless, the judge increased the mandatory minimum from five to seven years based on his own fact-finding.[98] Justice Thomas, writing for the majority, stated that it was "impossible to disassociate the floor of a sentencing range from the penalty affixed to the crime."[99] Returning to the broad language of *Booker*, the Court in *Alleyne* held that under *Apprendi*, the Sixth Amendment requires the jury to find all the facts that fix the penalty range for a crime.[100] Any distinction between penalty ceilings and floors was no longer relevant.[101]

Similarly, the Court in *Southern Union Co. v. United States*[102] showed that for *Apprendi* purposes, punishment is not limited to incarceration. In *Southern Union Co.*, a jury convicted a commercial

94. Carroll, *supra* note 68, at 195; *see also* United States v. Booker, 543 U.S. 220, 231–32 (2005) (re-affirming *Blakely*'s formulation of the statutory maximum for *Apprendi* purposes); Blakely v. Washington, 542 U.S. 296, 303 (2004) (identifying the statutory maximum as the sentence that the judge could impose based on facts reflected in the jury verdict); Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding aggravators could not be used to enhance defendant's sentence unless found by the jury).

95. *Cunningham*, 549 U.S. at 289 (quoting People v. Black, 113 P.3d 534, 543 (Cal. 2005)).

96. Alleyne v. United States, 133 S. Ct. 2151, 2163 (2013).

97. *Id.* at 2155–56.

98. *Id.* at 2156.

99. *Id.* at 2160.

100. *Id.* at 2163.

101. *Id.* at 2161.

102. S. Union Co. v. United States, 132 S. Ct. 2344, 2348–49 (2012).

defendant of illegally storing liquid mercury for a period of ten days.[103] The verdict supported a fine of $50,000 to be levied against the defendant, yet the trial judge imposed a fine of six million dollars after finding the violation occurred for 762 days.[104] In reviewing the case, the First Circuit held that *Apprendi* did not apply to criminal fines.[105] The Supreme Court reversed, holding the *Apprendi* rule prohibits a judge from basing a nonpetty fine on facts found by the court rather than the jury.[106]

The dissent in *Southern Union Co.* emphasized the policy ramifications of the majority's holding, stating that applying *Apprendi* to fines would hinder legislative attempts to reduce sentencing disparity, create confusion, violate federalism, and harm defendants.[107] The majority countered with their own policy arguments, stating that legislatures would still be able to constrain sentencing discretion and that the burden of applying *Apprendi* to fines would fall equally on the federal government and state governments.[108] Moreover, the majority argued that "even if [the government's and dissent's] predictions are accurate, the rule the government espouses is unconstitutional," and that is enough to conclude the matter.[109]

Lastly, the Court narrowed the lone exception to the *Apprendi* rule in the complicated case *Descamps v. United States*.[110] In *Apprendi*, the Court held that a judge may find the existence of a prior conviction without a jury determination.[111] Faced with the scope of that exception—and most pertinent to the discussion here—the *Descamps* Court limited a judge's ability to examine a prior conviction in order to enhance a defendant's sentence under the Armed Career Criminal Act.[112] The Court struck down the Ninth Circuit's "modified categorical approach" that permitted a trial judge

103. *Id.* at 2349.

104. *Id.*

105. United States v. S. Union Co., 630 F.3d 17, 33–36 (1st Cir. 2010) *rev'd*, 132 S. Ct. 2344 (2012).

106. *S. Union Co.*, 132 S. Ct. at 2348–49.

107. *Id.* at 2360–61, 2369–71 (Breyer, J., dissenting).

108. *Id.* at 2356–57.

109. *Id.* at 2357.

110. Descamps v. United States, 133 S. Ct. 2276, 2288 (2013).

111. Apprendi v. New Jersey, 530 U.S. 466, 490–91 (2000).

112. Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2014); *Descamps*, 133 S. Ct. at 2281–82.

"to try to discern what a [past] trial showed, or a plea proceeding revealed, about the defendant's underlying conduct," rather than merely examining the elements of the prior conviction.[113] Instead, the Court only approved of a judge examining certain portions of the record of a prior conviction when the statute of conviction was divisible, meaning that it set out elements in the alternative.[114] For example, under *Descamps*, a judge may engage in a more searching inquiry of a prior burglary conviction when the statute covers entry into a building *or* an automobile, rather than just entry into a building.[115]

The only apparent limitation to the broad reach of *Apprendi* came in *Oregon v. Ice*.[116] The defendant in *Oregon v. Ice* challenged the trial judge's ability under Oregon law to choose between sentencing him to consecutive rather than concurrent prison terms based on statutory factors.[117] The Court held that the *Apprendi* rule does not prohibit states from assigning judges the discretion to apply sentences that have been approved by the jury either consecutively or concurrently.[118] Importantly, the Court dictated that before extending *Apprendi* to more proceedings or alternative forms of sentencing, it would analyze "twin considerations—historical practice and respect for state sovereignty."[119] In light of these twin considerations, judicial discretion in applying consecutive rather than concurrent prison terms was not an encroachment upon the Sixth Amendment's jury guarantee, but rather was aligned with the states' historical ability to administer their criminal-justice systems.[120]

As described, *Oregon v. Ice* can be read as narrowing the future application of *Apprendi*; however, the Court's subsequent holdings in *Southern Co.*, *Alleyne*, and *Descamps* refute that interpretation.[121] In

113. *Descamps*, 133 S. Ct. at 2288.

114. *Id.* at 2281.

115. *Id.*

116. Oregon v. Ice, 555 U.S. 160 (2009).

117. *Id.* at 164–67.

118. *Id.* at 167–70.

119. *Id.* at 167–68.

120. *Id.* at 167–71.

121. *Compare Ice*, 555 U.S. 160 (upholding Oregon law which allowed judge to find the presence of statutory factors in order to impose a consecutive rather than concurrent prison sentence), *with* Alleyne v. United States, 133 S. Ct. 2151 (2013) (expanding *Apprendi* to mandatory minimums), *and* S. Union Co. v. United States, 132 S. Ct. 2344 (2012) (expanding *Apprendi* to fines), *and* Descamps v. United States, 133 S. Ct. 2276 (2013) (narrowing the

fact, none of the relevant decisions following *Oregon v. Ice* were completely premised on the twin considerations.[122] In *Alleyne v. United States*, decided in 2013, the majority and dissent failed to cite *Oregon v. Ice* even once. In context of the case law preceding and following it, *Oregon v. Ice* is better classified as the Court distinguishing between fact-finding that effects punishment and discretion in the administration of punishment, rather than construed as the end of the road for the Court's broad application of *Apprendi*.[123] It appears that the twin considerations of *Oregon v. Ice* are malleable concepts that can be fashioned to support a consistent application of *Apprendi*.[124]

In conclusion, over the past decade the Supreme Court has refused to significantly limit the reach of *Apprendi*.[125] In many cases the Court engaged in a thorough analysis of the policy ramifications of applying *Apprendi* to a particular type of proceeding. Most paramount, the Court has returned time and again to the core principle of *Apprendi*: any facts that are essential to a defendant's punishment must be determined by a jury, beyond a reasonable doubt. As discussed in the following sections, Oregon's juvenile-waiver proceedings squarely violate this well-established constitutional principle.

