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Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court

Prescott Loveland
Public Defender Service for the District of Columbia

ACKNOWLEDGING AND PROTECTING AGAINST JUDICIAL BIAS AT FACT-FINDING IN JUVENILE COURT

Prescott Loveland[*]

ABSTRACT

As a public defender, I often represent young people from twelve to seventeen years old in juvenile court. My juvenile clients face a wide range of accusations and they come from various family circumstances. Nearly all of my juvenile clients, however, are young people of color from under-resourced communities. Many find themselves arrested for typical adolescent behavior and others are accused crimes that they did not commit. When counseling juvenile clients, I carefully explain the nuances of the juvenile justice system that is now aggressively examining their lives. I strive to provide information that will help them make informed decisions in court proceedings that treat them like adults despite their still-developing adolescent brains. To some of my clients, for example, I must explain that unless your behavior is nearly perfect in the coming months, you may not be home with your family for a long time.

To many clients, I must explain the role of the judge in juvenile court. Despite what you have seen on television, I explain, a judge—not a jury—will decide whether or not you are "guilty" of the "crime" that you are accused of. When making this decision, the judge will be aware of all sorts of information that the judge is not permitted to consider. The judge, for example, knows if you have been in trouble before. The judge knows your family's financial struggles, your challenges at school, and the difficulties you may have had following court orders. The judge might even know if you have not been following the rules at home. To some clients, I also explain that the judge will know about your statement to the police even after the

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[*] Staff Attorney, Public Defender Service for the District of Columbia ("PDS"). The views expressed in this Essay are my own, and not necessarily those of PDS. Thank you to my clients and my colleagues. You teach and inspire me every day.

judge tosses it from the case because you did not "confess" voluntarily. I explain that the law requires us to act as if the juvenile court judge is simply able to ignore all this information when making the decision about whether you did what the police say you did. At this point, juveniles often become aware that the juvenile court process has some dangerously unfair features.

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INTRODUCTION

Judges, not juries, are the fact-finders in juvenile court because most states do not recognize a jury right for juveniles.[1] Failing to adequately protect juveniles from the biases of juvenile court judges can lead to innocent juveniles and their families being involved in a juvenile justice system that has very serious consequences. This Essay outlines how judges came to be the fact-finders in juvenile court and explains ways that juvenile court judges are uniquely susceptible to several types of bias that can undermine fact-finding.[2] The distorting influence of judicial biases can lead to inaccurate fact-finding and, in turn, to the improper adjudication of children as "delinquent." Further, the failure to limit apparent bias can lead juveniles to perceive juvenile court as inherently unfair, thereby undermining their willingness to participate and their broader opinion of the justice system. The risk of judicial bias at fact-finding in juvenile court can and should be minimized by using juries or other protective procedures.[3]

Part I of this Essay provides a brief history of the jury trial and of juvenile courts. Part I also discusses the procedural protections that the Supreme Court has extended to juvenile court, and the Court's decision in *McKeiver* to *not* extend a constitutional jury trial right to juvenile court. Part II describes various forms of judicial bias that can undermine fact-finding in juvenile court and it briefly discusses some features of the jury trial system that can shield against bias. Part III discusses how courts and policy-makers can protect juveniles from judicial bias by either extending the jury right to juvenile court or by instituting other protective measures.

I. A BRIEF HISTORY OF THE JURY TRIAL AND OF JUVENILE COURT

This Part provides a brief overview of the jury trial protection in criminal court and of the juvenile justice system, including the

1. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 5:3 (2d ed. 2017).
2. *See infra* Part II.
3. U.S. CONST. amend. VI.

Supreme Court's extension of certain Due Process protections to juvenile court.

A. The American Jury Trial

An accused person's right to a trial by jury has long been vital to the American criminal justice system.[4] The jury, as Justice Hugo Black noted, is "one of the fundamental aspects of criminal justice in the English-speaking world."[5] The jury traces back to the Magna Carta in 1215, and it underpinned English common law.[6] Trial by jury was adopted by the Framers when the U.S. Constitution was ratified, was included in the Bill of Rights via the Sixth Amendment,[7] and was incorporated to the states as a fundamental right through the Fourteenth Amendment.[8] Every state has adopted the right to a jury trial in their state constitutions[9] and has passed legislation guaranteeing the right to a jury trial in serious criminal cases.[10] The Supreme Court has made clear that the Sixth Amendment guarantee of a trial by jury in criminal cases is "fundamental to the American scheme of justice."[11]

The architects of the American justice system made the jury foundational to assure fairer trials and to protect from "corrupt or overzealous government action" including the biases of judges.[12] In deciding that the jury trial right is fundamental, the Supreme Court explained in clear terms how important the jury is to check government power:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges

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4. Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

5. DeBacker v. Brainard, 396 U.S. 28, 34 (1969) (Black, J., dissenting).

6. *See, e.g.*, Andrew Treaster, *Juveniles in Kansas Have a Constitutional Right to a Jury Trial. Now What? Making Sense of* In re L.M., 57 U. KAN. L. REV. 1275, 1277–78 (2009) (discussing historical antecedents of the right to a jury trial); *see also Duncan*, 391 U.S. at 151.

7. U.S. CONST. amend. VI.

8. *See generally* U.S. CONST. amend. XIV. *See also Duncan*, 391 U.S. at 149 (holding that a right to a jury trial is a fundamental right applicable to states through the Fourteenth Amendment).

9. *See* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 991–92 (2010); *see also* Javier M. Vazquez, *Appropriate Treatment for Juvenile Offenders: Juvenile Justice System v. Jury System*, 1 BARRY L. REV. 185, 199 (2000).

10. *Duncan*, 391 U.S. at 154.

11. *Id.* at 149; *see also* Bloom v. Illinois, 391 U.S. 194, 210–11 (1968).

12. Vazquez, *supra* note 9, at 199.

> too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and *against the compliant, biased, or eccentric judge* . . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[13]

The jury also lends legitimacy to the adjudication process. The jury is the primary link between courts and the communities that the courts are supposed to serve. Through jury service, the community is involved in the important decisions that courts make about life, liberty, and justice. Since the inception of the American legal system, juries have brought the community to the courtroom, helped "temper the legal mind with a healthy dosage of common sense and human emotion,"[14] and have supplied a "nexus between the legislature's original intent and the community's sense of justice."[15]

B. The American Juvenile Court

The first juvenile court was created in Illinois in 1899.[16] By 1925, nearly every state had some process aimed at adjudicating juveniles accused of crimes differently than adults.[17] The founders of juvenile courts hoped that a separate system for juveniles would be one of the generation's great contributions to the status of children in American

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13. *Duncan*, 391 U.S. at 156 (emphasis added).

14. W.J. Keegan, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L.J. 811, 835–36 (1977).

15. Vazquez, *supra* note 9, at 199 (citing Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 244–46 (1984)).

16. *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 376 (1998).

17. Gerald P. Hill, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 145 (2008); *see also* Jennifer M. Segadelli, *Minding the Gap: Extending Adult Jury Trial Rights to Adolescents While Maintaining a Childhood Commitment to Rehabilitation*, 8 SEATTLE J. SOC. JUST. 683, 686 (2010).

society.[18] Juvenile courts inquired more deeply into juveniles' individual circumstances, such as school, family, home life, and court history.[19] An overarching ideal of these new juvenile courts was rehabilitation over punishment.[20] *Parens patriae*, often considered the founding principle of American juvenile justice, is the idea that the state has a duty to intervene and care for so-called "troubled" children.[21] Juvenile courts sought to be more sympathetic and less formal, and to make determinations about the best interests of children who were perceived as "youngsters whose crimes were the product of immaturity."[22]

In an effort to protect juveniles from the harsh strictures of the adult criminal system, unique features were introduced, such as closed and confidential hearings, clinical examinations, broad and exclusive jurisdiction, more lenient sentencing, and judges rather than juries as fact-finders.[23] The judge's role expanded to one that was all-encompassing: managing the case, learning about the juvenile's life, ruling on evidentiary disputes, sentencing juveniles, and also—despite all the inadmissible information the judge was privy to—adjudicating guilt through bench trials rather than jury trials.[24]

Regardless of the intent to create a system that was unique from the adult criminal justice system, juvenile courts have evolved to closely resemble adult criminal courts over the last fifty years. For instance, juvenile justice in every state has shifted toward an approach

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18. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 45 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002).

19. *See generally* William Hannan, *Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 193, 197–98 (2008). *See also* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 478–79, 499 (3rd ed. 2007).

20. Hill, *supra* note 17, at 145; *see also* Segadelli, *supra* note 17, at 689.

21. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 12–13 (2001).

22. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 4 (2008); *see also* Hannan, *supra* note 19, at 193, 196; Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2430 (1996).

23. Tanenhaus, *supra* note 18, at 69–70; *see also* Segadelli, *supra* note 17, at 689.

24. *See* Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 216, 231–32 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (describing the contrast between the early juvenile court where the judge had tremendous power and discretion over all matters of the case and the post-*Gault* expansion of prosecutorial power at the expense of judicial and probation authority).

"that often holds young offenders to the same standard of criminal accountability [as] adults."[25] The resemblances between juvenile and adult courts are now apparent in how juveniles are regarded, in the procedural rights they are afforded,[26] in the similarities between juvenile and adult jails, and in the punishments received.[27] The jurisdiction of juvenile court also continues to shrink as more juveniles are transferred to adult court.[28] Increasing numbers of children are receiving adult-like sentences and are being prosecuted in juvenile court for normal juvenile behavior.[29]

Some scholars attribute this punitive shift in juvenile justice to the Due Process procedural protections extended to juvenile courts by the Supreme Court.[30] Other commentators perceive the shift as a hasty response to an increase in juvenile crime in the 1970s through 1990s.[31] During that time, people and politicians became increasingly uneasy with the informality of juvenile courts and skeptical of juvenile courts' ability to properly handle juveniles who were considered violent.[32] Prompted in part by sensationalized juvenile crime,[33] people latched on to a fiction of the so-called juvenile "super predator," now commonly recognized to be a veiled racial term used to frighten support for harsher treatment of juveniles of color.[34] The

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25. *See* SCOTT & STEINBERG, *supra* note 22.

26. *See* discussion *infra* Section I.C.

27. Margaret K. Rosenheim, *The Modern American Juvenile Court*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 18, at 342; *see also* Segadelli, *supra* note 17, at 715; SCOTT & STEINBERG, *supra* note 22.

28. SCOTT & STEINBERG, *supra* note 22, at 4–5.

29. *See* Andrea L. Dennis, *Decriminalizing Childhood*, 45 FORDHAM URB. L.J. 1, 5 (2017); *see also* Rosenheim, *supra* note 27, at 342.

30. *See* Klein, *supra* note 16, at 377–78.

31. *See* SCOTT & STEINBERG, *supra* note 22, at 4–5, 11, 94, 105; *see also* Michelle Haddad, *Catching Up: The Need for New York State to Amend Its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L., POL'Y & ETHICS J. 455, 484 (2009).

32. Rosenheim, *supra* note 27, at 342; Segadelli, *supra* note 17, at 689.

33. Segadelli, *supra* note 17, at 689; *see* SCOTT & STEINBERG, *supra* note 22, at 4–5.

34. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html [https://nyti.ms/2k1jqTu]; John Kelly, *Juvenile Transfers to Adult Court: A Lingering Outcome of the Super-Predator Craze*, CHRON. SOC. CHANGE (Sept. 28, 2016), https://chronicleofsocialchange.org/juvenile-justice-2/juvenile-transfers-adult-court-lingering-outcome-super-predator-craze/21635 [https://perma.cc/7VGJ-Q55G]; Kirsten W. Savali, *For the Record: 'Superpredators' is Absolutely a Racist Term*, THE ROOT (Sept. 30, 2016), http://www.theroot.com/for-the-record-superpredators-is-absolutely-a-racist-t-1790857020 [https://perma.cc/Z8H9-AHWY].

punitive shift in juvenile justice grew from highly impulsive legislative overhauls as sweeping changes were made to juvenile justice policies with hardly any debate or review.[35] No doubt, these punitive changes detracted from meaningful investment in a juvenile justice process that was data-driven or truly rehabilitative.

Now resembling adult criminal courts, juvenile courts have strayed far from their founding principles.[36] Some features of juvenile justice, however, remain distinct. In most jurisdictions, for instance, care and rehabilitation remain the stated purpose of the juvenile court, probation officers are involved early in the process, and a number of less harsh sentencing options are still available.[37] Importantly, in most jurisdictions, judges, not juries, remain the juvenile court fact-finders.[38]

C. Constitutional Rights in Juvenile Court

The Supreme Court has recognized a number of constitutional rights for juveniles facing criminal accusations. In 1967, the Supreme Court decided *In re Gault*.[39] Fifteen-year-old G.G. faced charges that he placed a lewd phone call to a neighbor.[40] For this "crime" an adult offender would receive a $50 fine and no more than sixty days in jail.[41] Young G.G. was convicted and committed to an "industrial school"—that is, a juvenile prison—for six years, until age twenty-one.[42] During the process of adjudication, G.G. was denied procedural rights to which an adult offender would have been

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35. *See* Klein, *supra* note 16, at 377–78; SCOTT & STEINBERG, *supra* note 22, at 4–5.

36. *See* Haddad, *supra* note 31, at 484–90; *see also* CTR. FOR CHILDREN'S LAW & POLICY, POTENTIAL FOR CHANGE: PUBLIC ATTITUDES AND POLICY PREFERENCES FOR JUVENILE JUSTICE SYSTEMS REFORM 2 (2007), https://www.macfound.org/media/article_pdfs/CCLPPOLLINGFINAL.PDF [https://perma.cc/7L8P-DDQH]. *See generally* SCOTT & STEINBERG, *supra* note 22, at 11–13. In recent years, federal incentives, state policies, and public opinion reflect a potential shift back towards more rehabilitative approaches in some states.

37. *See* DAVIS, *supra* note 1, at § 1:3; *see also* NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 11 (2010), http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf [https://perma.cc/7M6Z-3MHX] (comparing requirements between adult and juvenile systems).

38. *See* DAVIS, *supra* note 1, at § 5:3.

39. 387 U.S. 1 (1967).

40. *Id.* at 4.

41. *Id.* at 8–9; *see also* DEAN JOHN CHAMPION, THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW 52 (4th ed. 2003).

42. Segadelli, *supra* note 17, at 690.

entitled. He was, for example, never provided an opportunity to face or question his accuser, he was not advised that he had the right *not* to make a statement, he was subjected to proceedings during which witnesses were not sworn, and transcripts were not made.[43]

In re Gault went to the Supreme Court and, in a landmark decision, the Court held that, as in adult criminal court and under the Fifth and Sixth Amendments to the Constitution, juveniles accused of crimes have the right (1) to notice of charges, (2) to counsel, (3) to confrontation and cross-examination of witnesses, and (4) to privilege against self-incrimination.[44] The Court noted that despite the good intentions behind the juvenile system, "unbridled discretion . . . is frequently a poor substitute for principle and procedure."[45] The Court's rationale built on its recent decision in *Kent v. United States*,[46] where the Court acknowledged that in juvenile court "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[47] In *Gault*, the Court addressed some, but not all, of the Fifth and Sixth Amendment rights that had already been afforded to adults accused of crimes. Notably, the Court did not meaningfully address the issue of a juvenile's right to a jury trial.[48]

A few years later, in 1970, the Court decided *In re Winship*, a case involving a twelve-year-old charged with stealing money from a purse.[49] The Court in *Winship* held that the *standard* of proof to which juveniles are entitled is proof beyond a reasonable doubt, rather than a preponderance of the evidence.[50] The Court held that the evidentiary standard in juvenile delinquency proceedings must align with that of adult criminal proceedings, as "the same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child," particularly because an individual's freedom and autonomy are also at stake in juvenile court.[51] The Court said that Due Process requires the government to produce evidence beyond a reasonable doubt to ease

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43. *In re* Gault, 387 U.S. at 14.
44. *Id.* at 10.
45. *Id.* at 18.
46. 383 U.S. 541 (1966).
47. *Id.* at 556.
48. Segadelli, *supra* note 17, at 691.
49. 397 U.S. 358 (1970).
50. *Id.* at 367.
51. *Id.* at 365.

the minds of the fact-finders and to protect the innocent from punishment.[52] Yet, the Court said nothing, not even in dicta, about how juries also have an important protective purpose, especially because of judicial bias.[53]

D. *McKeiver*: No Right to a Jury Trial in Juvenile Court Under the Constitution

In 1971, one year after *Winship*, the Court decided *McKeiver v. Pennsylvania*.[54] Despite its increasing willingness to extend Due Process protections to juveniles in the face of the juvenile system's shortcomings, the Court, by plurality opinion, held that juveniles do *not* have a right to a jury trial in the fact-finding phase of juvenile court.[55] Saying very little about judicial bias and citing no meaningful data, the plurality conclusively asserted that juries are not necessary to accurate fact-finding because juries are not more capable than judges of making fact determinations.[56] The plurality briefly addressed the "worst of both worlds"[57] shortcomings of juvenile court that were described in *Kent* and *Gault*, as well as some of the bias-related critiques of having a judge as fact-finder.[58] But the Court then simply reasoned that juries for juveniles would make the proceedings too adversarial and risk imposing a criminal court process on juvenile court, thereby undermining the need for a separate juvenile court at all.[59]

In the dissent, Justice Douglas, with Justices Black and Marshall joining, espoused that constitutional jury trial rights *should* be extended to juveniles.[60] The dissent noted the serious consequences of juvenile court, including the substantial restrictions on liberty and the similarities between adult jails and juvenile detention centers.[61]

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52. *Id.* at 364; Segadelli, *supra* note 17, at 691–92.

53. *See Winship*, 397 U.S. at 358.

54. 403 U.S. 528 (1971).

55. *Id.* at 545.

56. *Id.* at 543, 547.

57. Kent v. United States, 383 U.S. 541, 556 (1966); *see also In re* Gault, 387 U.S. 1, 18 n.23 (1967).

58. *McKeiver*, 403 U.S. at 545.