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exception to *Apprendi*).

122. *See S. Union Co.*, 132 S. Ct. at 2360–61, 2369–71 (Breyer, J., dissenting) (criticizing majority for failing to follow *Oregon v. Ice* because the majority posed the wrong historical question and failed to heed the states' interest in devising solutions to difficult legal problems); *see also Alleyne* , 133 S. Ct. at 2170 (Roberts, C.J., dissenting) (arguing that the *Apprendi* rule rests on historical evidence, and stating "there is no body of historical evidence supporting [*Alleyne*'s] new rule").

123. *Ice*, 555 U.S. at 168 (holding imposition of a consecutive prison term is a specification on how the sentence will be administered, which is the prerogative of the state legislature and not within the jury function); *see also id.* at 173–77 (Scalia, J., dissenting) (stating the majority is making a "distinction without a difference").

124. For example, the majority and the dissent in *Southern Union Co.* had divergent historical positions and produced conflicting evidence in order to bolster their arguments. *S. Union Co.*, 132 S. Ct. at 2354 (internal quotations omitted) (emphasis added) ("The rule that juries must determine facts that set a fine's maximum amount is an application of the *two longstanding tenets* of common-law criminal jurisprudence on which *Apprendi* is based."); *id.* at 2360–61, 2369–71 (Breyer, J., dissenting) (internal quotations omitted) (criticizing majority for not asking "the relevant historical question, namely whether traditionally in England before the founding of our Nation, and in the early American States . . . judges, not juries, normally determined fine-related sentencing facts").

125. Carroll, *supra* note 68, at 197.

B. The Apprendi *rule applies to juvenile-waiver hearings in Oregon, and thus requires jury determinations for waiver*

Oregon's juvenile transfer laws cause two interrelated, retributive actions: they strip the juvenile of access to a rehabilitative legal structure, and they expose the juvenile to a harsher set of consequences. Both the loss of access to the juvenile-justice system and the correlative sentencing consequences of that loss prove that judicial fact-finding during waiver proceedings is in multiple ways essential to a juvenile's eventual punishment, and thus violates the core holding of *Apprendi*.

1. Loss of the rehabilitative juvenile-justice system is textbook punishment

The Supreme Court in *Kent v. United States* recognized that juvenile court is fundamentally different—and in many ways less harsh—than the adult criminal-justice system.[126] The juvenile-justice system is "rooted in social welfare philosophy rather than in the corpus juris."[127] "The juvenile court is engaged in determining the needs of the child and of society rather than adjudicating criminal conduct," and its objectives are to "provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[128] Oregon's juvenile-justice system shares the same rehabilitative mission.[129]

The adult criminal-justice system stands in sharp contrast to the rehabilitative nature of the juvenile-justice system.[130] The punishment-centered adult system is characterized by a sharp individual focus and a pervasive "tough on crime" ideology.[131] The

126. Kent v. United States, 383 U.S. 541, 554–55 (1966).

127. *Id.*

128. *Id.*

129. State *ex rel.* Juvenile Dep't of Wash. Cty. v. Fitch (*In re* Fitch), 84 P.3d 190, 195 (Or. Ct. App. 2004) ("The primary objective of the juvenile justice system is to avoid the stigma associated with a criminal conviction and to emphasize instead rehabilitative efforts for a juvenile offender.").

130. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 968 (2003) (stating that the adult criminal-justice system punishes offenders because they deserve proportional retribution, rather than provides rehabilitation).

131. *See* Scott Burris, *The Invisibility of Public Health: Population-Level Measures in a*

adult system's retributive nature is shaped around a need to punish the morally culpable.[132] Hence, when a juvenile is transferred to adult court the juvenile is moved from a rehabilitative system to a retributive system. The juvenile loses the benefits of one jurisdiction and is subjected to the harshness of another. In fact, the two systems are so distinct that the Supreme Court has mandated that courts afford special procedural protections before removing an offender from the juvenile system.[133]

The rehabilitation-focused juvenile-justice system is a statutorily prescribed privilege, and the deprivation of that privilege is textbook punishment.[134] This is especially true in Oregon, where a judge, in the course of waiving a juvenile to adult court, may also enter an order requiring the juvenile to be transferred to adult court for all future proceedings without another hearing.[135] In essence, this order

Politics of Market Individualism, 87 AM. J. PUB. HEALTH 1607 (1997); *see also* Cyrus Tata, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 1, 17–19 (Cyrus Tata & Neil Hutton, eds.) (2002) (discussing the conservative movement that helped shape the character of the current criminal-justice system).

132. Hoffman, *supra* note 130, at 995 ("[T]he demise of rehabilitation, and the reemergence of retribution, has made it clear that the act of [adult] sentencing is indeed a moral act.").

133. *See Kent*, 383 U.S. at 557 ("[W]e conclude that, as a condition to a valid waiver order, petitioner is entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision."); *see also* Breed v. Jones, 421 U.S. 519, 541 (1975) (holding Double Jeopardy Clause applied to transfer hearings, requiring prosecutors to choose a forum before a hearing on the juvenile's guilt); *In re* Gault, 387 U.S. 1, 17 (1967) (holding procedural protections announced in *Kent* were of a constitutional dimension and applied to proceedings in juvenile court as well as adult court).

134. *Kent*, 383 U.S. at 557 ("Petitioner . . . was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court."); *see* Wolff v. McDonnell, 418 U.S. 539, 547 (1974) (classifying deprivation of a prisoner's privileges as punishment); State v. MacNab, 51 P.3d 1249, 1253 (Or. 2002) (emphasis added) ("[E]ach form of noncorporal sanction within [the definition of 'punishment'] . . . imposes on the offender some detriment, restraint, or *deprivation* . . . ."); *see also* Olga Botcharova, *Justice or Forgiveness? In Search of a Solution*, 8 CARDOZO J. CONFLICT RESOL. 623, 630 (2007) (defining deprivation of a traditional privilege as punishment in western society).

135. Oregon Revised Statutes section 419C.364 dictates that:

> [a]fter the juvenile court has entered an order waiving a youth to an adult court under ORS 419C.349, the court may, if the youth is 16 years of age or older, enter a subsequent order providing that in all future cases involving the same youth, the youth shall be waived to the appropriate court without further proceedings under ORS 419C.349 and 419C.370.

permanently deprives an offender of the benefits and privileges of the juvenile-justice system.

2. A decision to waive a juvenile from the juvenile-justice system to the adult criminal-justice system carries direct and collateral consequences

The Supreme Court has previously recognized that waiver of a juvenile to adult court directly affects a juvenile's eventual sentence.[136] Similarly, the Oregon Supreme Court has recognized that waiver to adult court "carries with it the pains and penalties of the criminal law."[137] These "pains and penalties" come in the form of both direct and collateral consequences for juveniles.