59. *Id.*

60. *Id.* at 558.

61. *Id.* at 559 (citing *Gault*, 387 U.S. at 4 (Black, J., concurring)) (recognizing the serious restrictions on liberty that juveniles are subjected to and noting that "[w]here a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, . . . the Constitution requires that [the juvenile] be tried in accordance with the

The dissent also noted two important concepts that the plurality did not meaningfully address: the potential for bias among judges and juveniles' perception of whether they are treated fairly.[62]

II. JUDICIAL BIAS IN JUVENILE COURT: A REALITY OFTEN IGNORED

The jury in a criminal trial protects innocent people from the adverse consequences of a criminal conviction. In *McKeiver*, the Court did not extend the jury protection to juveniles despite the resemblance between juvenile and criminal court.[63] The Court asserted that juries have not been necessary for accurate fact-finding, citing the absence of juries in equity cases, probate matters, deportation hearings, and other civil matters.[64] In defense of its decision, the Court also cited the *Duncan* Court's statement: "[w]e would not assert that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as [s/]he would be by a jury."[65] The *McKeiver* plurality, however, paid little attention to the concept of judicial bias.[66]

This Part outlines various biases to which juvenile court judges are susceptible. It also discusses ways that juries are less susceptible to these biases and addresses some critiques of the jury system. The potential for judicial bias should not be ignored by lawmakers and judges who are considering how to structure fact-finding in juvenile courts.

A. Judicial Biases that Can Undermine Juvenile Court Fact-Finding

Without a jury or other procedural protections, juvenile court judges are susceptible to various types of bias that can undermine fact-finding, thereby threatening to subject innocent young people to the consequences of a juvenile conviction.

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guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment").

62. *McKeiver*, 403 U.S. at 562–63.

63. *See supra* Section I.D.

64. *McKeiver*, 403 U.S. at 543.

65. *Id.* at 543 (citing Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

66. *Id.* at 552 (White, J., concurring).

1. Bias from Exposure to Inadmissible Information

One of the most apparent biases to which juvenile court judges are vulnerable is bias from constant exposure to information that is typically not admissible at the fact-finding stage. Juvenile court judges, for instance, preside over hearings where testimony and evidence are elicited, such as hearings about whether a juvenile should be detained pending trial and hearings about whether a juvenile is to be transferred to adult court.[67] During the process, judges receive information that is often not admissible at trial, including information about tangible evidence, alleged identification evidence, and alleged statements that children made.[68] Juvenile court judges also oversee juveniles' compliance with pre-trial court conditions and monitor juveniles' participation in social service programs.[69] Thus, judges become intimately aware of information that threatens to shape their opinion about accused juveniles before fact-finding—that is, before the government is supposed to use only admissible evidence to prove guilt beyond a reasonable doubt.[70] For example, while managing the case, pre-trial judges learn if accused children are not abiding by curfew, if they are missing school, if they are not reporting to counseling, or even if children are not listening to their parents' rules.[71] Similarly, inadmissible information can reach the judge "as a result of offhand remarks by a clerk or bailiff made in the judge's presence or even by reviewing the court file."[72]

Even the most careful judges are, after all, human. And psychological evidence and social scientific studies show that humans, in general, have great difficulty deliberately disregarding

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67. *See* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 584 (1998).

68. *Id.* at 571.

69. *Cf. McKeiver*, 403 U.S. at 550 (acknowledging "[c]oncern about . . . the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers").

70. *See* Guggenheim & Hertz, *supra* note 67, at 572; *accord* FED. R. EVID. 402.

71. *See* John Stuart & Philip Bush, *It's Time for Jury Trials in Juvenile Court*, 50 HENNEPIN LAW. 8, 9 (1981) ("[A] juvenile court judge often follows the development of a juvenile respondent and his or her family for several years.").

72. Vazquez, *supra* note 9, at 208; *see also* Commonwealth v. Goodman, 311 A.2d 652, 654 (Pa. 1973) (holding that a judge should honor a defendant's request to recuse himself where the judge receives inadmissible evidence during pre-trial that is "highly inflammatory").

information.[73] Juries, in contrast, are carefully shielded from inadmissible information by the rules of procedure and evidence.[74] Juries are shielded from this information precisely because of its potential for creating bias; indeed, when the jury is exposed to this type of information, it is common grounds for granting a mistrial.[75]

Yet, juvenile judges have regular access and exposure to this inadmissible information and are expected to play "mental gymnastics" by ignoring it.[76] This is a fiction that the rest of the justice system, including appellate courts, upholds despite the empirical and anecdotal evidence suggesting that prejudicial information influences judges' decisions.[77]

2. Political Bias

Political pressures can also compromise fair decision-making at fact-finding. One study by sociologist Alexes Harris about the California juvenile waiver hearing process included interviews with juvenile court judges in California.[78] Harris found that important goals for juvenile court judges were to retain their position and to be

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73. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005); *see also* Guggenheim & Hertz, *supra* note 67, at 572 (citing Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997)).

74. *See, e.g.*, FED R. EVID. 403.

75. *See, e.g.*, JULIE LEWIS ET AL., NORTH CAROLINA DEFENDER MANUAL VOL. 2, TRIAL § 31.4 (John Rubin eds., 2d ed. 2012), http://defendermanuals.sog.unc.edu/sites/defendermanuals.sog.unc.edu/files/pdf/31.4.pdf [https://perma.cc/697D-VYX8]; *see also* Izzy Kapnick, *Mistrial Declared in Murder-for-Hire Case Featured On TV's Cops*, COURTHOUSE NEWS (Dec. 14, 2016), https://www.courthousenews.com/mistrial-declared-in-murder-for-hire-case-featured-on-cops/ [https://perma.cc/TBF2-E9UZ]; *Judge Declares Mistrial in Roger Clemens Case*, THE TAKEAWAY (Jul. 15, 2011), http://www.wnyc.org/story/146468-judge-declares-mistrial-roger-clemens-case/ [https://perma.cc/RWC7-NUDQ]; *Mistrial Declared in Clemens' Perjury Trial*, NPR (July 14, 2011), http://www.npr.org/2011/07/14/137858529/mistrial-declared-in-clemens-perjury-trial [https://perma.cc/73HX-WAPQ)].

76. *See* Guggenheim & Hertz, *supra* note 67, at 573 ("Although judges undoubtedly are better than juries at ignoring or not acting upon inadmissible evidence, it strains the imagination to believe that a judge would not be affected by knowledge of a confession, if only at an unconscious level.").

77. *See id.* at 572 (citing Saks, *supra* note 73, at 27). *See generally* Wistrich et al., *supra* note 73, at 1251–52.

78. Alexes Harris, *Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamic in California Juvenile Justice*, 41 LAW & SOC'Y REV. 387, 392 (2007) ("Thirty years after the 'constitutional domestication' of the juvenile court, a more punitive approach to crime and justice increasingly guides the juvenile system." (internal citations omitted)).

promoted beyond juvenile court.[79] Judges commonly "sought to create reputations that would generate prestige and connections to elected [office]."[80] Judges were concerned about how their judging abilities were perceived by the public, including the views of police, media, and government agencies.[81] With surprising candor, for example, judges admitted that implications for their reputation makes them sentence more severely.[82]

Harris helps demonstrate that legally irrelevant factors such as personal ambition, the perceptions of others, and favoritism for more conservative case outcomes can unduly influence judicial decisions at fact-finding. Based on the openness of the judges in the Harris Study, one can easily imagine a judge who, under political pressure, is influenced to rule against young people at fact-finding or who is reluctant to truly hold the government to its burden of proving a case beyond a reasonable doubt.

Jurors, on the other hand, are simply not subject to the same political pressures. They are not typically affiliated with the court system, and individual juror decisions on a verdict are not subject to the same level of transparency or scrutiny from other judges, from police, or from government agencies.[83]

3. Situational Bias

Judges are also susceptible to situational biases, that is, extraneous variables that should have no bearing on legal decisions. In one oft-cited study by Danziger, Levav, and Avnaim-Pesso,[84] researchers recorded how parole decisions made by experienced judges related to the judges' two daily food breaks.[85] This study found that favorable rulings for legally similar cases dropped gradually from about sixty-

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79. *Id.* at 399; *see also* Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 132 (2011).

80. Harris, *supra* note 78, at 399.

81. *See id.*

82. *See* Neitz, *supra* note 79, at 132.

83. Warger v. Shauers, 135 S. Ct. 521, 528 (2014) (holding that jurors may not testify about what went on during deliberations, even to expose dishonesty during jury selection); Tanner v. United States, 483 U.S. 107, 127 (1987) ("[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry."). *But see* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 866 (2017) (noting an exception to the usual rule that jury deliberations are secret when evidence of extreme racial or ethnic bias emerges).

84. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889, 6889 (2011).

85. *Id.*

five percent to zero percent within each period between food breaks and then rose again abruptly to about sixty-five percent immediately after a break.[86] Ultimately, the likelihood of a favorable ruling was greater at the very beginning of the work day or after a food break than it was later in the succession of cases.[87]

This study bolsters a growing body of evidence suggesting that experienced judges are indeed susceptible to psychological biases, even small psychological biases associated with their particular situation.[88] The danger of bias is real: "legally irrelevant situational determinants—in this case, merely taking a food break—may lead a judge to rule differently in cases with similar legal characteristics."[89] The extent to which the results of this study translate from a parole to a fact-finding context is not entirely clear. However, if something as simple as a food break threatens the outcome of judicial decision-making, one can easily imagine other legally irrelevant circumstances that have undue influence—such as the amount of sleep a judge has had, the sadness a judge is feeling, or the amount of stress a judge is under at home.

While situational biases are not unique to judges, and can of course have some impact on jurors as well, the design of the jury system provides some inherent protection against such biases. The jury is a group making a fact-finding decision about one case, rather than an individual judge repeatedly making decisions about multiple, often similar, cases.[90] Jurors as a group of decision-makers serve to check and balance one another's small psychological influences.

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86. *Id.* at 6889; *see also* Ed Yong, *Justice is Served, but More So After Lunch: How Food-Breaks Sway the Decisions of Judges*, DISCOVER MAG.: NOT EXACTLY ROCKET SCI. (Apr. 11, 2011), http://blogs.discovermagazine.com/notrocketscience/2011/04/11/justice-is-served-but-more-so-after-lunch-how-food-breaks-sway-the-decisions-of-judges/#.WgtACRNSzow [https://perma.cc/PQ29-HSP7].

87. Danziger et al., *supra* note 84, at 6890.

88. *Id.* at 6892; *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001); Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 96 (1987); Jeffrey J. Rachlinski et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2011). *See generally* Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188 (2006); Neil Vidmar, *The Psychology of Trial Judging*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 58 (2011).

89. Danziger et al., *supra* note 84, at 6892.

90. *See infra* Section II.B.1.

4. Bias from Having Multiple Roles and a Repetitive Job

Juvenile court judges are susceptible to bias by virtue of the many different roles they serve in juvenile court, the pressures associated with those roles, and by the repetitive nature of their jobs.

In addition to being fact-finders, for example, juvenile court judges also sentence juveniles, manage the progression of the case, direct and manage the courtroom, and monitor pre-trial release conditions.[91] In the process, judges frequently hear reports about the juveniles from probation officers, social workers, and agencies.[92]

Managing busy court calendars can create pressure that undermines their fact-finding decisions. Juvenile courts—often "perceived as less important"[93]—are frequently not resourced well enough, which adversely affects staffing.[94] Heavy judicial caseloads can create increased anxiety about greater efficiency. For judges who are under consistent pressure to be more efficient, an excessive docket makes it "difficult to spend the time you want on each case,"[95] creating the risk of spending insufficient time and attention on fact-finding. These multiple responsibilities and pressures create a risk that important facts will be missed or forgotten by the juvenile court judge.[96]

Further, the repetitive nature of sitting in the same court over years and hearing the same types of cases increases judges' familiarity with police officers, probation officers, as well as with particular juveniles and certain neighborhoods.[97] Dealing with cases similar to those that they have heard in the past risks that judges will base decisions on factual precedent and prejudices, rather than on the unique circumstances presented by each case.[98] For example, a judge's experience presiding over many criminal and juvenile cases may make judges "unduly skeptical of the testimony of the accused . . . [because] they tend to hear the same stories repeatedly."[99] Jaded perspectives or insufficient attention to the testimony of an accused juvenile can undercut fact-finding. Familiarity with police officers can as well. If

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91. *See* Feld, *supra* note 15, at 231; *see also infra* Section II.B.

92. *See* Feld, *supra* note 15, at 231; *see also infra* Section II.B.

93. Neitz, *supra* note 79, at 115 (quoting Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 26 (1992)).

94. *Id.*

95. *Id.*

96. *See* discussion *infra* Section II.B.1.

97. Vazquez, *supra* note 9, at 208–09.

98. *Id.*

99. *Id.*; *see also* Guggenheim & Hertz, *supra* note 67, at 579.

judges assume, based on experience, that a certain officer is trustworthy, they will naturally tend to "presume that the officer will not lie [and will therefore be] less likely to subject the officer's testimony to . . . rigorous scrutiny that would expose possible untruths."[100] Judges will be "likely to presume that [any] inconsistenc[ies are] the result of a mistake or misunderstanding, rather than from fabrication."[101]

Juries, on the other hand, are not as susceptible to the same biases and pressures associated with role and repetition. Jury service is infrequent and jurors are routinely excluded from any cases where they are familiar with a witness or party, and they are instructed to be singularly focused on the evidence and its application to the law.[102] The protection of a jury decreases the risk of overlooking salient facts because, simply, there are more people paying attention. Indeed, as the Supreme Court has acknowledged, members of a group may remember testimony that other group members have forgotten.[103] The pressures to multi-task and to be efficient are not as heavy on jurors as they are on juvenile judges. While jurors may seek to wrap cases up quickly to get home to their families or get back to work, the external pressures facing judges are simply not present for the jury.

5. Corruption Bias

Many of the biases discussed to this point are biases that can be subtle or inadvertent on the part of judges. Judges, however, are also more susceptible than juries to intentional biases. Corruption bias, for instance, is engaging in illegal activity from the bench. Accepting bribes or favors and participating in illegal ex parte communications are common enough to demand sufficient protection against such behavior. In early 2011, two juvenile court judges in Pennsylvania—Mark Ciavarella and Michael Conahan—were convicted of receiving millions of dollars from private juvenile detention facilities in exchange for sending young people to those facilities after adjudicating them delinquent.[104] Hundreds of young people and their

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100. Vazquez, *supra* note 9, at 208.

101. *Id.*

102. *See, e.g.*, 1-II Criminal Jury Instructions for DC Instruction 2.102 (2017).

103. *See* Ballew v. Georgia, 435 U.S. 223, 233 (1978).

104. Neitz, *supra* note 79, at 98; John Schwartz, *Clean Slates for Youth Sentenced Fraudulently*, N.Y. TIMES (Mar. 26, 2009), http://www.nytimes.com/2009/03/27/us/27judges.html [https://nyti.ms/2gZOfJg] (noting that youth advocacy groups often complained about the unusually harsh nature of Judge Ciavarella's adjudications); Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youth for*

families were affected when these two judges detained children in facilities away from their homes, families, and schools.[105] Without doubt, perceptions of fairness about the process were undermined as well.

While incarcerating children in exchange for cash is, indeed, an extreme example of corruption bias among judges, it is far from the only example. Judges have engaged in illegal ex parte communications, inappropriate sexual relationships, collusion, inappropriate comments, preferential treatment,[106] and overt racism.[107] While many judges strive to be impartial and fair, far too many have proven susceptible to corruption, which threatens fact-finding as well as all other aspects of the juvenile court process, thereby undermining the legitimacy of the institution.

Profit, N.Y. TIMES (Feb. 12, 2009), http://www.nytimes.com/2009/02/13/us/13judge.html [https://nyti.ms/2jGLG0i].

105. *See* Neitz, *supra* note 79, at 98; Schwartz, *supra* note 104; Urbina & Hamill, *supra* note 104.

106. *See, e.g.*, *In re* Esworthy, 77 N.E.2d 1195, 1196 (N.Y. 1991) (per curium) (upholding decision of State Commission on Judicial Conduct to remove juvenile court judge from bench for, among other things, making inappropriate comments during a juvenile delinquency proceeding); *see also Former Circuit Court Judge Reprimanded for Improper Sexual Relationship*, WBKO (Feb. 24, 2017), http://www.wbko.com/content/news/Former-Circuit-Court-Judge-reprimanded-for-improper-sexual-relationship-414739073.html [https://perma.cc/YS8H-2X4C]; Jason Grant, *Judge Quits Bench Amid Alleged Duct Tape Threat, Ex Parte Talks*, N.Y. L.J. (Aug. 16, 2017), http://www.newyorklawjournal.com/id=1202795663177/Judge-Quits-Bench-Amid-Alleged-Duct-Tape-Threat-Ex-Parte-Talks?slreturn=20170816141054 [https://perma.cc/3SSM-57SZ]; Max Mitchell & Lizzy McLellan, *As Officials in Centre County Face Discipline, Appeals May Follow*, LEGAL INTELLIGENCER (Sept. 1, 2017), http://www.thelegalintelligencer.com/id=1202797180584/As-Officials-in-Centre-County-Face-Discipline-Appeals-May-Follow?slreturn=20170816142547 [https://perma.cc/4JC2-8CBN]; Alex Wolf, *2 Philly Judges Removed for Case Fixing Scheme*, LAW360 (Dec. 20, 2016), https://www.law360.com/articles/875085/2-philly-judges-removed-for-case-fixing-scheme [https://perma.cc/BN8V-2L6M].