The direct consequences of waiver pertain primarily to detention, incarceration, and supervision. First, waiver can result in juveniles being detained in adult facilities.[138] In Oregon, there is a statutory preference against pretrial jailing of juveniles in adult facilities, however adult detention may still occur postwaiver if the director of the county juvenile department and the local sheriff facilitate it.[139] As of 2011, twenty-four counties in Oregon detain juveniles in adult facilities before trial.[140]

Second, once waived to adult court, juveniles in Oregon face a harsher sentencing scheme. Oregon Revised Statutes section 161.620 prohibits judges from sentencing waived juveniles to mandatory-minimum prison terms.[141] Under Oregon Revised Statutes section 161.620, however, waived juveniles convicted of aggravated murder or use of a firearm during commission of a felony "shall" still receive mandatory sentences.[142] Moreover, the case law gloss on the prohibition of mandatory minimums for waived juveniles shows it to be a fairly toothless statute in two ways. First, Oregon courts do not

136. *Kent*, 383 U.S. at 557 (holding procedural protections were required for waiver of the defendant to adult court because the difference in punishment was potentially great); *see also* Carroll, *supra* note 68, at 187 (stating that the Supreme Court in *Kent* "explicitly acknowledged that procedural protections were critical in a waiver hearing" since the hearing's outcome affected the juvenile's sentence).

137. State v. Turner, 453 P.2d 910, 912 (Or. 1969).

138. *See* OR. REV. STAT. § 137.705(3)(a) (2013).

139. *Id.* § 137.705(3)(a); CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 52.

140. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 53.

141. OR. REV. STAT. § 161.620.

142. *Id.* § 161.620(1)–(2).

consider a statutory sentence to be a mandatory minimum if it gives the sentencing court some discretion, rather than imposing a required minimum sentence.[143] More importantly, the Oregon Court of Appeals has determined that a judge may sentence a waived juvenile under Oregon's determinative-sentencing guidelines without violating section 161.620.[144] Under the court's logic, a judge could sentence a waived juvenile to a term of incarceration that exceeds the offense's mandatory minimum without violating the statute, so long as the judge follows the guidelines—including permitted upward departures—and the sentence is not unconstitutionally disproportionate.[145]

Third, under Oregon's statutory framework, juvenile offenders convicted of adult offenses may end up incarcerated in adult facilities. All Oregon youth fifteen or older transferred and convicted in adult court are in the legal custody of the Oregon DOC.[146] However, OYA[147] retains physical custody of those juveniles in most circumstances.[148] This is a noble effort to mitigate the harmful effects adult facilities have on juvenile offenders, but there are still avenues for a juvenile offender to end up incarcerated in an adult facility.

Oregon youth convicted of adult offenses can be sent to adult prison from OYA's custody if they pose a behavioral risk or are not benefiting from the treatment services in their juvenile facility.[149] Other juveniles will finish their adult sentences in adult prisons after

143. *See* State v. Jones, 844 P.2d 188, 190 (Or. 1992) ("The reading that is most consistent with [the purpose of Oregon Revised Statutes section 161.620] is that a 'minimum sentence' is 'mandatory' if it gives the sentencing judge no flexibility, but requires the judge statutorily to impose a specified minimum sentence.").

144. State v. Davilla, 972 P.2d 902, 905 (Or. Ct. App. 1998) ("[A] determinate sentence under the [sentencing] guidelines is not a 'mandatory minimum sentence' within the meaning of ORS 161.620 . . . .").

145. For example, in *Davilla*, the court stated that a sentencing judge "can make findings that allow an upward or downward departure or can accept a sentencing agreement made between the state and the defendant in light of the presumptive sentence." *Id.* at 905. What matters is that a statutory floor does not limit the trial judge's discretion. *See id.* "While a presumptive sentence or a departure sentence under the guidelines imposes a determinative period of incarceration, the court retains some flexibility in determining the length of the sentence by the use of departure factors." *Id.*

146. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 58.

147. The Oregon Youth Authority is the "state-run juvenile custody, probation, and parole system for young people who have engaged in the most serious behavior or who have the highest needs that can't be met by local juvenile justice departments." *Id.*

148. *Id.*

149. *Id.*

graduating out of OYA's care.[150] For example, in 2009, of the 160 youth who served an adult sentence in OYA's custody, sixty-two completed their sentences in adult facilities.[151]

Even those juveniles convicted of adult offenses who manage to stay in OYA's custody are housed in more secure facilities than other juveniles.[152] Generally, the majority of juveniles under OYA's care are on probation or parole, while a minority of offenders are housed in locked facilities.[153] In January of 2010, 373 of the 875 (42%) youths housed in OYA's locked facilities, or so-called close-custody beds, were convicted as adults.[154] Of the 373 transferred juveniles in these facilities, 137 (15%) were judicially waived.[155] Three years later, the statistics were largely the same. In 2013, of the 1,665 juveniles in OYA care, 663 were in close-custody facilities.[156] Of those 663 juveniles, 342 (51%) were sentenced as adults, and 137 (20%) were judicially waived to adult court prior to conviction.[157] These close-custody facilities are characterized by "high security, intensive accountability, and treatment designed to meet the specific reformation needs of youth while protecting the public from further criminal behavior."[158]

Finally, after serving terms of imprisonment, juveniles convicted of adult offenses in Oregon can be placed on adult postprison supervision or parole.[159] In 2009, over half of transferred juveniles given an adult sentence ended up on adult parole or postprison supervision.[160] The average length of time on postprison supervision for waived juveniles was 766 days.[161] Of the juveniles placed on

150. *See id.*

151. *Id.* at 59.

152. *Id.* at 58.

153. *See OYA at a glance*, OR. YOUTH AUTHORITY (Or. Youth Auth., Salem, Or.), Oct. 2014.

154. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 58.

155. OYA QUICK FACTS JANUARY 2013, OR. YOUTH AUTHORITY 1 (2013), http://www.ore gon.gov/oya/docs/QuickFacts/QuickFacts_July2013.pdf.

156. *Id.*

157. *Id.*

158. *Facilities*, OR. YOUTH AUTHORITY, http://www.oregon.gov/oya/pages/facilities/facilities_list.aspx (last visited Oct. 15, 2015).

159. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 60–61.

160. OYA QUICK FACTS JANUARY 2014, OR. YOUTH AUTHORITY (Jan. 2014), http://www. oregon.gov/oya/docs/QuickFacts/QuickFacts_Jan2014.pdf.

161. Juvenile Justice Servs. & Or. Youth Auth., *Oregon Juvenile Justice System Symposium 2010*, OR. YOUTH AUTHORITY, www.oregon.gov/OYA/jjs/jjs_slideshow_slideson

adult parole or postprison supervision, only around 5% actually received age-appropriate juvenile services.[162] If a juvenile violates parole or postprison supervision conditions, the juvenile will be sanctioned according to the sentencing guidelines or the discretion of the probation or supervision officer.[163] In some counties, this means the juvenile will be sent to a juvenile facility; in others, the juvenile will be sent to adult jail.[164]

An adult conviction in Oregon also comes with a cornucopia of negative collateral consequences. First, both the Oregon Sentencing Guidelines and other federal enhancements prescribe harsher punishment for offenders who have prior adult criminal convictions.[165] That means a juvenile convicted as an adult is exposed to the possibility of severer sentences for subsequent state or federal criminal activity. Moreover, while the Supreme Court has held sentencing judges may find the existence of prior convictions without violating *Apprendi*,[166] the Oregon Supreme Court has held that juvenile adjudications—unlike adult convictions—do not fit within that exception.[167] Therefore, in a subsequent criminal proceeding, a juvenile offender with an adult conviction will not receive the benefit of the *Apprendi* protections in regards to his prior offense, but a juvenile who committed similar conduct and was retained in the juvenile system would.

Second, while a juvenile conviction in Oregon cannot be unsealed without a court order,[168] an adult trial and disposition is public record.[169] That is because confidentiality is a key component of the juvenile-justice system.[170] Moreover, an adult conviction

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162. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 60–61.

163. *Id.* at 62.

164. *Id.* at 52, 61.

165. *See Oregon Sentencing Guidelines Grid*, OR. CRIM. JUST. COMMISSION, http://www.oregon.gov/cjc/about/Documents/guidelinesgrid.pdf (providing formula for criminal history categories that partially control where an offender falls on the sentencing grid); *see, e.g.*, Armed Career Criminal Act, 18 U.S.C. § 924 (2014) (requiring that a felon who has been convicted more than twice of a "violent felony" or a "serious" drug crime receive a minimum sentence of fifteen years in federal prison).

166. Apprendi v. New Jersey, 530 U.S. 466, 491 (2000).

167. State v. Harris, 118 P.3d 236, 245 (Or. 2005) (holding juvenile adjudications are not synonymous with adult convictions and therefore do not fall within the *Apprendi* exception).

168. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 64.

169. *Id.*

170. *See id.*

takes years to expunge,[171] and all Class A and many Class B felony convictions cannot be expunged.[172] If a juvenile with an adult conviction is not convicted of another crime, the juvenile's original adult conviction may be expunged after a three-year waiting period.[173] If the juvenile is convicted again, the juvenile must wait ten years before the initial conviction is eligible to be expunged.[174]

For example, imagine a sixteen-year-old who is waived to adult court and convicted of a Class C felony. During that waiver process the juvenile judge issued an order permanently placing that juvenile within adult jurisdiction. If that juvenile was later convicted of a low-level misdemeanor in adult court, he or she would have to wait ten years—until the age of twenty-six—to expunge his or her felony conviction. Moreover, consider a fifteen-year-old waived to adult court and convicted of a Class A felony. That fifteen-year-old will likely carry that felony conviction on his record for the remainder of his life.

Third, a criminal record can directly reduce a juvenile's future employment prospects.[175] A large portion of employers use criminal background checks to help make hiring decisions, and employers increasingly bar individuals with a criminal record from even applying.[176] Studies show that having a criminal record reduces the amount of time per year that an individual is able to retain employment.[177] Notably, one study concluded that time in jail or prison cut employment by about five weeks per year for young white men and eight weeks per year for young African-American and Latino men.[178] A 2007 study found that only about 40% of prospective employers would be willing to hire someone with a criminal record.[179]

171. OR. REV. STAT. § 137.225 (2013).

172. *Id.* § 137.225(5).

173. *Id.* § 137.225.

174. *Id.*

175. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 2 (2010), http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.

176. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, 65 MILLION "NEED NOT APPLY" 1–3 (2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf.

177. SCHMITT & WARNER, *supra* note 175, at 9.

178. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2006).

179. HARRY J. HOLZER, COLLATERAL COSTS: THE EFFECTS OF INCARCERATION ON THE EMPLOYMENT AND EARNINGS AMONG YOUNG MEN 14 (2007), http://repec.iza.org

Considering that Oregon youth are already disadvantaged in the current job market, an adult criminal conviction severely compounds the problem. Oregon's unemployment recently fell below 7% for the first time in five years,[180] yet it is still higher than many other states.[181] According to the Bureau of Labor Statistics data, unemployment for youth ages 16 to 24 reached 39.9% in 2013, a near historic low for Oregon youth employment.[182] Further exacerbating the problem, certain professions in Oregon bar people with a felony conviction.[183] For example, a felon is barred from becoming a licensed engineer, land surveyor, dentist, veterinarian, cosmetologist, real estate agent, construction contractor, clinical social worker, occupational therapist, or teaching professional.[184]

Finally, an adult conviction in Oregon may even restrict a juvenile's ability to obtain housing after release.[185] For example, Section 8[186] low-income housing may be denied to those convicted of illegal drug use, violent criminal activity, methamphetamine production, sex offenses, or other housing-related offenses.[187] In Portland, the Public Housing Authority makes individual eligibility determinations based, in part, on relevance of criminal history, including arrests.[188]

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180. Molly Young, *Unemployment in Oregon: Jobless Rate Slides Below 7 Percent for First Time in 5-plus Years*, OREGONIAN (Mar. 18, 2014, 10:00 AM), http://www.oregonlive.com/money/index.ssf/2014/03/unemployment_in_oregon_jobless_rate_slides_below_7_percent_for_first_time_in_5-plus_years.html.

181. *Unemployment Rates for States*, BUREAU LAB. STAT., http://www.bls.gov/web/laus/laumstrk.htm (last modified Dec. 18, 2015).

182. Guy Tauer, *Recession's Lingering Effects on Oregon's Youth Employment,* OR. EMP. DEP'T (Jan. 6, 2012), http://www.qualityinfo.org/olmisj/ArticleReader?itemid=00006966.

183. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 35, at 65.

184. *Id.*

185. *Id.* at 66.

186. 42 U.S.C. § 1437f (2013).

187. *Id.*

188. LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: OREGON REPORT CARD 1 (2009), http://www.lac.org/roadblocks-to-reentry/upload/reportcards/37_Image_Oregon%20final.pdf; *see also* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY, (2009), http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry—2009.pdf (surveying re-entry roadblocks for people with criminal records).

3. A hearing that strips a juvenile of a rehabilitative system and exposes the juvenile to the adult system's direct and collateral punishments falls within the reach of *Apprendi*

Once a separate juvenile system has been established[189]—much like application of the sentencing guidelines in *Blakely* and *Booker*, or the mandatory minimum in *Alleyne*—its jurisdiction over a juvenile is statutorily presumed.[190] During a waiver proceeding, a judge makes factual determinations by a preponderance-of-the-evidence standard in order to waive a juvenile to adult criminal court, where the juvenile will face a litany of primary and secondary consequences.[191] Thus, under Oregon's waiver laws, the facts that a judge determines are analogous to facts that trigger sentence enhancements or the application of more severe mandatory minimums.[192]

Apprendi applies to waiver hearings even though an Oregon

189. State *ex rel.* Juvenile Dep't of Wash. Cty. v. Fitch (*In re* Fitch), 84 P.3d 190, 192–95 (Or. Ct. App. 2004) (describing the existence and objectives of Oregon's juvenile-justice system).