107. Neitz, *supra* note 79, at 131 ("[A] juvenile court judge in Tennessee was publicly censured for his habit of ruling against immigrant juveniles 'based solely on the real or perceived immigration status' of the children or their parents. In a formal Letter of Reprimand, the Court of the Judiciary noted that this judge's actions displayed 'a perceived predetermination as to Hispanic individuals appearing before [him].'") (citing Formal Letter of Reprimand from the Hon. Don R. Ash, Presiding Judge, Tenn. Court of the Judiciary, to the Hon. A. Andrew Jackson, Dickson Cty. Gen. Sessions Judge, (May 16, 2008), [hereinafter Formal Letter of Reprimand] http://www.tba2.org/tbatoday/news/2008/judicialreprimand_051608.pdf [https://perma.cc/X345-RE7P]); *see also* Aldrich v. State Comm'n on Judicial Conduct, 447 N.E.2d 1276, 1277 (N.Y. 1983) (per curium) (upholding decision of State Commission on Judicial Conduct to remove juvenile court judge from bench for using "profane, improper and menacing language" and making "inappropriate racial references" during proceedings).

The jury, while of course not immune from illegality,[108] is by design more insulated from ex parte communications and overt illegality because juries are composed of multiple members that check one another,[109] and their communications are limited and carefully monitored.[110] Bribing a juror is far more difficult since their identity is unknown until they are selected for trial, which gives little time to approach them.[111]

6. Racial Bias

Juvenile court judges are susceptible to racial bias, both explicit and implicit. Judges themselves have acknowledged the problem of bias. U.S. Circuit Court of Appeals Judge Bernice B. Donald candidly acknowledged to a group of judges and lawyers at the 2016 ABA Annual Meeting: "[e]ach of us in doing our jobs are viewing the functions of that job through the lens of our experiences, and all of us are impacted by biases, stereotypes and other cognitive functions that enable us to take shortcuts in what we do."[112]

Concerns over racial bias in juvenile court are underscored by pervasive racial disparities in the juvenile justice system.[113] Black

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108. *See, e.g.*, Alberto Luperon, *Jessica Chambers Murder Trial Juror Booted After Posting on Facebook*, LAW NEWZ (Oct. 11, 2017), https://lawnewz.com/high-profile/juror-dismissed-in-jessica-chambers-murder-trial-after-posting-on-facebook/ [https://perma.cc/LT82-CFVX]; Kelly Puente, *Did a Juror Get Too Chatty at a Fountain Valley Nail Salon, Putting a Murder Conviction in Trouble?*, ORANGE COUNTY REG. (Oct. 12, 2017), http://www.ocregister.com/2017/10/12/did-a-juror-get-too-chatty-at-a-fountain-valley-nail-salon-putting-murder-a-conviction-in-trouble/ [https://perma.cc/GD6Z-ZQVF]; Eric Shorey, *October 17, 1931: Al Capone Convicted for Tax Evasion*, OXYGEN (Oct. 17, 2017), http://www.oxygen.com/blogs/october-17-1931-al-capone-convicted-for-tax-evasion [https://perma.cc/3ZUP-6UQ5].

109. See discussion *infra* Section II.B.1.

110. *See, e.g.*, 1-II Criminal Jury Instructions for DC Instruction 2.509 (describing the very limited ways in which jurors are authorized to communicate with parties).

111. *See* RANDOLF N. JONAKAIT, THE AMERICAN JURY SYSTEM 16 (2003).

112. *Judges: 6 Strategies to Combat Implicit Bias on the Bench*, AM. BAR ASS'N (Sept. 2016) [hereinafter *6 Strategies*], https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html [https://perma.cc/U24F-HUZY].

113. *See* Perry Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 289 (2008) ("Over the last thirty years, a number of increasingly sophisticated analyses have documented a statistically significant 'race effect' on juvenile justice outcomes."); Margaret Olesnavage, *Disproportionate Representation of Children of Color in the Child Welfare and Juvenile Justice Systems in Michigan*, 89 MICH. B.J. 26, 26 (2010) ("Youth of color are overrepresented at nearly every point of contact with the juvenile justice system."); Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97, 109–10 (2003) (discussing statistics illustrating racial discrepancies at every stage of the juvenile

students in Florida, for example, were two and one-half times more likely than white students to be arrested and referred to the juvenile justice system in 2007–2008.[114] Latino students in Colorado were fifty percent more likely than white students to be referred to law enforcement in 2006–2008.[115]

Statistically, black youth receive more severe sanctioning than similarly situated white youth,[116] receive harsher sentences for certain behaviors,[117] and are more likely to be held in secure detention which statistically correlates with harsher sanctions in later proceedings when compared to white youth.[118] Black youth are also more likely than white youth to receive a court referral for prosecution, rather than to participate in a diversion program,[119] and are disproportionately removed from their homes.[120]

Often, the juvenile system is a backstop for inadequate mental health care in communities of color.[121] Black males, especially those with mental health struggles, "are more likely to be referred to . . . delinquency court than a treatment system."[122]

Particularly concerning is the interplay between schools and juvenile courts. The school-to-prison pipeline epidemic plagues U.S. schools, as students of color—as well as students with a history of

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justice process); Franklin E. Zimring, *Minority Overrepresentation: On Causes and Partial Cures*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 24, at 169–86.

114. ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 19 (2010) (internal citations omitted), https://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf [https://perma.cc/486L-XWPP]; Neitz, *supra* note 79, at 132.

115. ADVANCEMENT PROJECT, *supra* note 114, at 19; Neitz, *supra* note 79, at 132.

116. *See* Michael J. Leiber et al., *The Likelihood of a "Youth Discount" in Juvenile Court Sanctions: The Influence of Offender Race, Gender, and Age*, 6 RACE & JUST. 5, 8 (2016), http://journals.sagepub.com/doi/pdf/10.1177/2153368715595088 [https://perma.cc/G5NR-L38M]; *see also* MICHAEL J. LEIBER, THE DISPROPORTIONATE OVERREPRESENTATION OF MINORITY YOUTH IN SECURE FACILITIES: A SURVEY OF DECISION MAKERS AND DELINQUENTS 1, 54 (1993), https://www.ojjdp.gov/dmc/pdf/disproportionate.pdf [https://perma.cc/J3JN-ABUN].

117. *See* Leiber et al., *supra* note 116, at 8–9.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* discussion *infra* Section I.B.

122. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 13 (2005) [hereinafter JUVENILE DELINQUENCY GUIDELINES]; Neitz, *supra* note 79, at 131–32; *see also* Thalia González, *Youth Incarceration, Health, and Length of Stay*, 45 FORDHAM URB. L.J. 45, 48, 52 (2017).

abuse, neglect, poverty, or learning disabilities—are disproportionately targeted by policies that suspend, expel, and arrest boys and girls for infractions in school.[123]

Explicit racial bias (as opposed to implicit racial bias) can, in theory, be more easily rooted out among judges because it is more apparent than implicit bias.[124] However, evidence increasingly shows that *implicit* bias is pervasive and that measures of implicit bias are dissociated from measures of explicit bias.[125] In other words, a judge would not need to hold explicit biases to be *implicitly* biased.

Of course, racial disparities in the juvenile system are not all attributable to judicial biases. But the discretion of juvenile court judges "could allow personal racial bias or prejudice to have an enhanced role in adjudications."[126] The pervasiveness of racial disparities alone warrants maximum systemic protection against the influence of racial bias in juvenile court.

Jurors are also susceptible to racial bias; however, the jury trial has more substantial methods for protecting against such biases, including voir dire, to root out prospective jurors with discernible biases, *Batson* precedent to help ensure a more diverse composition of juries,[127] the ability of defendants to challenge convictions when

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123. *See* Carla Amurao, *Fact Sheet: How Bad Is the School-To-Prison Pipeline?*, PBS: TAVIS SMILEY REPORTS (Mar. 26, 2013), http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/ [https://perma.cc/5X5N-MJAG]; *see also* Josh Gupta-Kagan, *The School-to-Prison Pipeline's Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 FORDHAM URB. L.J. 83, 107–11 (2017).

124. *See, e.g.*, Neitz, *supra* note 79, at 135 ("A juvenile court judge in Tennessee was publicly censured for his habit of ruling against immigrant juveniles 'based solely on the real or perceived immigration status' of the children or their parents. In a formal Letter of Reprimand, the Court of the Judiciary noted that this judge's actions displayed 'a perceived predetermination as to Hispanic individuals appearing before [him].'" (citing Formal Letter of Reprimand, *supra* note 107)); *see also* Aldrich v. State Comm'n on Judicial Conduct, 447 N.E.2d 1276, 1277 (N.Y. 1983) (per curium) (upholding decision of State Commission on Judicial Conduct to remove juvenile court judge from bench for using "profane, improper and menacing language" and making "inappropriate racial references" during proceedings); Leiber et al., *supra* note 116, at 7, 9 (noting that decision-makers racially stereotype black youth as dangerous and unsuitable for release into the community). It is important to note that the Leiber study does not focus on Latinos.

125. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512 (2005); *see also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 994 (2006).