190. The Supreme Court described the presumptive jurisdiction of the juvenile court in this way:

> It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile. . . . The Juvenile Court is vested with *original and exclusive jurisdiction* of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.

Kent v. United States, 383 U.S. 541, 556–57 (1966) (emphasis added) (internal quotations omitted). Oregon's juvenile-justice system shares many of these attributes. The juvenile court has exclusive jurisdiction over a juvenile until the juvenile is waived by the judge. OR. REV. STAT. § 419C.005(1) (2013). Juveniles are to be detained under Oregon Youth Authority's custody and not where adults are detained. *Id.* § 419C.130. All juvenile dispositions terminate at age twenty-five. *Id.* § 419C.005(4)(d). All juvenile proceedings are confidential and not available to employers or other parties except for narrow circumstances. *Id.* § 419A.255.

191. *See id.* § 137.707(5)(b)(A); *id.* § 419C.349; *id.* § 419C.352; *id.* § 419C.364.

192. For example, the trial judge in *Apprendi* found the defendant's actions were motivated by racial bias in order to apply the hate-crime sentence enhancement. Apprendi v. New Jersey, 530 U.S. 466, 469–70 (2000). Additionally, in *Alleyne*, the judge determined that the defendant had brandished a firearm in order to raise the mandatory minimum. Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).

judge may sentence a juvenile to a range of incarceration that would have been permitted had the juvenile remained in juvenile court, because the parameters of punishment are still fundamentally altered by waiver.[193] Additionally, an adult conviction in Oregon—even if it provides a similar period of incarceration—carries consequences that a juvenile conviction does not, and, therefore, it constitutes a departure from the "standard range" of juvenile sanctions.[194]

The Oregon Court of Appeals has recognized that these collateral punishments still invoke *Apprendi*,[195] as did the Supreme Court in *Southern Union Co*.[196] In *State v. Hopson*, the Oregon Court of Appeals held that the trial judge's determination that the defendant was a "sexually violent dangerous offender" was impermissible because that designation would prohibit him from residing in places where children are the primary occupants and expose the defendant to lifelong postprison supervision (rather than the presumptive three–year term) and severer punishment if he violated the terms of postprison supervision.[197] The court held that "application of *Blakely* and *Apprendi* [was] straightforward" due to these added punishments, and the "sexually violent dangerous offender" sentence could not be imposed without a jury finding.[198]

Considering the *Hopson* decision, the Oregon courts are only a logical step away from recognizing *Apprendi*'s application in juvenile-waiver proceedings, something Massachusetts's highest court has already done. The Massachusetts Supreme Court held that "once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services . . . for a defined time period," any facts that would increase the penalty, including those that require transfer to the adult system, "must be proved to a jury beyond a reasonable doubt."[199]

193. *See Alleyne*, 133 S. Ct. at 2157–60. The Court held that a judge "increasing either end of the sentencing range produces a new penalty and constitutes an ingredient of the offense," and thus, even though the judge does not "alter the maximum sentence to which [the defendant] is exposed," the sentence violates *Apprendi*. *Id.*

194. *See* Blakely v. Washington, 542 U.S. 296, 299, 303–04 (2004) (holding the defendant's sentence that was within the statutory maximum, but in excess of the "standard range" by more than three years, violated *Apprendi*).

195. State v. Hopson, 186 P.3d 317, 318–19 (Or. Ct. App. 2008), *modified on other grounds*, 206 P.3d 1206 (Or. Ct. App. 2009).

196. S. Union Co. v. United States, 132 S. Ct. 2344, 2349 (2012).

197. *Hopson*, 186 P.3d at 319.

198. *Id.* at 321.

199. Commonwealth v. Quincy Q., 753 N.E.2d 781, 787–89 (Mass. 2001), *overruled on*

Regarding the Sixth Amendment jury-trial right, Justice Scalia stated:

> "[T]he criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*. . . .
>
> . . . .
>
> [rather than] by a single employee of the State."[200]

Similarly, the Oregon Supreme Court stated that the Framers intended the jury "to serve as the people's check on judicial power at the trial court level."[201] If a safeguard against a judge's bureaucratic rigidness is necessary for society's most hardcore offenders, it is even more so for juveniles. Because the juvenile's decision-making skills, ability to control impulses, and foresight are less developed than the adult offender's, the juvenile is less culpable. [202]

In conclusion, a decision to waive a juvenile to adult court in Oregon should fall "within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge

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other grounds sub nom. Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005).

200. Apprendi v. New Jersey, 530 U.S. 466, 498 (Scalia, J., concurring).

201. State v. Harris, 118 P.3d 236, 243 (Or. 2005).

202. Adolescence is a transitional stage where rapid changes to an individual's physical, social, and emotional capabilities take place. Anthony R. Holtzman, Comment, *Juvenile Justice? The Increased Propensity for Juvenile Transfer to the Criminal Court System in Pennsylvania and the Need for a Revised Approach to Juvenile Offenders*, 109 PENN ST. L. REV. 657, 679–80 (2004). It is also a period where individuals are greatly adaptable, and experiences with peers are likely to influence future behavior and development. *Id.* Finally, it is a period where developmental characteristics become firmly established and difficult to alter. *Id.* Juveniles' limited development, susceptibility to peer pressure, and poor decision-making skills also mean they are less culpable for their actions. *See* Lisa M. Flesch, Note, *Juvenile Crime and Why Waiver is Not the Answer*, 42 FAM. CT. REV. 583, 590–91 (2004); Gerard Glynn & Ilona Vila, *What Should States Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 317–19 (2012). Due to the biological immaturity of their developing brain systems, juveniles lack mature capacity for self-regulation in emotionally charged contexts. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2 (2012). Moreover, juveniles have heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives. *Id.* Finally, juveniles have less ability than adults to make sound judgments and decisions that require future orientation. *Id.*

determining where the preponderance of the evidence lies."[203] Yet one last issue exists. As the Supreme Court has broadened the reach of the *Apprendi* rule, it has done so with policy considerations in mind.[204] A hypothetical examination of the mechanics of a jury hearing and a beyond-a-reasonable-doubt standard for juvenile-waiver proceedings reveals positive policy consequences.

C. Requiring jury determinations in waiver proceedings would assuage some of the negative public-health consequences of juvenile transfer

With the standard of proof elevated from the preponderance-of-the-evidence standard to a beyond-a-reasonable-doubt standard, evaluation of the nature of the juvenile's alleged offense and the juvenile's amenability to rehabilitation, along with the other factors, would require a more searching inquiry. At the end of a waiver hearing, it would be more difficult for a fact-finder to conclude beyond a reasonable doubt that retaining jurisdiction is not justified.[205] Therefore, the net number of juveniles waived would be reduced, which in turn would alleviate some of the negative public-health effects of juvenile transfer.

Moreover, as judicial-waiver decisions are often arbitrary,[206] a jury would more effectively honor the purpose of the waiver statutes by weeding out hardcore and nonamenable juveniles. Idiosyncratic differences in judicial philosophies, geographic divisions, and a juvenile's race can all affect a judge's waiver decisions.[207] In contrast, a panel of individuals making findings, rather than one judge, likely would reduce the random nature of waiver.[208] Finally,

203. Cunningham v. California, 549 U.S. 270, 273 (2007).

204. *See, e.g.*, S. Union Co. v. United States, 132 S. Ct. 2344, 2356–57 (2012).

205. *See In re* Winship, 397 U.S. 358, 363–64 (1970) (internal quotations omitted) ("[T]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . . [T]he reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.").

206. Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 86 (1995); *see also* John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL'Y 1, 10–14 (2005) (documenting the scholarly criticism of judicial waiver of juveniles as a subjective and arbitrary practice).

207. Marcy Rasmussen Podkopacz et al., *supra* note 206, at 96–98, 131–33.

208. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 565–66 (1971) (Douglas, J., dissenting) (discussing the jury's competent ability to make amenability determinations); *see*

the jury's involvement in waiver decisions would also give the community a voice in the juvenile-justice system and a role in mitigating the public-health effects created by juvenile crime and the judicial response.[209]

Since the Supreme Court has considered policy ramifications in its broadening of *Apprendi*,[210] the public-health consequences of applying *Apprendi* to juvenile-waiver hearings in Oregon provide more support for its application.

IV. UNDERSTANDING JUDICIAL RELUCTANCE TO APPLYING *APPRENDI* TO JUVENILE WAIVER PROCEEDINGS

The Oregon appellate courts have never squarely decided the issue of *Apprendi*'s application in waiver hearings. The Oregon Supreme Court has held that juries are not required for juvenile-delinquency determinations.[211] The court reasoned that the jury-trial right does not apply because rehabilitation-based juvenile dispositions are fundamentally different than criminal prosecutions.[212] The court closely confined its holding to delinquency determinations. And the court's reasoning falls away when a juvenile is facing transfer to adult court to face punitive punishment rather than a determination of responsibility by the juvenile court.

Unfortunately, many state courts facing challenges to juvenile transfer laws have refused to apply *Apprendi* to waiver hearings on the following grounds: (1) waiver hearings only determine a jurisdictional matter; (2) waiver hearings do not adjudicate guilt or culpability; (3) the unique nature of the juvenile-justice system warrants different constitutional requirements; (4) and the history of

also id. at 552 (White, J., concurring) (discussing the necessity of juries "to guard against judicial bias," but holding that a juvenile system which eschews "blameworthiness and punishment for evil choice" is itself a sufficient operative force).

209. Danie M. Vannella, Note, *Let the Jury Do the Waive: How* Apprendi v. New Jersey *Applies to Juvenile Transfer Proceedings*, 48 WM. & MARY L. REV. 723, 764–765 (2006).

210. *See, e.g.*, *S. Union Co.*, 132 S. Ct. at 2356–57.

211. State *ex rel.* Juvenile Dep't of Klamath Cty. v. Reynolds (*In re* Reynolds), 857 P.2d 842, 850 (Or. 1993); State v. Turner (*In re* Turner), 453 P.2d 910, 913–15 (Or. 1969).

212. *In re Reynolds*, 857 P.2d at 848–49 ("[T]he juvenile code's focus [is] on the 'rehabilitative' model of juvenile justice rather than on the 'punitive' model. . . . The message of the juvenile code is clear and unequivocal—rehabilitation of children in trouble is a *family* affair. In no way is the adult criminal justice system comparable . . . . Juvenile courts are concerned with rehabilitation, not punishment. If the state wishes to prosecute a child criminally, it must do so by transferring the child to an adult criminal court.").

juvenile transfer shows judicial fact-finding is constitutional.[213] These arguments and others are addressed in the following section.

A. Juvenile-waiver hearings only determine initial jurisdiction

The majority of state courts facing the issue have held that juvenile waiver is a pretrial, jurisdictional decision that does not invoke *Apprendi*.[214] However, this position is unsupported; as the Supreme Court has never indicated that *Apprendi* is limited to certain proceedings or certain prosecutorial stages.[215] Rather, in many of its recent cases, the Court has applied *Apprendi* broadly.[216]

An analogy is helpful to show why the stage or timing of a proceeding does not affect the *Apprendi* calculus. Say for example a state established two separate courts to handle petty-theft cases. In

213. *See* State v. Andrews, 329 S.W.3d 369, 374 (Mo. 2010). The court in *Andrews* denied the application of *Apprendi* to juvenile transfer hearings, *id.*, and reasoned that "Justice Ginsberg's majority opinion in *Ice* signals a change in the Court's Sixth Amendment right-to-jury-trial analysis in that it emphasizes and embraces for the first time these historical and sovereignty-based arguments expressed by the previous dissenting opinions in the *Apprendi* line of cases," *id.* at 379 n.3. State v. Rudy B., 216 P.3d 810, 818 (N.M. Ct. App. 2009), *rev'd*, 243 P.3d 726 (N.M. 2010) (documenting state court reluctance); *see also Rudy B.*, 243 P.3d at 739 ("Clearly, we can conclude that the amenability determination is not an 'encroachment . . . by the judge upon facts historically found by the jury . . . .'" (quoting Oregon v. Ice, 555 U.S. 160, 169 (2009))).

214. *See, e.g.*, United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003) ("*Apprendi* does not require that a jury find the facts that allow the transfer to district court. The transfer proceeding establishes the district court's jurisdiction over a defendant."); United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000) (internal quotations omitted) (holding that the transfer of a juvenile to an adult court "merely establishes a basis for district court jurisdiction"); State v. Kalmakoff, 122 P.3d 224, 227 n.29 (Alaska Ct. App. 2005) (finding that the weight of authority indicates that transfer proceedings are mere determinations of the court's jurisdiction and therefore *Apprendi* protections do not apply); State v. Rodriguez, 71 P.3d 919, 928 (Ariz. Ct. App. 2003) (citation omitted) (holding that the state juvenile-transfer statute in question is not a sentence-enhancement scheme because "it does not subject [a] juvenile to enhanced punishment, it subjects [a] juvenile to the adult criminal justice system"); People v. Beltran, 765 N.E.2d 1071, 1076 (Ill. App. Ct. 2002) (holding that transfer establishes jurisdiction and therefore is "dispositional, not adjudicatory"); Caldwell v. Commonwealth, 133 S.W.3d 445, 452–53 (Ky. 2004) (adopting the argument that juvenile transfer is merely jurisdictional); State v. Lopez, 196 S.W.3d 872, 875–76 (Tex. App. 2006) (holding that a decision allowing "prosecution of a juvenile as an adult" only "involves the determination of which system will be appropriate for a juvenile offender").