126. Neitz, *supra* note 79, at 132.

127. *See* Batson v. Kentucky, 476 U.S. 79, 80 (1986) (holding that prosecutors may not use a preemptory challenge to dismiss a juror based solely on race).

jurors overtly rely on racial stereotypes or animus,[128] and the protective dynamics of group decision-making.[129]

B. The Protective Features of a Jury Trial

This Section briefly discusses three aspects of the jury trial that protect against judicial bias: (1) group decision-making, (2) voir dire, and (3) jury instructions. Policy-makers who are deciding how to structure fact-finding in juvenile court should carefully consider how vital these features are to the integrity of fact-finding.

1. Group Decision-Making

The group decision-making feature of a jury trial system has significant virtues. As veteran law professors Martin Guggenheim and Randy Hertz have discussed, "the very fact that the decisionmaker is an individual rather than a group" can distort the perceptions and judgments of juvenile judges.[130] The jury model, which pulls together various people from the community, helps ensure that "a variety of different experiences, feelings, intuitions, and habits" bear on factual decision-making.[131] Social science has helped to demonstrate that jurors' tendency to apply their respective experiences and perspectives during deliberation enhances their evaluation of evidence.[132]

Further, a single judge "may fail to notice some meaningful aspect of a witness's demeanor or some highly salient gesture or meaningful glance by the witness while on the stand."[133] Drawing from the experiences and perspective of just a single judge, rather than a full jury, decreases the likelihood that "witnesses' credibility will be assessed accurately and facts correctly found."[134] To present another example, while most judges are permitted to take notes during fact-finding—unlike juries—"even the most assiduous note-taking judge may neglect to jot down an important response by a

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128. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) ("Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").

129. *See* discussion *infra* Section II.B.1.

130. Guggenheim & Hertz, *supra* note 67, at 575.

131. *Id.* at 575–76.

132. *Id.* at 576.

133. *Id.* at 578.

134. *Id.* at 576.

witness . . . because the judge failed to appreciate its significance at the time."[135]

Similarly, Guggenheim and Hertz emphasize that while appellate review serves as a protection against overt judicial biases, "subtle biases such as predispositions based on life experiences or long held assumptions" are less apparent on appellate review of a paper record.[136] Subtle but dangerous biases such as situational biases, pressures to be more efficient, and implicit racial biases are "most likely to be uncovered—and corrected—by means of an interchange between individuals with conflicting perspectives, such as what typically occurs during a jury deliberation."[137] Deliberating through the lens of competing views and life experiences is undeniably beneficial to rooting out biases and to discerning the credibility of witnesses and evidence. The Supreme Court—despite largely overlooking the issue in *McKeiver*—has expounded on the virtues of large group decision-making in the jury context.[138] Those virtues, according to the Court, include meaningful deliberation, remembering important facts and arguments, and a broader representation of the community, including representation of "minority groups."[139]

2. Voir Dire

Voir dire is a tool that is unique to the jury model and that specifically serves to root out biases among potential fact-finders. Voir dire allows attorneys and the court to scrutinize jurors for overt and hidden biases. During voir dire, attorneys and the judge examine jurors for experiences or belief-sets that may predispose them to ways of viewing a case or an accused person.[140] As Vazquez notes:

> In a bench trial, however, there is no analogous opportunity to explore the judge's background. Without voir dire scrutiny to detect the possibility of judicial bias, one must assume that judges have incredible powers of self-reflection and are able to attend to their conscious and unconscious mental processes and set aside any prejudices they might reveal.[141]

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135. *Id.* at 578.
136. *Id.* at 577.
137. *Id.*
138. Ballew v. Georgia, 435 U.S. 223, 241 (1978).
139. *Id.* at 237, 241.
140. *See* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 558–63 (1975).
141. Vazquez, *supra* note 9, at 198.

Voir dire serves to protect against many of the specific types of biases outlined above by, for example, eliminating prospective jurors who have had previous experiences with the parties or witnesses in a case or who have had too much exposure to subject matter relating to a case.[142]

3. Jury Instructions

The process of instructing jurors in a criminal case also allows for protection against biases that can undermine fact-finding. Jury instructions allow for meaningful articulation of the law being applied as well as an opportunity for appellate review.[143] Without jury instructions that "explain the judge's understanding of the law, the reviewing court is unable to determine whether the juvenile court judge misunderstood or misapplied the law."[144] In bench trials where judges are the fact-finders, it is said that, "juveniles lose out twice because they are more likely to be convicted at trial and are very unlikely to prove an error . . . on appeal."[145] Jury instructions also serve as a powerful reminder from the court to jurors to make decisions based only on admissible evidence.[146]

C. Critiques of the Jury System

The jury system is, of course, not a perfect method of preventing bias from detrimentally influencing fact-finding. Juries, for example, have been known to make decisions based on racial animus.[147] Juries also often lack racial diversity, which functions to the detriment of defendants of color.[148] Additionally, recent exoneration data

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142. *See generally* THOMAS MAUET, TRIAL TECHNIQUES AND TRIALS 29–72 (9th ed. 2013).

143. *See* Feld, *supra* note 15, at 250 n.425.

144. Vazquez, *supra* note 9, at 198–99.

145. *Id.* at 199.

146. *See, e.g.*, 1-II Criminal Jury Instructions for DC Instruction 2.104 (2017).

147. *See, e.g.*, Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 866 (2017) ("Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").

148. *See, e.g.*, Rebecca McCray, *All-White Juries Are Still a Big Problem for Black Defendants*, TAKEPART (May 31, 2016) (citing Steve Hartsoe, *All-White Jury Pools Convict Black Defendants 16 Percent More Often than Whites*, DUKE TODAY (Apr. 17, 2012), https://today.duke.edu/2012/04/jurystudy [https://perma.cc/37R4-E72D]), http://www.takepart.com/article/2016/05/27/racial-bias-jury-selection/ [https://perma.cc/U2D5-HE4X] ("All-white jury pools in Florida were 16 percent more likely to convict black defendants than white defendants[.]").

provides a glimpse into how juries can wrongfully convict: since 1989, there have been at least 2144 exonerations in the United States,[149] including 20 people who had served time on death row.[150]

These dangers, however, are *not* more poignant in the jury system than in bench trials. On the contrary, anecdotal case data suggests that, with alarming frequency, juvenile court judges fail to apply the beyond a reasonable doubt standard and instead convict on insufficient evidence.[151]

Another critique of the jury trial is that group decision-making, despite its benefits, is shrouded with secrecy, as the public is often not privy to the nature and substance of jury deliberations.[152] Judges-as-fact-finders, on the other hand, sometimes back up their application of the facts to the law with some analysis, either orally or in writing. But the jury system, at least, has the additional protective mechanisms discussed above—voir dire, jury instructions, and opportunities for advocates to challenge verdicts based on jurors' overt prejudices.[153]

Opponents of extending the jury to juvenile court cite the added cost and decreased efficiency associated with the jury system.[154] Implementing juries in juvenile court means various expenses including jury stipends, additional courtrooms, new judges, and delays

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149. THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/PU8R-78XH]; Caitlin Nolan, *After Doing 13 Years for a Murder He Didn't Commit, Exonerated Man Adjusts to Life on the Outside,* INSIDE EDITION (Dec. 21, 2017), http://www.insideedition.com/after-doing-13-years-murder-he-didnt-commit-exonerated-man-adjusts-life-outside-39138 [https://perma.cc/ZC67-WSUJ].

150. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/VL24-WYZT].

151. *See* Guggenheim & Hertz, *supra* note 67, at 564–65 (citing five cases in one year where a juvenile judge was overturned on appeal for convicting a juvenile on insufficient of the evidence); Treaster, *supra* note 6, at 1303.

152. *See* Warger v. Shauers, 135 S. Ct. 521, 528 (2014) (holding that jurors may not testify about what went on during deliberations, even to expose dishonesty during jury selection); *see also* Tanner v. United States, 483 U.S. 107, 127 (1987) ("[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry."). *But see Pena-Rodriguez*, 137 S. Ct. at 866 (noting an exception to the usual rule that jury deliberations are secret when evidence of extreme racial or ethnic bias emerges).

153. *Pena-Rodriguez*, 137 S. Ct. at 866.

154. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) ("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[.]"); Guggenheim & Hertz, *supra* note 67, at 562–63; Treaster, *supra* note 6, at 1293.

associated with selecting, instructing, and litigating before juries.[155] The juvenile system, courts have said, should dispose promptly of issues "without all the time-consuming procedures which accompany trial by jury."[156] Where juvenile courts are falling short of rehabilitation, some argue, adding the expense and delay of a jury trial will not advance those rehabilitative aims.[157] Further, as the court emphasized in *McKeiver*, many people believe that introducing jury trials threatens to "remake the juvenile proceeding into a full adversary process and thus substantially deny the possibility that the juvenile system would achieve its goals of prompt adjudications, fairness, concern, sympathy, and paternal attention."[158]

In light of the increasingly apparent realities of judicial bias, however, focus on costs is little more than a policy choice that prioritizes efficiency over fairness. Further, a jury trial process would not undermine other rehabilitative features of juvenile court, such as diversion options, earlier involvement of probation officers and families, access to social service agencies, or sentencing alternatives that are less harsh than jail.[159]

III. LIMITING JUDICIAL BIAS IN JUVENILE COURT

Under *McKeiver*, jury rights for juveniles are not required by the United States Constitution.[160] The Court's rationale in *McKeiver* could one day be revisited in light of the stark realities of today's juvenile court. Until then, however, *McKeiver* explicitly left the door open for states to extend the protection of a jury in juvenile court. In his concurring opinion, Justice White noted that "[o]f course, there are strong arguments that juries are desirable when dealing with the young, and States are free to use juries if they choose."[161] This Part discusses how, despite *McKeiver*, specific jurisdictions can and have protected against judicial bias by extending jury rights to juveniles and by creating procedural protections and mandating bias training.