215. Carroll, *supra* note 68, at 202.

216. *See* Blakely v. Washington, 542 U.S. 296, 346 (2004) (Breyer, J., dissenting) (recognizing the majority's broad application of *Apprendi* by stating "[u]ntil now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts"); *see, e.g.*, Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013) (applying *Apprendi* to mandatory minimums despite the fact that all prior cases concerned statutory maximums).

court *A*, an adult defendant could receive jail time if found guilty, but in court *B* the defendant could not; probation or community service would serve as the only available sanction. Furthermore, say the statute setting up this two-tiered court structure called for a judge to host a preliminary hearing to examine certain enumerated factors and decide which court to send a defendant to. This preliminary hearing would be essential to a defendant's punishment, and therefore *Apprendi*, and more directly *Cunningham*, would apply.[217] The fundamental fairness that was the essence of the Court's decision in *Apprendi* means that mere classification of these decisions as jurisdictional is insufficient to evade constitutional requirements. [218]

Even if the timing of a judicial determination in some way limited *Apprendi*, one portion of Oregon's statutory-waiver regime comes after adjudication of guilt and prior to sentencing. After a juvenile pleads guilty or is convicted in adult court, Oregon Revised Statutes section 137.707(5)(b)(A) calls for the judge to conduct an investigation and decide whether to transfer the juvenile back to juvenile court or retain the juvenile for sentencing in adult court.[219] This judicial determination takes place at the same stage as the fact-finding that occurred in all of the *Apprendi* cases.[220]

B. Juvenile-waiver hearings do not adjudicate guilt or culpability

Another argument commonly adopted by state courts is that juvenile-waiver hearings are immune from *Apprendi* because they do not culminate in a determination of guilt.[221] More specifically, some of the factors considered in juvenile-waiver hearings are different from those traditionally weighed by juries in assessing culpability,

217. Cunningham v. California, 549 U.S. 270, 288 (2007) (holding that a judge engaging in fact-finding in order to apply one of three sentencing ranges violates *Apprendi*); *see also* Carroll, *supra* note 68, at 203 (putting forth a similar analogy and explaining that *Apprendi* would apply).

218. *See* Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

219. OR. REV. STAT § 137.707(5)(b)(A) (2013).

220. *See id.* (calling for a judge to make a waiver determination for a defendant charged with a Ballot Measure 11 crime, but convicted of a lesser offense).

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

and may require expertise that juries lack and juvenile judges have.[222]

Apprendi itself refutes this argument. When the trial judge imposed the sentencing enhancement, Apprendi's guilt had already been determined.[223] The hate-crime enhancement did not make him guiltier of the convicted offenses; rather it applied because of factual determinations that spoke to motive.[224] The scenario was the same in *Ring*, where the judge's fact-finding in search of aggravators or mitigators came after the jury found the defendant culpable.[225] Yet, the Court held that a jury finding was required in each case.[226]

Additionally, the Supreme Court has rejected the notion that the traditional role of judges to find particular facts associated with sentencing outweighs *Apprendi*.[227] Rather, the Court recognized that judicial findings used to measure appropriate punishment are invariably linked to the underlying crimes and conduct.[228]

C. The juvenile-justice system is fundamentally different

Some state courts refuse to apply *Apprendi* to juvenile-waiver hearings because they argue the juvenile-justice system is fundamentally different than adult court.[229] This argument is premised on the idea that the "fundamental fairness" guaranteed by the Due Process Clause applies differently in juvenile court.[230] Therefore, a juvenile transfer hearing is constitutionally compliant as long as the requirements of *Kent v. United States* are satisfied.[231]

Ironically, this argument identifies the reason *Apprendi* should

222. *See, e.g.*, State v. Read, 938 A.2d 953, 960 (N.J. Super. Ct. App. Div. 2008) ("[T]he determination whether to waive charges against a juvenile to adult court . . . . [I]s similar in this respect to a prosecutor's decision to present a case to a grand jury rather than to remand the case to municipal court for trial on lesser charges.").

223. *Apprendi*, 530 U.S. at 470–71.

224. *Id.* at 471–72.

225. Ring v. Arizona, 536 U.S. 584, 592–93 (2002).

226. *Id.* at 607–08; *Apprendi*, 530 U.S. at 476–77.

227. In *Booker* and *Cunningham*, the Court, relying upon *Blakely*, rejected the argument that *Apprendi* should not apply because the judge based the enhanced sentence on facts that were ordinarily not part of a culpability determination. *See* Cunningham v. California, 549 U.S. 270, 307–11 (2007); United States v. Booker, 543 U.S. 220, 236 (2005).

228. Carroll, *supra* note 68, at 216.

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

230. *Id.*; *In re* Welfare of D.W., 731 N.W.2d 828, 833 (Minn. Ct. App. 2007).

231. *See In re Welfare of J.C.P.*, 716 N.W.2d at 668.

apply to juvenile waiver hearings. In prescribing due-process protections for the juvenile facing transfer, the Court in *Kent* identified the fundamental difference between juvenile and adult court, focusing especially on the rehabilitative nature of the juvenile-justice system.[232] Therefore, an offender facing the loss of juvenile treatment, and exposure to the adult system, should warrant the full panoply of constitutional protections.[233]

Moreover, to adopt the position that *Kent* is the end of the road is to ignore the Supreme Court's landmark interpretations of the Sixth and Fourteenth Amendments embodied in the *Apprendi* line.[234] Finally, courts that couch their reluctance in the distinct nature of the juvenile-justice system ignore the fact that, by stripping jurisdiction for an entire class of offenders, juvenile transfer itself deeply disturbs the juvenile-justice system.[235]

Similarly, many courts base their refusals to apply *Apprendi* to juvenile transfer on the Supreme Court's plurality holding in *McKeiver v. Pennsylvania* that juries are not required for accurate fact-finding in juvenile proceedings.[236] The *McKeiver* decision contained an inherent presumption that judges, rather than juries, possess the expertise needed for juvenile adjudications.[237] Additionally, the Court worried that a jury requirement would impose costly administrative burdens on the juvenile-justice system.[238]

However, similar to the Oregon Supreme Court's holdings, *McKeiver* concerned juvenile adjudications generally, not waiver, and therefore is misplaced when used to negate application of *Apprendi* in waiver proceedings.[239] Moreover, because *Apprendi* would impose

232. Kent v. United States, 383 U.S. 541, 554–55 (1966).

233. Carroll, *supra* note 68, at 209–10.

234. *See* discussion *supra* Part III.A.

235. Vannella, *supra* note 209, at 762.

236. *See, e.g.*, People v. Beltran, 765 N.E.2d 1071, 1075–76 (Ill. App. Ct. 2002) ("It is well established that, in a juvenile proceeding, due process does not require a jury." (citing McKeiver v. Pennsylvania, 403 U.S. 528 (1971))); State v. Jones, 47 P.3d 783, 795–96 (Kan. 2002) (citing *McKeiver*, 403 U.S. 528) (concluding that the reasoning of *McKeiver* and existing procedural safeguards are sufficient to support a determination that *Apprendi* does not apply to juvenile transfer).

237. *See McKeiver*, 403 U.S. at 551 (White, J., concurring).

238. *See id.* at 550 ("If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system, and possibly, the public trial.").

239. *See id.*

jury hearings for judicial waiver, rather than all juvenile dispositions, the widespread administrative burden the *McKeiver* Court worried about would not be present. Additionally, the public-health benefits of reducing juvenile transfer by applying *Apprendi* to waiver proceedings could negate any increased administrative costs.

D. The history of juvenile transfer proves judicial fact-finding in waiver proceedings is constitutional

Finally, state courts have invoked *Oregon v. Ice*, relying on the historical practice of judges making transfer decisions, as a reason to avoid applying *Apprendi* to transfer proceedings.[240] Yet, there are multiple ways a court can frame the applicable historical practice regarding juvenile waiver. A court can focus on the history of amenability determinations, the entire juvenile-justice system, or, more broadly, criminal sentencing.[241] The last formulation is no less logical than the first if a court is willing to view waiver as a form of

240. Villalon v. State, 956 N.E.2d 697, 704 (Ind. Ct. App. 2011) (citing Oregon v. Ice, 555 U.S. 160 (2009)) ("[*Oregon v. Ice*] makes clear that not all judicial fact-finding ultimately resulting in an increased term of incarceration invades the province of the jury. . . . [D]efendant provides no argument as to how our juvenile-waiver statute might be understood to encroach upon the jury's traditional domain."); State v. Rudy B., 243 P.3d 726, 739 (N.M. 2010) ("Clearly, we can conclude that the amenability determination is not an 'encroachment . . . by the judge upon facts historically found by the jury . . . .'" (citing *Ice*, 555 U.S. at 161)); State v. Childress, 280 P.3d 1144, 1147 (Wash. Ct. App. 2012) (citing *Ice*, 555 U.S. 160) (relying on *Oregon v. Ice*, and holding that juvenile-waiver decisions do not invoke the core concerns of *Apprendi*); *see also* State v. Andrews, 329 S.W.3d 369, 379 n.3 (Mo. 2010) (citing *Ice*, 555 U.S. 160) ("Justice Ginsberg's majority opinion in *Ice* signals a change in the Court's Sixth Amendment right-to-jury-trial analysis in that it emphasizes and embraces for the first time these historical and sovereignty-based arguments expressed by the previous dissenting opinions in the *Apprendi* line of cases."). The Supreme Court of Missouri denied the application of *Apprendi* to juvenile transfer hearings in *Andrews*. *Andrews*, 329 S.W.3d 369.

241. Amanda L. Thatcher, Comment, State v. Rudy B.*: Denying Youthful Offenders the Benefit of* Apprendi*'s Bright-line Rule Before Adult Sentencing*, 43 N.M. L. REV. 317, 345 (2013). Similarly, the malleability of the historical question has been demonstrated throughout the Court's jurisprudence. For example, the majority and the dissent in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), asked divergent historical questions and produced conflicting evidence in order to bolster their arguments. The majority argued that "[t]he scope of the constitutional jury right must be informed by the historical role of the jury at common law," and that this "supports applying *Apprendi* to criminal fines," *id.* at 2347. The dissent argued that "the relevant historical question . . . [was] whether traditionally in England before the founding of our Nation, and in the early American States, judges, not juries, normally determined fine-related sentencing facts," *id.* at 2366 (internal quotations omitted). See also Chief Justice Roberts's dissent in *Alleyne v. United States*, 133 S. Ct. 2151, 2170 (2013), arguing that the *Apprendi* rule rests on historical evidence, and that "there is no body of historical evidence supporting [*Alleyne*'s] new rule."

retributive punishment, or at least as the invocation of a higher maximum or minimum sentence. And the latter historical formulation squarely invokes *Apprendi*.[242] Moreover, after *Southern Union Co.*, *Alleyne*, and *Descamps* eroded the importance of *Oregon v. Ice*'s twin considerations, state courts can no longer rely upon historical practice to avoid application of *Apprendi*.[243]

As shown above, the arguments supporting state courts' rejection of *Apprendi*'s application to juvenile waiver are fully refuted by the *Apprendi* line. From *Blakely* to *Alleyne* and beyond, the Supreme Court has shown the principles of *Apprendi* apply broadly, and thus state courts should no longer be able to evade application of those principles.

CONCLUSION

The negative public-health consequences of juvenile transfer are personified by the continued prevalence of juvenile violence and recidivism. In the name of remedying those negative public-health consequences, constitutional challenges should be used to reform Oregon's juvenile transfer provisions. In that vein, a detailed argument that *Apprendi* applies to juvenile waiver in Oregon has been formulated here, and counterarguments have been addressed. By forcing juvenile waiver to occur through a jury hearing, and under a higher standard of proof, the net number of juveniles transferred in Oregon will be reduced. The issue needs to be squarely presented to Oregon's appellate courts.

However, the possibility that such a constitutional attack will cause legislative blowback is real. The Oregon legislature may react to a successful legal challenge by simply relying more heavily on statutory exclusions. While it is beyond the scope of this article, Oregon's statutory-exclusion statutes may be susceptible to other forms of constitutional challenge. It is possible that after the Supreme Court's recent decisions in *Graham v. Florida* and *Miller v. Alabama*[244] the question of whether or not automatic juvenile transfer

242. Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000).

243. *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Alleyne*, 133 S. Ct. 2151, and *Southern Union Co.*, 132 S. Ct. 2344, all applied *Apprendi* in a variety of settings despite the "twin considerations." *See also* Carroll, *supra* note 68, at 175, 205–06 (concluding that *Ice* does not preclude states from applying *Apprendi* to juvenile-waiver hearings).

244. Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010).

is compliant with federal conceptions of due process needs to be revisited.[245] A juvenile may now have a constitutional right to the rehabilitative nature of the juvenile-justice system—a right that cannot be stripped without some form of judicial process.[246] This and other challenges to statutory exclusions need to be explored and utilized by Oregon practitioners.

Finally, legal challenges to Oregon's current regime should be paired with proactive policies that address the risk factors that lead to juvenile delinquency[247] and confront the relevant differences between juvenile and adult offenders.[248] These risk factors point toward theoretical approaches that take stock of juveniles' social and environmental conditions prior to their fall into delinquency.[249] After investigating risk factors, Oregon can employ evidence-based measures to alter the institutions that are contributing to the social and environmental conditions that create juvenile delinquency in the first place. Piece by piece, challenge by challenge, with the law as a tool, the tide of juvenile transfer in Oregon can be stemmed and a new paradigm of juvenile justice instituted.

245. *See Miller*, 132 S. Ct. 2455; Graham, 560 U.S. 48; Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

246. *See* Arya, *supra* note 245, at 102.

247. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *Serious and Violent Juvenile Offenders*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Protection, Washington, D.C.), May 1998, at 1.

248. *See* Flesch, *supra* note 202, at 588; Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System—Former Prosecutor's Perspectives on Reform*, 48 FAM. CT. REV. 322, 328 (2010).

249. *See* Robert Hahn et al., *Effectiveness of School-Based Programs to Prevent Violent and Aggressive Behavior*, 33 AM. J. PREVENTIVE. MED. S114 (2007); NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 202, at 3–4.