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155. Treaster, *supra* note 6, at 1293–94.
156. *See, e.g.*, U.S. *ex rel.* Murray v. Owens, 465 F.2d 289, 292 (2d Cir. 1972).
157. *See id.*
158. *Id.* at 291; *see also McKeiver*, 403 U.S. at 550.
159. *See* ABRAMS & RAMSEY, *supra* note 19, at 436, 479, 506.
160. *See supra* Section I.D.
161. *McKeiver*, 403 U.S. at 553 (White, J., concurring).

A. *In Re L.M.*: The Kansas Supreme Court Extends the Jury Protection to Juveniles

In 2008, the Kansas Supreme Court decided *In re L.M.*,[162] which extended jury rights to juveniles in Kansas under the Kansas State Constitution and the U.S. Constitution.[163] Sixteen-year-old L.M. was charged with aggravated sexual battery as well as being a minor in possession of alcohol.[164] L.M. was accused of making inappropriate sexual contact and comments toward a neighbor.[165] L.M. requested a jury but was denied, and was found guilty by a judge at a bench trial.[166] His punishment included probation for five years, sex offender treatment, and registration as a sex offender.[167]

The Kansas Supreme Court distinguished L.M.'s case from *McKeiver* and extended jury trial rights to juveniles statewide.[168] The Kansas Supreme Court based its decision not on the risks of judicial bias, but on the fact that recent changes to the Kansas juvenile justice system had "eroded the benevolent . . . character that distinguished [the juvenile system] from the adult system."[169] Specifically, the Kansas juvenile code supplanted non-punitive language with more punitive language, aligned the juvenile and adult sentencing guidelines, and diminished a host of other protections that served to distinguish juvenile and adult court, such as private proceedings and confidentiality of records.[170] As a result, the Kansas Supreme Court explained, juvenile justice in Kansas had little differentiation from the adult system.[171] Without the paternalistic protections previously afforded, *McKeiver*'s rationale did not apply to Kansas, and juveniles became entitled to the protection of a jury at fact-finding under the Sixth and Fourteenth Amendments of the U.S. Constitution, as well as the Kansas State Constitution.[172]

Although judicial bias was not an explicit focus of *In re L.M.*, the Kansas Supreme Court nonetheless provided a sound rationale that other state courts can follow to extend the jury protection in juvenile

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162. 186 P.3d 164 (Kan. 2008).
163. *Id.* at 165.
164. *Id.*
165. *Id.*
166. *Id.*
167. *In re* L.M., No. 96,197, 2006 WL 3775275, at *1 (Kan. Ct. App. 2006).
168. *In re L.M.*, 186 P.3d at 170.
169. *Id.*
170. *Id.* at 168.
171. *Id.* at 169.
172. *Id.* at 170–72.

court—to acknowledge similarities between juvenile court and adult criminal court. Where state legislatures, as in Kansas, further erode the *parens patriae* features of juvenile court through changes to juvenile code provisions, policy-makers and juvenile advocates might find ripe ground to argue that the jury protection should be reconsidered, *McKeiver* notwithstanding.

Certain states, such as Texas, New Hampshire, and Montana have followed Kansas's lead and fully extended jury rights to juvenile court, while several other jurisdictions afford the protection only under certain circumstances related to age and severity of accusation.[173] Today, however, in most jurisdictions, judges *not* juries remain the finders of fact despite the risk of judicial bias.[174]

B. Ways (Other than a Jury) to Protect Against Judicial Bias

As statutory creations, juvenile courts can be altered by state policy-makers.[175] Legislatures, administrative judges, and even individual judges can introduce measures to reduce judicial bias. This Section describes ways that policy-makers can—and should—limit judicial bias in jurisdictions that do not have jury protections for juveniles.

1. Ensuring Different Judges for Different Phases of the Case

In some jurisdictions, a juvenile court judge who presides over pretrial detention or transfer hearings (during which alleged facts are commonly presented) must recuse himself from fact-finding at the defense's request.[176] To maximize protections against bias due to exposure to inadmissible information, a rule should exist that "all pretrial matters, including detention pending trial, transfer to adult court, and suppression of evidence, [should] be heard by a judge other than the one who will preside over the trial."[177] This different-judge-for-trial rule can be taken further. For example, Guggenheim and Hertz propose placing a burden on litigants: require them to raise all questionable evidentiary issues before trial during motions *in limine* to decrease the chance that the fact-finder will be presented with

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173. *See* NAT'L JUVENILE DEF. COUNCIL, JUVENILE RIGHT TO JURY CHART 2, 8, 9, 13 (2014), http://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf [https://perma.cc/BE47-JM6T].

174. *See generally id.*

175. *See* Segadelli, *supra* note 17, at 689.

176. Guggenheim & Hertz, *supra* note 67, at 583.

177. *Id.* at 584.

inadmissible, and potentially prejudicial, information.[178] The threat of sanctions against the party that fails to present such tainting information *in limine*, however, would need to be meaningful for this protective measure to work.[179]

Another procedural mechanism—issue-based certification—allows for judges to briefly certify cases to other judges to resolve evidentiary and other potentially prejudicial issues during trial.[180] For jurisdictions with only one juvenile court judge, criminal court judges or even civil court judges can handle issues that might lead to bias because of exposure to prejudicial information.[181]

2. Recusal

Guggenheim and Hertz also suggest less formal mechanisms, such as recusal, as a way to protect against judicial bias resulting from exposure to inadmissible information.[182] Administrative judges who set courthouse policies, or individual juvenile judges taking seriously their desire to appear fair and to reduce bias, can more liberally recuse themselves upon counsel's motion, or even *sua sponte*, after being exposed to inadmissible information.[183] Today, recusal motions are rarely requested because they are rarely granted, since judges generally uphold the fiction that they are not prejudiced by exposure to information they are not supposed to consider.

3. Seeking Advisory Juries and Group Deliberation

Courts and individual judges can also "modify the [juvenile] bench trial model to secure some of the virtues of careful, thorough deliberation" that exists in the jury system.[184] For example, to incorporate the virtues of group decision-making such as the benefit of various perspectives,[185] judges can follow the possibility raised by the *McKeiver* court, that is, to empanel advisory juries.[186] Guggenheim and Hertz propose a less formal and more convenient

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178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 585.
185. *See supra* Section II.B.1.
186. McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971) ("There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.").

approach that could have a similar effect: judges can routinely discuss cases with their fellow judges before rendering a verdict.[187]

4. Utilizing Jury Instructions in Bench Trials

To further protect against bias, juvenile judges can borrow the important feature of jury instructions. Despite the prominence of jury instructions in guiding juries prior to deliberation, judges in bench trials rarely instruct themselves by explaining what law they are applying to a fact-finding decision. Requiring judges to verbalize the jury instructions they are applying—or, even better, to incorporate instructions into written findings—can help to eliminate unconscious bias, to remind judges of the standard of proof, and to ensure that judges are deciding cases on applicable law rather than inadmissible information to which they have been exposed. The use of instructions by judges would have the added benefit of allowing attorneys and appellate courts to better understand the legal standards that judges applied or failed to apply to a case and to take appropriate action on appeal.

5. Managing Situational Biases Through Increased Self-Awareness

Courts and individual judges should also work to understand and protect against situational biases that unnecessarily influence legal decisions. As the Danziger et al. study[188] suggests, favorable rulings in legally similar cases can vary based on the temporal proximity of those decisions to a judge's food break or to the beginning of the workday.[189] Common experience dictates that human decision-making can be influenced by exhaustion, anxiety, sadness, and hunger. Juvenile court judges should make a point of reflecting with their colleagues about what life circumstances may unduly influence their decision-making and then work to postpone important fact-finding decisions when they are experiencing grief, exhaustion, or even if they have not yet had lunch.

6. Understanding and Limiting the Influence of Implicit Bias

The data around bias—especially implicit racial bias—and its likely contribution to racial disparities in the juvenile system is problematic. Courts and individual judges should receive bias training and should

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187. Guggenheim & Hertz, *supra* note 67, at 585.
188. *See* Danziger et al., *supra* note 84.
189. *See supra* Section II.A.3.

adopt techniques to understand and mitigate the influence of implicit bias. As social psychologists Jeffrey Rachlinski, Judge Andrew Wistrich, and law professors Chris Guthrie and Sheri Lynn Johnson found: "when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so."[190] Additionally, researchers at the National Center for State Courts have emphasized:

> Avoiding the influence of implicit bias . . . is an effortful, as opposed to automatic, process and requires intention, attention, and time. Combating implicit bias, much like combating any habit, involves "becoming aware of one's implicit bias, being concerned about the consequences of the bias, and learning to replace the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold."[191]

In 2016, the American Bar Association hosted a workshop that sought to invest some of the "intention, attention and time" necessary to combat implicit bias.[192] The workshop was for state and federal judges from around the country and examined the problem of implicit bias and explored practical strategies that judges can utilize to "de-bias."[193] The workshop featured a bias training video called "Hidden Injustice: Bias on the Bench."[194] The video features well-known judges, law professors, and experts.[195] It raises awareness of implicit bias and provides practical methods of understanding and combating it.[196] The video and similar resources can serve as important tools for judges.[197] The following techniques and strategies, for example, are recommended on a weekly basis as a way that judges (and everyone, for that matter) can mitigate their implicit biases:

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190. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV 1195, 1221 (2009).

191. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 AM. JUDGES ASS'N CT. REV. 64, 69 (2013) (internal emphasis omitted) (quoting Bridget M. Law, *Retraining the Biased Brain*, 42 MONITOR ON PSYCH. 42, 43 (2011)), http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1.pdf [https://perma.cc/H2N7-GKF2].

192. *See 6 Strategies*, *supra* note 112.

193. *Id.*

194. *Id.*; *Hidden Injustice: Bias on the Bench*, AM. BAR ASS'N (Feb. 8, 2016) [hereinafter *Hidden Injustice*], https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html [https://perma.cc/ADU2-FFZ4]. This video is still available online, free of charge, at the time of publication.

195. *See 6 Strategies*, *supra* note 112.

196. *Id.*

197. *Id.*

- **Take the Implicit Association Test ("IAT").** The IAT helps increase awareness by identifying stereotypes that affect, often unknowingly, personal perceptions of the character and qualities of different races and ethnic groups. [198]
- **Individuation**. Gather specific information about a person (e.g., background, family) so that judgments consider the particulars of a person rather than assumed group characteristics.[199]
- **Replace stereotypes.** Recognize when we are "responding to a situation or person in a stereotypical fashion" and consider the reasons for this response. Then actively replace the biased response with an unbiased one.[200]
- **Engage in counter-stereotypic imaging.** After detecting a stereotyped response, think of well-known people that undermine the stereotype, thereby "provid[ing] concrete examples that demonstrate the inaccuracy of stereotypes."[201]
- **Perspective-taking.** Assess the emotional damage of stereotyping by considering the perspectives of stereotyped people. Thinking about, for example, how it would feel to be viewed certain ways because of your appearance.[202]
- **Increase opportunities for contact**. Seek positive interactions with stereotyped groups. Participate in events, for example, that allow for meeting people who disconfirm stereotypes. Change the movies, TV and news that we consume to features that do not portray groups stereotypically.[203]

Utilizing these techniques appears to have had demonstrable impact on the prevalence of implicit bias.[204]

Likewise, in 2013, several researchers from the National Center for State Courts ("NCSC") published *Addressing Implicit Bias in the Courts*, which provides over a dozen practical strategies that individuals and courts can take to reduce the influence of implicit bias.[205] The NCSC recommends, for example, diversity training as well as the development of guidelines and the use of deliberative

198. Project Implicit, *Implicit Association Test*, IMPLICIT.HARVARD.EDU (2011), https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/5Z5U-AF8V]; *6 Strategies*, *supra* note 112; *Hidden Injustice*, *supra* note 194.

199. *See 6 strategies*, *supra* note 112.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*; *Hidden Injustice*, *supra* note 194.

204. *See 6 Strategies*, *supra* note 112.

205. *See* Casey et al., *supra* note 191.

decision-support tools among decision-makers.[206] The NCSC recommends that judges consult with colleagues to increase deliberative thinking and to decrease the intuitive thinking in which implicit biases linger.[207] The NCSC also recommends that courts review areas where judges are over-burdened and consider options for modifying procedures to provide more time for decision-making.[208]

Courts and individual judges should acknowledge the realities of implicit bias among judges and the potential impact that bias likely has on the overrepresentation of people of color in the juvenile justice system. They should follow the lead of the recent American Bar Association conference and the National Center for State Courts by prioritizing the resources available to understand and reduce implicit bias.

C. The Importance of Juveniles Perceiving Juvenile Court to Be Fair

Policy-makers who assume, as the Supreme Court apparently has,[209] that fact-finding in juvenile court is *not* undermined by judicial bias should still consider how important it is that our young people *perceiv*e their experience in juvenile court as fair. Juveniles of course recognize the dangers of biased judges. Juveniles can understand the risk of being pre-judged at fact-finding by a judge who is exposed to inadmissible information, a judge who is too focused on hurrying the proceedings along, or a judge who has prejudices toward certain juveniles because of how they look or where they are from. Juveniles understand that people struggle to intentionally ignore information they have been exposed to. Even if a judge can control his or her biases when making decisions, the risk is real that the fact-finding process without juries or other procedural protections does not *appear* fair to the young person whose future is being litigated.

Significant criminological research suggests that "when citizens perceive justice system agencies to be fair, they are more likely to comply with the law, legal authorities and court mandates."[210]

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206. *Id.* at 66–67.

207. *Id.* at 68.

208. *Id.* at 67.

209. *See supra* Section I.D.

210. M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER 3 (2006) (citing TOM R. TYLER & YUEN HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION

Studies of mediation[211] and of domestic violence courts[212] also support the notion that perceptions of fairness affect one's decision to accept the outcome of the court process and to comply with its mandates.[213]

Somewhat surprisingly, research also suggests that litigants' opinions about court experiences are based more on *procedural* fairness than they are on the outcome of a case.[214] Indeed, having a neutral and trustworthy decision-maker is one of the key dimensions informing the perceptions of fairness among court-involved people.[215] The appearance of an impartial judge enhances the sense that court is fair.[216]

Jury trials and the other procedural protections that are outlined above not only limit opportunities for judicial bias, but these protections serve to limit the *perception* of unfairness during juvenile court fact-finding. Among malleable young people who are developing their beliefs about the justice system, a process that appears fair to them is important for the legitimacy of juvenile court as an institution and for the likelihood that young people will follow the mandates that the court may impose.

CONCLUSION

Historically, the jury trial as a protection for the accused has been fundamental to the American concept of justice.[217] The Supreme Court, however, did not broaden this protection to juvenile court despite all the other constitutional rights that were extended to that forum.[218] The Court rationalized this, in part, by concluding that even

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WITH THE POLICE AND THE COURTS (2002)), http://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf [https://perma.cc/HHC2-T445].

211. *Id.* (first citing E. Allen Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Justice as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993); then citing Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 314 (1993)).

212. *Id.* (citing Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 170 (1997)).

213. *Id.* at 1, 3.

214. *See* TYLER & HUO, *supra* note 210, at 49–57. *See generally* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (1993).

215. *See* FRAZER, *supra* note 210, at 3.

216. *Id.* at 29.

217. *See supra* Section I.A.

218. *See supra* Sections I.C, I.D.

though liberty interests are at stake and juvenile courts now resemble adult courts, the jury protection is still not necessary because judges are as competent as juries at fact-finding.[219] The Court, however, said little about the reality of judicial bias.[220]

Social science has helped show that juvenile court judges are uniquely susceptible to various forms of bias.[221] Their fact-finding decisions can be unduly influenced by legally irrelevant information, ranging from when their last food break was to implicit racial stereotypes.[222] Although jurors are not immune to such influences, features of the jury trial—such as group decision-making, voir dire, and the practice of jury instructions—mitigate the dangers of such biases among jurors.[223]

Those who oppose juries and other procedural protections against judicial bias in juvenile court often cite concerns of efficiency and sparse resources.[224] This is a valid concern because juvenile courts are under-resourced and understaffed.[225] Indeed, most of the protective measures suggested in this Essay would slow down the juvenile adjudication process and would require that additional resources be directed to juvenile court. However, with the evidence of judicial bias mounting, fact-finding is not the place to cut costs. Doing so risks over-involving innocent young people in a juvenile system that has serious consequences.[226] Resources in juvenile court can be conserved in other ways. The government, for instance, can stop arresting and adjudicating children for typical teenage behavior, or it can make substantially greater use of non-court diversion options.[227]

If the United States Supreme Court and state courts do not protect juveniles with a jury trial, then policy-makers and judges should institute procedural protections and awareness training that limits judicial bias.[228] Limiting judicial bias at fact-finding will better protect children and will inform the extent to which young people perceive the juvenile justice system as fair.[229] If young people believe

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219. *See supra* Section I.D.
220. *Id.*
221. *See supra* Section II.A.
222. *See supra* Section II.A.
223. *See supra* Section II.B.
224. *See supra* Section II.C.
225. *See supra* Section II.A.4.
226. *See* Dennis, *supra* note 29, at 5.
227. *See, e.g.*, *id.* at 27, 42.
228. *See supra* Section III.B.
229. *See supra* Section III.C.

the process to be fair they are more likely to comply with its requirements and respect the justice system as a whole. We must strive to better protect our young people from judicial bias at fact-finding. The lives of our young people, simply put, matter too much to prioritize efficiency over fairness.